CONSONANCE OR RIVALRY?
CALIBRATING THE EFFORTS TO PROSECUTE
WAR CRIMES IN NATIONAL AND
INTERNATIONAL TRIBUNALS

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I. INTRODUCTION

It is not surprising that many perpetrators of international humanitarian law violations in the former Yugoslavia and in Rwanda have been detained in the countries directly involved in the hostilities, and that they are now facing criminal trials there. Nor is it unprecedented that a large number of culprits were subsequently forced to flee or eventually, as became the case particularly in Rwanda, were victimized themselves by the atrocities and therefore became refugees in third countries. To the extent that they are now recognized and identified as war criminals in these countries, criminal legal proceedings may be instituted against them under the domestic jurisdiction of the host countries.

A very distinctive feature of the criminal legal process against the perpetrators of humanitarian law violations in the former Yugoslavia and in Rwanda is that for the first time in recent history an international criminal jurisdiction over individuals, which exists con-

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1. As of December 1996, it is estimated that the Rwandan government has approximately 88,000 potential suspects in custody in connection with Hutu violence against the Tutsi minority which occurred in Rwanda in 1994. See Elizabeth Neuffer, Amid Tribal Struggles, Crimes Go Unpunished; War Tribunal Stalls Over Mass Killings, BOSTON GLOBE, Dec. 8, 1996, at A1.

2. Many of the Hutu leaders and members of the Rwandan army took shelter in refugee camps located in neighboring Zaire in the wake of the genocide in Rwanda and following the establishment of a Tutsi-led government. These camps were controlled by the same Hutu extremists who had carried out the genocide. Indeed most of the architects, planners and implementers of the mass murder not only found havens in these ‘cities’ but actually retained their positions of authority. Even worse, they escaped together with the fully-armed former Rwandan army which had played an active role in the murders.

currently with the jurisdiction of national courts, has been estab-
lis hed. 3 This represents a landmark in the development of interna-
tional law.

Concurrent criminal jurisdiction implies that authorities of two
legal systems have the legal capacity to investigate, prosecute, and
convict the same person for the same criminal acts under their re-
pective, separate jurisdictions. 4 This frequently occurs between two
states, each of which claims the right to convict the same person un-
der its domestic jurisdiction. 5 Such cases are normally resolved by re-
sorting to provisions on universal jurisdiction 6 or extradition 7 in the
domestic laws of each country. Concurrent jurisdiction may also
arise between states and an international tribunal, such as the Inter-
national Criminal Tribunal for Rwanda (Tribunal), as each is legally
ettitled to prosecute individual persons for certain criminal acts. 8 In
the case of the Tribunal, however, the situation is slightly different
both in that states have in many cases not adopted the necessary leg-
islation allowing for prosecution of war crimes and extradition to the
Tribunal, 9 and also because the Tribunal has ultimate primacy over
the national courts. 10 The problems relating to concurrent jurisdic-
tion between states and the Tribunal, therefore, assume a unique
character. 11

3. See, e.g., Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955,
33 I.L.M. 1598, 1605 (1994) [hereinafter Tribunal Statute].

1990) (discussing concurrent criminal jurisdiction of the flag state and the territorial state over
vessels in ports or territorial waters of the latter).

5. See id.

6. Universal jurisdiction has been defined as "a principle allowing jurisdiction over acts
of non-nationals where the circumstances, including the nature of the crime, justify the repres-
sion of some types of crime as a matter of international public policy." Id. at 304.

7. Extradition has been defined as follows:
[S]tates have to depend on the co-operation of the other states in order to obtain sur-
rrender of suspected criminals or convicted criminals who are, or have fled, abroad.
Where this co-operation rests on a procedure of request and consent, regulated by
certain general principles, the form of international judicial assistance is called extra-
dition. . . . With the exception of alleged crimes under international law [i.e., war
crimes, crimes against humanity and crimes against peace], in the absence of a treaty,
surrender of an alleged criminal cannot be demanded as of right.
Id. at 315 (citations omitted).

8. See Tribunal Statute, supra note 3, art. 8(1), 33 I.L.M. at 1605.

9. Among Rwanda’s African neighbors, only Cameroon and Zambia have enacted legis-
lation to facilitate cooperation with the Tribunal. See Iain Guest, Makings of Disaster, WASH.

10. See Tribunal Statute, supra note 3, art. 8(2), 33 I.L.M. at 1605.

11. In the present context, concurrent jurisdiction will be discussed in the latter sense, that
Concurrent jurisdiction carries both benefits and drawbacks for the parties involved. On the positive side, concurrent jurisdiction may allow for a thrifty and cost-saving coordination of prosecution resources between states and the international organization, neither of which can afford high expenses for this purpose. If investigations can be coordinated and evidence collected and shared between the national and international prosecutors, for instance, considerable time and resources can be saved. Concurrent jurisdiction, furthermore, may relieve states of the risk of prejudice in the trials of very high-profile perpetrators. From the victims’ point of view, concurrent jurisdiction may establish a basis for a joint legal and financial framework to provide compensation for suffering and damages which would most likely prove more accessible to the victims than a divided national and international program.

On the negative side, concurrent jurisdiction almost inevitably involves considerable uncertainty as to the division of responsibilities for investigation and prosecution by each of the competent parties. This uncertainty may eventually lead to extensive rivalry between the parties if both seek to garner the credit for prosecuting the same perpetrators. More importantly, however, concurrent jurisdiction may obstruct national catharsis by frustrating popular expectations in the victim’s country that justice will be done under domestic law to those most responsible. Whatever the case, the endeavour to avoid the negative side-effects of concurrent jurisdiction between the national authorities and the Tribunal would seem to require the continuous maintenance of close cooperation, careful coordination, and open links of communication between the parties.

This Comment explores some of the legal and practical implications of concurrent jurisdiction, notably from the perspective of the International Criminal Tribunal for Rwanda. Section II expounds briefly on the applicable principles and provisions governing the Tribunal’s international jurisdiction vis-à-vis the domestic jurisdictions of Rwanda and other states. Section III looks separately at a number of particular legal problems inherent in the Statute of the International Tribunal for Rwanda\(^\text{12}\) and the Rules of Procedure and Evidence of the International Tribunal for Rwanda,\(^\text{13}\) and Sections IV

\(^{12}\) Tribunal Statute, supra note 3.
and V conclude by offering an analysis of the Tribunal’s practice and suggesting a new approach to concurrent jurisdiction.

II. THE GENERAL PRINCIPLES OF JURISDICTION AND COOPERATION

Three general principles govern the relations between national authority and the Tribunal: primacy of the Tribunal over national courts; non bis in idem; and cooperation and judicial assistance between states and the Tribunal. The first principle is embodied in Article 8 of the Tribunal Statute, which creates concurrent jurisdiction between national courts and the Tribunal and then establishes the Tribunal’s supremacy over national courts. Under this provision, the Tribunal may request national courts to defer to the competence of the Tribunal at any stage in their procedures. If a criminal case over which the Tribunal has concurrent jurisdiction has been initiated before a national court, the Tribunal may assume control of the hearings and convict the accused, thereby superseding the national court’s jurisdiction.

The second principle, non bis in idem, provides that no person shall be tried before a national court for violations of international humanitarian law for which he or she has already been tried by the Tribunal. The Tribunal may, however, try a case against a person already convicted by a national court, but only under certain conditions: If the national court had characterized the crime as an ordinary crime, if the national court proceedings were not impartial or independent, if the hearings were designed to shield the accused

International Law) (Cited Rules reproduced in Appendix attached to this Comment) [hereinafter Tribunal Rules of Procedure and Evidence].

14. Non bis in idem is defined as “[n]ot twice for the same; that is, a man shall not be twice tried for the same crime.” BLACK’S LAW DICTIONARY 1200 (4th ed. 1968).

15. “The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.” Tribunal Statute, supra note 3, art. 8(1), 33 I.L.M. at 1605.

16. See Tribunal Statute, supra note 3, art. 8(2), 33 I.L.M. at 1605.

17. See id.

18. See Tribunal Statute, supra note 3, art. 9(1), 33 I.L.M. at 1605; see also Tribunal Rules of Procedure and Evidence, supra note 13, Rule 13.

19. See Tribunal Statute, supra note 3, art. 9(2)(a), 33 I.L.M. at 1605; see also Tribunal Rules of Procedure and Evidence, supra note 13, Rule 9(i).

20. See Tribunal Statute, supra note 3, art. 9(2)(b), 33 I.L.M. at 1605; see also Tribunal Rules of Procedure and Evidence, supra note 13, Rule 9(ii).
from international criminal responsibility, or if the case was not diligently prosecuted.

The third principle, established by Article 28 of the Tribunal Statute, obliges states to cooperate with the Tribunal in its investigation and prosecution of persons falling within the Tribunal’s competence, and to comply swiftly with orders and requests issued by the Tribunal’s Chambers. States are bound to carry out any orders or requests made by the Tribunal’s Chambers for, inter alia, identifying and locating suspects, taking testimonies and producing evidence, effecting the service of documents, arresting or detaining suspected persons, and transferring accused persons to the Tribunal. The obligation to cooperate with the Tribunal and to offer judicial assistance is further implemented in Rules 11, 13, 40, 55, 58, 59, 60 and 61 of the Tribunal Rules of Procedure and Evidence.

These standards, however, are not merely a set of guiding principles. The Tribunal Statute was adopted by the U.N. Security Council under Chapter VII of the U.N. Charter, which implies that any legal obligations in the provisions of the Tribunal Statute, as well as any orders issued by the Tribunal in accordance with the Tribunal Statute and the Rules of Procedure and Evidence, are directly binding on states under international law. In the case of a state’s violation or disregard of a request for deferral or an order for execution of a warrant issued by the Tribunal, the President of the Tribunal may bring the matter before the Security Council and allege that the state has violated its international legal obligations under the U.N. Charter.

21. See id.
22. See id.
23. See Tribunal Statute, supra note 3, art. 28(1), 33 I.L.M. at 1612.
24. See id., art. 28(2), 33 I.L.M. at 1612.
25. See id.
28. See U.N. Charter art. 48 (stating that the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all Members of the United Nations); id. art. 49 (stating that U.N. members must offer mutual assistance to carry out measures decided upon by the Security Council).
III. CONCURRENT JURISDICTION AND COOPERATION: THE CHAMBERS AND NATIONAL AUTHORITIES

The decisions, orders, and requests issued by the Tribunal’s Chambers in accordance with its Statute and its Rules of Procedure and Evidence provide a substantial basis for cooperation with national judicial and executive authorities. Yet the Chambers are only rarely engaged in direct contact with these state authorities. Contact may occur if a Chamber or a judge decides to sit in another country to execute the functions of the Tribunal. Otherwise, under Article 28 of the Tribunal Statute, the decisions, orders and requests issued by the Chambers or a judge normally assume the character of legally-binding instructions to national authorities.

A. Rule 40 bis

Interesting legal questions may arise, however, as to the limits of the Tribunal’s jurisdiction in issuing legally-binding instructions to national authorities. Under Rule 40 bis, a judge may order the transfer of a suspect, who is held in custody abroad, from the host country to the Tribunal’s detention facilities in Arusha, and also order the provisional detention of the suspect for up to 90 days. Rule 40 bis applies in cases where the Prosecutor has already requested a state to arrest a suspect provisionally under Rule 40, or where a suspect has otherwise been detained by that state.

The question then arises whether Rule 40 bis is to be interpreted to imply that a Tribunal judge can order and extend the provisional detention of the suspect while in foreign custody, or whether the power to do so only arises once the suspect has been transferred to the Tribunal’s detention facilities in Arusha. One possible interpretation is to hold that the Tribunal is incompetent under international law to order the detention of a suspect held in custody under foreign national law; thus, an order to that effect constitutes an unwarranted

30. See id. Rule 4. One example of the use of the Rule 4 arrangement, observed by the author, occurred when a Tribunal judge twice extended the provisional detention of four suspects under investigation by the Tribunal by acting in the capital of a foreign country where the suspects were detained. On one of these occasions, a courtroom was provided in the court building by the government of the host country.
31. See Tribunal Statute, supra note 3, art. 28, 33 I.L.M. at 1612. See supra notes 23-25 and accompanying text.
33. See id. para. A.
34. See id. para. H.
35. See id. para. B (1).
intrusion into the sovereignty of the host country. Although the Prosecutor may request a state to arrest a suspect under Rule 40, a request to this effect is clearly limited to the immediate arrest of the suspect and does not cover the subsequent detention in domestic custody, which is a matter of national concern. A according to this interpretation, a Tribunal judge can order the detention of the suspect only after transfer to Arusha, which is why Rule 40 bis is worded to read “transfer and detention,” in that order.

A nother possible interpretation, however, would be to contend that Rule 40 bis was adopted expressly for the purpose of providing the Tribunal with the power to regulate the detention of a suspect in foreign custody, and that Rule 40 bis therefore should be interpreted so as to govern the “detention and transfer” of that suspect. Although this problem may seem to have far-reaching implications, it should not be overestimated. Paragraph 2 of Article 28 of the Tribunal Statute, in essence, obliges states to comply with requests or orders issued by a Chamber, and an order for provisional detention (or extension thereof) of a suspect in foreign custody automatically assumes the character of a directly applicable and presumably legally binding instrument under international law. Given the purpose of Article 28 of the Tribunal Statute, it would seem reasonable to assume that the power to order a state to arrest a suspect, and notably to keep him detained until he can be transferred to the Tribunal, does fall within the competence of the Tribunal. Otherwise, the state might have to release the suspect after a short time for lack of sufficient evidence to sustain the charges against him. Orders under Rule 40 bis issued not by a Chamber but by a single judge should be viewed as valid and binding upon states, since there is nothing to suggest that states should not be obliged by Article 28, paragraphs (d).

37. See id. Rule 40 bis(A) (emphasis added).
38. The author observes that Rule 40 bis was adopted as a reaction to the objection by one host country that a mere request by the Prosecutor for the arrest of a suspect (under Rule 40) was insufficient as a legal basis for detention, since a request to this effect would have to be issued by a court proper and not just by the Prosecutor.
39. See Tribunal Statute, supra note 3, art. 28(2), 33 I.L.M. at 1612; see supra notes 23-25 and accompanying text.
40. Per its own language, the purpose of Article 28 is to ensure that states cooperate with the investigations and prosecutions of the Tribunal and comply with any requests or orders issued by the Chambers. See id.
41. “States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to . . . (d) The arrest or detention of persons . . . .” Tribunal Statute, supra note 3, art. 28(d), 33 I.L.M. at 1612.
and (e)\textsuperscript{42} of the Statute to comply with arrest warrants and orders for the surrender of persons indicted by the Tribunal, even if these are rendered only by a single judge.\textsuperscript{43} Orders and decisions, therefore, have the same legal force whether they are issued by a single judge or a Chamber.

B. Communication

A nother problem relates to the level of communication between the Tribunal and national authorities. Convictions in absentia are prohibited under Article 20 of the Tribunal Statute,\textsuperscript{44} but parallel and simultaneous indictments might be issued inadvertently by the attorney general of a state and the Tribunal’s Prosecutor. It would therefore be desirable to oblige national courts to notify the Tribunal whenever a case is being brought against a perpetrator for crimes committed within the Tribunal’s jurisdiction, but no such provision is found in the Tribunal Statute.\textsuperscript{45} In practice thus far, most countries have willingly notified both the Tribunal and the International Criminal Tribunal for the Former Yugoslavia of domestic criminal cases against potential Tribunal suspects.\textsuperscript{46} However, as more trials are expected to begin in Rwanda and the former Yugoslavia in the near future, a proper system of prior notification should be implemented.\textsuperscript{47}

\textsuperscript{42} “States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to . . . (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.” Tribunal Statute, supra note 3, art. 28(e), 33 I.L.M. at 1612.

\textsuperscript{43} See Rules of Procedure and Evidence, supra note 13, Rule 55(A)-(B).

\textsuperscript{44} “In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: . . . (d) to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing . . . .” Tribunal Statute, supra note 3, art. 20(4), 33 I.L.M. at 1610.

\textsuperscript{45} National courts are prevented from convicting a person who has already been tried by the Tribunal. See Tribunal Statute, supra note 3, art. 9(1), 33 I.L.M. at 1605; see also Tribunal Rules of Procedure and Evidence, supra note 13, Rule 8 (allowing the Tribunal’s Prosecutor to request information about investigations or criminal proceedings from national authorities).

\textsuperscript{46} In the one case so far in which a person has been tried and convicted in a third country not involved in the hostilities for crimes falling under the Tribunal’s jurisdiction, the case in which Refic Saric was sentenced to eight years imprisonment by the Supreme Court of Denmark, the Tribunal was first asked if it wished to assume the case. The Tribunal declined, but sent an observer to follow the trial in Copenhagen. See Bosnischer Muslim Beteuert Seine Unschuld, SUDDEUTSCHE ZEITUNG, Aug. 12, 1995, at 6.

\textsuperscript{47} For communication of information on ongoing investigations, see infra notes 48-50 and accompanying text.
C. Deferral to the Competence of the Tribunal

A related aspect of concurrent jurisdiction is that of obliging
national courts to defer to the competence of the Tribunal. According to Rule 9 of the Tribunal Rules of Procedure and Evidence, the Prosecutor may invite a Chamber to issue a formal request that a national court defer to the competence of the Tribunal whenever the Prosecutor finds that an act subject to national investigation or criminal proceedings in a national court is characterized as an ordinary crime or is not diligently prosecuted, or if such proceedings are conducted with a lack of impartiality, or if the issue otherwise has severe ramifications for the Tribunal. The practical implications of this type of a request, however, appear somewhat uncertain. As indicated above, states are not obligated to notify the Tribunal of ongoing trials, let alone ongoing investigations, and chances are that the Prosecutor will have little opportunity to supervise the conduct of national investigations and trials. Even if the Prosecutor did become aware of any such parallel actions, the only recourse available would be for the Tribunal to make a formal request for deferral according to Rule 10 of the Tribunal Rules of Procedure and Evidence and thus to take over the case. This outcome, however, is unlikely given the Tribunal’s lack of resources. The best option for both the Tribunal and national courts in this kind of situation is to insist on closer cooperation between the Tribunal and the national prosecution as early as possible, including the exchange of evidence and coordination of the investigation.

D. Orders for Arrest and Surrender of Accused Persons

Both the Tribunal’s primacy over national courts and the binding international legal character of the Tribunal Statute confer a strong obligation on states to cooperate with the Tribunal regarding the arrest and surrender of accused persons. Rule 56 of the Tribunal Rules of Procedure and Evidence requires swift action by states to ensure that indicted persons are arrested as soon as an arrest warrant has been served on the host state. Rule 58 then highlights the Tribunal’s primacy over all legal impediments, found under national law or extradition treaties of states, to the immediate surrender of the accused.

49. See supra notes 45-46 and accompanying text.
51. Id., Rule 56.
to the Tribunal after an arrest has been made.\footnote{52}{Id. Rule 58.} This provision effectively sets aside national legislation on extradition to the extent that such legislation hampers the immediate surrender of the accused to the Tribunal, and fills lacunae in national legislation in order to permit the surrender if there is no enactment to this effect.\footnote{53}{To clarify the Tribunal’s supremacy over national authorities, Rule 59 establishes that failure to execute an arrest warrant within a reasonable time period may result in a prompt report of the matter to the U.N. Security Council.\footnote{54}{Tribunal Rules of Procedure and Evidence, supra note 13, Rule 59.}} These provisions appear dramatically interventionist, making it more appropriate to characterize this part of the Tribunal’s jurisdiction not as concurrent with, but superior to, the national jurisdiction of states. These provisions also reflect the need to avoid situations where states would either refuse to arrest persons accused by the Tribunal or eventually refuse to surrender such persons after their arrest.

In practice, however, the Tribunal’s approach has been less confrontational. States which were willing to surrender the accused to the Tribunal have been given sufficient time to prepare and implement the necessary legislation for transfer of the accused.\footnote{55}{For example, the Tribunal waited until after the Belgian legislature passed the necessary extradition legislation before formally indicting three suspects who had been arrested in Belgium. See James C. McKinley, Jr., Rwanda War Crimes Tribunal Indicts 2 Men in Jail in Zambia, N.Y. Times, Feb. 20, 1996, at A9.} The Tribunal has restricted itself to exerting various degrees of political pressure even when states have been reluctant to comply immediately with arrest warrants.\footnote{56}{Cameroon, which had in place legislation compelling cooperation with the Tribunal’s prosecution, still refused to extradite Colonel Theoneste Bagosora and three other Rwandans who had been indicted by the Tribunal and only surrendered the suspects to the Tribunal in January of 1997, nearly one year after the suspects were brought into custody. See U.N. Rwanda Genocide Tribunal Receives Key Accused, Reuters N. A. M. Wire, Jan. 24, 1997, available in LEXIS, News Library, Resuna File.} The Tribunal was not ready to receive any of the accused until the detention facilities in Arusha were ready, which occurred only recently.\footnote{57}{The first cells in the detention facilities in Arusha were not ready until May 26, 1996.} Reporting to the Secu-
Consort Council is an available option, and the Tribunal has reiterated to recalcitrant states that it eventually will resort to this remedy, which carries dramatic political implications, should the situation remain unchanged. There can be no doubt whatsoever that this caution is to be taken literally and seriously; non-compliance is not and cannot be an option.

E. Sanctions and the Serving of Sentences

Concurrent jurisdiction also covers sanctions and the serving of sentences. Rule 101(A) of the Tribunal Rules of Procedure and Evidence excludes the death penalty and limits the Tribunal’s sentencing options to prison terms, up to life imprisonment. Rule 101(B)(iii) explicitly instructs the Tribunal Chambers to take into account the general sentencing practices of Rwandan courts when determining a Tribunal sentence. Harmonizing Tribunal sentences with the level of Rwandan practice is a shrewd way of calibrating the concurrent jurisdictions of Rwanda and the Tribunal without committing the Tribunal to adhering to the practices of other countries where war crimes are being tried.

A related issue is the identification of the place where sentences can be served. Rule 103 provides that imprisonment shall be served in Rwanda or in a state designated by the Tribunal from a list of states which have notified the Tribunal of their willingness to receive convicted persons. A literal interpretation of this provision indicates that sentences are to be served in Rwanda unless there are particular reasons to transfer the convicted persons to prisons elsewhere, and unless other countries have volunteered to receive them and have made the necessary preparations, such as providing prison cells which meet international criteria. One can only speculate about the reasons which eventually may motivate the Tribunal’s transfer of a convict to a foreign country other than Rwanda. These reasons, which differ from case to case, may include fear of reprisals against the convicted person, lack of security, and lack of adequate detention facilities. It is crucial that other states volunteer to receive persons convicted by the Tribunal. This practice will make it possible for the Tribunal to assess the risks and needs of each case and provide sup-

59. See Tribunal Rules of Procedure and Evidence, supra note 13, Rule 59(B).
60. These comments are based on the author’s personal observations.
62. Id. Rule 101(B)(iii).
63. Id. Rule 103(A).
port for and relief to Rwanda which otherwise would hold sole responsibility for accommodating the Tribunal’s lifetime prisoners. As the prison facilities are to be accepted and supervised by the Tribunal or another international institution designated by the Tribunal, e.g., the International Committee for the Red Cross, there should be little chance of significantly different standards for prison cells, whether located inside or outside Rwanda.

It would be preferable to have states on the African continent receive at least some of the prisoners, partly to provide a practical example that justice is done and enforced in Africa. Utilizing prison facilities in Africa will also ensure that the prisoners are located where physical contact with their families is still possible, and where the prison conditions, in terms of religion, culture, climate, and language, are not overly foreign. The choice of a host country may vary from prisoner to prisoner.

F. Restitution of Property and Compensation to Victims

Article 23 of the Tribunal Statute, supplemented by Rules 88(B), 105, and 106 of the Tribunal Rules of Evidence and Procedure, explicitly provides for restitution and compensation, which inevitably will entail substantial practical and legal cooperation between the Tribunal and Rwanda. Perpetrators who have illegally taken alien property may be forced to return such property to its rightful owners upon identification by the relevant national authorities. Given that Rwandan courts and executive authorities will be entangled in the process of settling civil property claims in the wake of the return of refugees, it would seem appropriate for the Tribunal to coordinate its judgments on property restitution with the Rwandan authorities.

The same rationale applies to the question of victim compensa-

64. Id. Rule 104 (providing that the Tribunal or body acting upon its authority will oversee all prison sentences).
65. “In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.” Tribunal Statute, supra note 3, art. 23(3), 33 I.L.M. at 1611.
67. See Id. Rule 105.
68. See Stephen Buckley, Rwandans Crowd Road From Tanzania; U.N. Puts Count of Day’s Returnees, Mostly Hutus, at 22,000, WASH. POST, Dec. 16, 1996, at A20 (stating that “Thousands of Rwandans have returned over the last month to find their houses and land occupied, a problem likely to be exacerbated by the continuing flow of refugees from Tanzania.”).
tion. The Tribunal shall notify states if it finds the accused guilty of crimes which have caused injury to victims, a finding which allows the victims to claim compensation through judicial procedures or public institutions. If the Tribunal renders judgments to this effect, prior arrangements will have to be made with the states in question to ensure that sufficient procedures and funds are available.

G. Amicus Curiae

Another way of handling the practicalities of concurrent jurisdiction between Rwanda and the Tribunal is to allow the Rwandan Government to appear directly before the Tribunal and voice its legal concerns and factual observations. This may be done by having the Rwandan government appear as amicus curiae before the Tribunal.

IV. CONCURRENT JURISDICTION AND COOPERATION: THE PROSECUTOR AND NATIONAL AUTHORITIES

The fundamental issue relating to concurrent jurisdiction is how to divide investigation and prosecution between the two parties in order to avoid overlap, inaccessibility of evidence and rivalry. Until recently, the Tribunal operations were relatively independent of the Rwandan Government’s investigation of perpetrators in Rwanda. Given its mandate and the limited resources available to the Tribunal, however, together with constraints imposed by the security situation in Rwanda, the Tribunal, over time, adopted a strategy of investigation and prosecution which was aimed at the political and military leadership down to the level of regional authorities. Although this strategy was at times strongly affected by the arrest of a number of suspects in various third states, it has remained largely unchanged.

This strategy, however, was never properly coordinated with the Rwandan authorities in the sense that no arrangement was made to divide the suspects between the two concurrent jurisdictions, primarily because the Tribunal wished to retain full and unlimited inde-

70. See id. para. B.
72. The following section draws upon the author’s own experiences.
73. Except for witnesses who may wish to plead guilty before the Tribunal of having committed crimes for which they have accounted during their testimonies, the Prosecutor is likely to abstain from indicting any public civil servant below the level of bourgmasters.
dependence. In addition, no framework seemed available to the Tribunal for practical coordination with the Rwandan Government on exactly how and to what extent this issue could be negotiated and how a division of responsibilities could be implemented in practice.

It might have been desirable to have a strategy or policy for limiting the Tribunal’s investigation and prosecution in order to allow for concurrent Rwandan jurisdiction. In my opinion, however, it would have been extremely difficult to adopt any policy on how to share the evidence and divide the suspects between the two parties. The differences between the two establishments in terms of means and methods of investigation, access to witnesses and evidence, political constraints, and cultural and linguistic barriers, together with the accidental and totally unpredictable nature of arrests made in third States, would frustrate any effort to work out a viable strategy for dividing the targets. In addition, a strategy to this effect would endure only so long as both parties had a true common interest in the exercise. Both parties are probably aware of the possibility that this might not always be the case, which may further explain why a common strategy was never adopted.

The frustration felt in Rwanda with the fear that the Tribunal would always intervene and effectively bar the Rwandan prosecution from ever bringing any of the former leaders of the genocide campaign to trial in Rwanda is perfectly understandable, as is the frustration with the fact that the most responsible perpetrators will receive life sentences from the Tribunal, while less culpable culprits may face the death penalty under Rwandan law. One might first question whether the death penalty is really a harsher sentence than life imprisonment; some may argue convincingly to the opposite. One must always recognize that the Tribunal was established not only to restore peace and justice in Rwanda, but also to maintain international peace and security as a new institution which could pave the way for the prevention of such atrocities in the future on a more general level.  

74. U.N. Security Council Resolution 955, which established the International Tribunal for Rwanda, states:

The Security Council,

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons...
Thus, on this point, the Tribunal has its own agenda.

V. CONCLUSION

The Tribunal’s approach in handling its concurrent jurisdiction has not been strict and consistent, and could not have been expected to be. Establishing and organizing a new international institution in an area with no precedents represents a major and difficult enterprise. Two approaches have prevailed in the Tribunal’s short history.

The first approach is, in my viewpoint, the more dogmatic and formal one. According to this approach, the Tribunal is viewed as an independent international judicial body which neither could nor should interfere with the Rwandan Government’s jurisdiction or the public interest in Rwanda, and therefore should remain isolated from any activity which could place legal or political commitments on the Tribunal.

The other approach, as I see it, would appear to be more pragmatic and post-modern in the sense that the Tribunal is conceived of as an instrument which is both political and judicial in nature, established for various purposes and without any expectations as to which methods it should apply or which strategies it might follow. Under this approach, the end would justify the means.

Neither of these approaches, in my viewpoint, have dominated at any time in the Tribunal’s short history; they have both been present all along and have influenced the decisions of the Tribunal at various levels and at different times. Rather than advocating one approach over the other, I support the fruitful cross-fertilization of the two, and recommend the combination of dogmatic wisdom with innovation. This synthesis forms an important part of the Tribunal’s approach to concurrent jurisdiction.

responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed, . . .

S.C. Res. 955, supra note 27, at 1, 33 I.L.M. at 1601.
APPENDIX

EXCERPTS FROM RULES OF PROCEDURE AND EVIDENCE FOR INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

RULE 4
Sittings Away from the Seat of the Tribunal

A Chamber or a Judge may exercise their functions at a place other than the seat of the Tribunal, if so authorised by the President in the interests of justice.

RULE 8
Request For Information

Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 28 of the Statute.

RULE 9
Prosecutor's Request for Deferral

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

(i) the act being investigated or which is the subject of those proceedings is characterised as an ordinary crime;

(ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or

(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.
RULE 10
Formal Request For Deferral

(A) If it appears to the Trial Chamber seized of a proposal for deferral that, on any of the grounds specified in Rule 9, deferral is appropriate, the Trial Chamber may issue a formal request to the State concerned that its court defer to the competence of the Tribunal.

(B) A request for deferral shall include a request that the results of the investigation and a copy of the court’s records and the judgement, if already delivered, be forwarded to the Tribunal.

RULE 11
Non-Compliance With a Request For Deferral

If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the order, the Trial Chamber may request the President to report the matter to the Security Council.

RULE 13
Non Bis in Idem

When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for acts constituting serious violations of international humanitarian law under the Statute for which that person has already been tried by the Tribunal, a Trial Chamber shall, following mutatis mutandis the procedure provided in Rule 10, issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council.
RULE 40
Provisional Measures

(A) In case of urgency, the Prosecutor may request any State:
(i) to arrest a suspect provisionally;
(ii) to seize physical evidence;
(iii) to take all necessary measures to prevent the escape of a sus-
pect or an accused, injury to or intimidation of a victim or witness,
or the destruction of evidence.

The State concerned shall comply forthwith, in accordance with
Article 28 of the Statute.

(B) Upon showing that a major impediment does not allow the
State to keep the suspect under provisional detention or to take all
necessary measures to prevent his escape, the Prosecutor may apply
to a Judge designated by the President for an order to transfer the
suspect to the seat of the Tribunal or to such other place as the Bu-
reau may decide, and to detain him provisionally. After consultation
with the Prosecutor and the Registrar, the transfer shall be arranged
between the State authorities concerned, the authorities of the host
Country and the Registrar.

(C) In the cases referred to in paragraph B, the suspect shall,
from the moment of his transfer, enjoy all the rights provided for in
Rule 42, and may apply for review to a Trial Chamber of the Tribu-
nal. The Chamber, after hearing the Prosecutor, shall rule upon the
application.

(D) The suspect shall be released if (i) the Chamber so rules, or
(ii) the Prosecutor fails to issue an indictment within twenty days of
the transfer.

RULE 40 bis
Transfer and Provisional Detention of Suspects

(A) In the conduct of an investigation, the Prosecutor may
transmit to the Registrar, for an order by a Judge assigned pursuant
to Rule 28, a request for the transfer to and provisional detention of a
suspect in the premises of the detention unit of the Tribunal. This
request shall indicate the grounds upon which the request is made
and, unless the Prosecutor wishes only to question the suspect, shall
include a provisional charge and a summary of the material upon
which the Prosecutor relies.

(B) The Judge shall order the transfer and provisional detention
of the suspect if the following conditions are met:

(i) the Prosecutor has requested a State to arrest the suspect provisionally, in accordance with Rule 40, or the suspect is otherwise detained by a State;

(ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and

(iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

(C) The provisional detention of a suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.

(D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the application made by the Prosecutor under Sub-rule (A), including the provisional charge, and shall state the judge's grounds for making the order, having regard to Sub-rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.

(E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.

(F) At the end of the period of detention, at the Prosecutor’s request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the order, or another Judge of the same Trial Chamber, may decide, subsequent to an inter partes hearing, to extend the detention for a period not exceeding 30 days.

(G) At the end of that extension, at the Prosecutor’s request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the order, or another Judge of the same Trial Chamber, may decide, subsequent to an inter partes hearing, to extend the detention for a further period not exceeding 30 days.

(H) The total period of detention shall in no case exceed 90 days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or,
if appropriate, be delivered to the authorities of the requested State.

(I) The provisions in Rules 55(B) to 59 shall apply mutatis mutandis to the execution of the order for the transfer and provisional detention relative to a suspect.

(J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.

(K) During detention, the Prosecutor and the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the order is a member, all applications relative to the propriety of provisional detention or to the suspect’s release.

(L) Without prejudice to Sub-rules (C) to (H), the Rules relating to the detention on remand of an accused person shall apply mutatis mutandis to the provisional detention of persons under this Rule.

RULE 55
Evaluation of Arrest Warrants

(A) A warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused. These rights include those set forth in Article 20 of the Statute, and in Rules 42 and 43 mutatis mutandis, together with the right of the accused to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

(B) A warrant for the arrest of the accused and an order for his surrender to the Tribunal shall be transmitted by the Registrar to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, together with instructions that at the time of arrest the indictment and the statement of the rights of the accused be read to him in a language he understands and that he be cautioned in that language.

(C) When an arrest warrant issued by the Tribunal is executed, a member of the Prosecutor’s Office may be present as from the time of arrest.
RULE 56
Co-operation of States

The State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 28 of the Statute.

RULE 58
National Extradition Provisions

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

RULE 59
Failure to Execute a Warrant or Transfer Order

(A) Where the State to which a warrant of arrest or transfer order has been transmitted has been unable to execute the warrant, it shall report forthwith its inability to the Registrar, and the reasons therefore.

(B) If, within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the Security Council accordingly.

RULE 60
Advertisement of Indictment

At the request of the Prosecutor, a form of advertisement shall be transmitted by the Registrar to the national authorities of any State or States in whose territory the Prosecutor has reason to believe that the accused may be found, for publication in newspapers having wide circulation in that territory, intimating to the accused that service of an indictment against him is sought.
RULE 61
Procedure in Case of Failure to Execute a Warrant

(A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures he has taken. When the Judge is satisfied that:

(i) the Prosecutor has taken all reasonable steps to effect personal service, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to him to be; and

(ii) the Prosecutor has otherwise tried to inform the accused of the existence of the indictment by seeking publication of newspaper advertisements pursuant to Rule 60, the Judge shall order that the indictment be submitted by the Prosecutor to his Trial Chamber.

(B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment and any other evidence submitted to him after confirmation of the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge.

(C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in Sub-rule (A) above.

(D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or proprio motu, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.

(E) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to co-operate with the Tribunal in accordance with Article 28 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as he thinks fit.
RULE 74
Amicus Curiae

A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to appear before it and make submissions on any issue specified by the Chamber.

RULE 88
Judgment

(A) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present.

(B) If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105.

(C) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

RULE 101
Penalties

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23(2) of the Statute, as well as such factors as:

(i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of Rwanda;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served,
as referred to in Article 9(3) of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) The sentence shall be pronounced in public and in the presence of the convicted person, subject to Rule 102(B).

(E) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.

RULE 103
Place of Imprisonment

(A) Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons. Prior to a decision on the place of imprisonment, the Chamber shall notify the Government of Rwanda.

(B) Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed.

RULE 104
Supervision of Imprisonment

All sentences of imprisonment shall be supervised by the Tribunal or a body designated by it.

RULE 105
Restitution of Property

(A) After a judgement of conviction containing a specific finding as provided in Rule 88(B), the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.

(B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.

(C) Such third parties shall be summoned before the Trial
Chamber and be given an opportunity to justify their claim to the property or its proceeds.

D. Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

E. Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.

F. Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

G. The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to Sub-rules (C), (D), (E) and (F).

RULE 106
Compensation to Victims

A. The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

B. Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.

C. For the purposes of a claim made under Sub-rule (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.