

# The International Criminal Tribunal for Rwanda (ICTR) and Jurisdictional Issues

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**Abstract:** - International Criminal Law seeks to make certain crimes punishable at the international level by bringing such crimes within the purview of international Courts or Tribunals. The international court or tribunal so created therefore assumes jurisdiction for the trial of persons accused in this regard. This jurisdiction is without prejudice to the National Courts' power to try such cases and or individual accused persons. This exercise of Jurisdiction may pose a problem even where the international court or tribunal has been vested with what is termed as jurisdictional primacy. This paper examines this issue and possible conflicts inherent in this arrangement and proffers possible solutions in resolving its consequential logjam using the ICTR set up in 1994 to try cases arising out of the crisis in that country in 1993 as a case study.

**Key Words:** ICTR, Hutu, Tutsi, Jurisdiction, Complementarity.

## I. INTRODUCTION

The International Criminal Tribunal for Rwanda (ICTR) was the direct response of the UN<sup>1</sup> to the events that occurred in Rwanda between April and June 1994. On the 6<sup>th</sup> April, 1994 the plane conveying Rwandan President Juvenal Habyarimana (and his Burundi counterpart Cyprien Ntaryamira) was shot down over Kigali Airport, an act resulting in the death of everyone on board. He was a Hutu. The attack was blamed precociously on the other dominant tribe, the Tutsi. The Tutsis in turn claimed that it was the work of Hutu extremists seeking to lay the premise for the Hutu plan to finally exterminate the Tutsis. The result of this scenario was the death of roughly 800,000 Rwandans in 100 days; one of the worst disasters in human history. The acrimony between these two tribes had started when their colonial master Belgium relinquished power and the Hutus took their place. This had led to the formation of the Rwanda Patriotic Front (led by Paul Kagame) by the Tutsis and their moderate Hutu supporters whilst in exile in Uganda<sup>2</sup>.

The spontaneity of the reaction to the sabotage of the plane suggests a premeditated scheme aimed at achieving exactly that purpose; extermination. Lists of Tutsis and moderate Hutus were prepared and handed over to the unofficial criminal gang known as the "Interahamwe"<sup>3</sup>, who, prodded by

the Presidential Guard and radio propaganda<sup>4</sup> hacked their way through the Tutsi population to the glee of military officials, politicians and even Hutu businessmen. The attack was vicious and members of the 30,000 member strong Interahamwe were, along with ordinary citizens induced with promissory rewards to participate in the cleansing<sup>5</sup>.

## II. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

The magnitude of the Rwandan crisis needed some form of intervention by the international community. Its effect had glaringly spilled over to Zaire<sup>6</sup> and Uganda. The preamble of The UN Charter<sup>7</sup> implies that this kind of scenario will not be waived aside.

The Statute of the ICTR was adopted by the UN Security Council Resolution 955 (1994)<sup>8</sup>. Having 32 Articles, it was to lay the framework of for the dispensation of due justice in the whole Rwanda episode. Articles 1 through 4 spells out and defines the offences within the purview of the Tribunal; Articles 5 through 9 deal with the issue of jurisdiction, while the other Articles spell out the issues relating to organization of the Tribunal, its composition, procedure and practice and other matters<sup>9</sup>.

This paper is limited in the above context to Articles 5 through 9 i.e. issues concerning jurisdiction. The word "jurisdiction" in this regard is given in the context of its most loosely defined form i.e. the scope, legality and exercise of the powers of a court or judicial entity in the adjudication of a matter before it. I will look at Jurisdiction of the ICTR in two respects: as against to the person; and as against other courts. In this context I examine the powers vested in the Tribunal, those of the national courts, whether properly or judiciously exercised, instances of overlap or usurpation or whether in any instance the jurisdiction of the Tribunal was hindered, tampered with or made outrightly impracticable or impossible by any other court or judicial entity. It is by this critique that I

<sup>4</sup> see Rwanda..BBC News..(supra)

<sup>5</sup> Ibid.

<sup>6</sup> Hutu militias, afraid of reprisals had fled into Zaire (now the DRC) along with about two million Hutu civilians when the RPF entered Kigali, creating a serious Refugee problem.

<sup>7</sup> See the Preamble to the UN Charter (and its four paragraphs); and Article 1 ( on its purposes).

<sup>8</sup> amended by Security Council Resolutions 1165 (1998); 1329 (2000); 1411 (2002); and 1431 (2002)

<sup>9</sup> See UNSC Resolution 955 (1994)

<sup>1</sup> United Nations Security Council Resolution 955 (1994)

<sup>2</sup> They believed the persecution of the Tutsi would not abate and aimed to overthrow Habyarimana. See Rwanda, How the Genocide Happened. BBC News. Accessed at <http://www.bbc.co.uk/news/world-africa-13431486>.

<sup>3</sup> "those who attack together"

intend to draw my inferences and suggest possible ways of resolving any issues thereto.

Article 5<sup>10</sup> reiterates the resolve of the international community to hold persons accountable for the carnage by stating that The Tribunal shall try natural persons. This is apt since artificial persons cannot be sentenced to any term of imprisonment as stipulated by the ICTR Statute.

Article 6 is also on jurisdiction as regards the person. It is reflective of the essence of international criminal justice by making an individual responsible and accountable for a crime which would conveniently not have been prosecuted by the State, or which the legal apparatus of the State may have found too cumbersome to handle<sup>11</sup>. It transmutes criminal prosecution of an individual for a crime at the national level into the international realm. Its thrust is that a person would be responsible for a crime and be liable to stand trial for it, which ordinarily would have been deemed collectively committed at the level of the State or Organization thereby making individual criminal liability impossible. It is fundamentally a tool to end impunity on the part of those in control of State machinery.

The novel and distinct principle of international criminal justice system i.e the non- applicability of “sovereign immunity” is repeated in subsection 2 of this Article<sup>12</sup>. Any person could and would be held responsible for having committed a crime under international criminal law regardless of his official state position or the privileges conferred on him by municipal law<sup>13</sup>.

Article 6 further expands the frontiers of Law and buttresses the need to re-formulate some precepts of the legal criminal justice system in order to entrench international criminal law. In normal criminal law proceedings, the two elements required to be proved are the *actus reus*, and the *mens rea*<sup>14</sup>. By the provisions of subsections 3 and 4 however, the two elements are capable of establishing criminal liability separately. The knowledge of the plan of commission<sup>15</sup>, or the obedience of a command in pursuance of the plan, are each capable of conferring criminal liability.

The Statute also spells out<sup>16</sup> the scope of the exercise of jurisdiction ; the manner of exercise of such jurisdiction i.e. concurrent jurisdiction, and in trying to forestall any jurisdictional conflict, conferred “jurisdictional primacy” on The ICTR. It is also important to note that the Statute restates

the *Ne Bis in Idem* principle, a discussion of which shall be made later on herein.

### III. ISSUES AND CONFLICTS

#### a. *The ICTR and The ICTY*

The issues that form the thrust of this paper are basically on Jurisdiction. The concepts of Complementarity, Concurrent Jurisdiction, and Universal Jurisdiction must therefore be brought to fore since the subject matter is an international tribunal.

To provide for a proper insight however, it is instructive to examine the perception of The ICTR from a Rwandan perspective and possibly juxtapose with the earlier International Criminal Tribunal for the former Yugoslavia i.e. The ICTY<sup>17</sup>. It is my opinion that it was a better project than the ICTR in terms of jurisdictional issues and the exercise of its mandate without hindrance from national courts.

The ICTY was more acceptable to the Peoples of the former Yugoslavia than The ICTR was to Rwandans partly due to the actions or inaction of the international community during the crisis. The international community as represented by NATO and The UN played an active part during the crisis in former Yugoslavia with a view to resolving it, hence the parties were more amenable to accepting the jurisdictional primacy of The Tribunal and saw it as a genuine attempt to apportion blame. This was diametrically opposite the mindset of Rwandans to an international tribunal set up by those who had been criminally negligent of passivity during the crisis<sup>18</sup>, and who had been alleged to have at some point played a key role in fueling the crisis<sup>19</sup>.

The two situations were also different and to a large extent affected the issue of exercise of jurisdiction between The Tribunal and National Courts. The breakup of the former Yugoslavia was imminent, therefore the parties saw The ICTY as the most appropriate judicial entity to pronounce any guilt or apportion any blame since in circumstances where genocide is alleged each of the parties sees itself as the victim. On the other hand, Rwandans i.e The Tutsi and the moderate Hutu that supported them did not think in terms of Secession or self- determination but only wanted a better society and an atonement by those persons who had tried unsuccessfully to break the polity along ethnic lines; a task perceived to be

<sup>10</sup> “Personal Jurisdiction”

<sup>11</sup> “Individual Criminal Responsibility”. Article 6(1)

<sup>12</sup> This principle has been fundamental to international criminal prosecutions since its establishment at the Nuremberg and Tokyo Tribunals

<sup>13</sup> Former Prime Minister Jean Kambanda was tried on all six counts of his indictment. Also tried was former Cabinet Minister Callixte Kalimanzira. See Rwanda Profile-Timeline-BBC News. Accessed at <http://www.bbc.co.uk/news/world-africa-14093322>

<sup>14</sup> exceptions of Strict Liability offences e.g. Traffic Violations.

<sup>15</sup> as obtains in the elements of the crime of genocide.

<sup>16</sup> In Articles 7, 8, and 9.

<sup>17</sup> The ICTY. Adopted by UN Security council Resolution 827 (1993)

<sup>18</sup> The United States was wary of African conflicts after its foray in Somalia; the UN and Belgium forces in Rwanda had no mandate to stop the killing and pulled out after the killing of Belgian troops; Tutsis were slaughtered in French controlled “safe zones” (Rwanda Genocide: 100 days of Slaughter-BBC News. Accessed at <http://www.bbc.co.uk/news/world-africa-26875506>. Also see Neil J. Krutz et al. “*The Rwanda Tribunal and its Relationship to National Trials in Rwanda*” American University International Law Review 13, no 6, (1998): 1469-1493.

<sup>19</sup> In 2008, Rwanda published its report accusing France of having actively participated in the 1994 crisis. (see Rwanda Genocide...BBC..(supra))

capable of being more effectively taken care of by the national courts<sup>20</sup>.

#### b. Manner and Scope of Justice

The idea of the kind of justice and sanctions to be meted to accused persons also contributed to the issues arising from jurisdictional exercise between The ICTR and the National Courts. The policy of international criminal justice system being a methodical, evidence induced form of justice was laid by Justice Jackson<sup>21</sup>. Justice in this regard as the ultimate aim of an international criminal court or tribunal involved a steady albeit slow process of prosecution ensured to be as fair as possible to the parties. On the other hand, Rwanda(ns) required a swift, severe and decisive dispensation of justice; the tribunal could not even inflict capital punishment. Rather than allow the jurisdictional primacy of The ICTR to hold sway, “*the country sidestepped legal formalities in order to speed up the process of punishment and reconciliation through traditional Gacaca Courts*”<sup>22</sup>. Indeed in one instance, about seven accused persons tried in the national courts were convicted and sentenced to death in the morning, and executed in the afternoon of the same day<sup>23</sup>. The location of The ICTR in Arusha, Tanzania also affected the due exercise of its jurisdictional primacy<sup>24</sup>. It is to an extent correct to offer the opinion that the Rwandan Government at some point rather than uphold the jurisdictional primacy of the ICTR, engaged in a “first grab first try” policy<sup>25</sup> and given the handling of cases at the national courts, the ICTR has in certain instances refrained from referrals to the national courts<sup>26</sup>.

It is therefore submitted that The ICTY was a better project than The ICTR, having its jurisdictional primacy status directly or clandestinely unchallenged. The 161 indictments in former Yugoslavia recorded a hundred percent compliance at the Tribunal itself and not a proliferation of trials between it and any national court.

<sup>20</sup> Article 3 of ICTY provides the indictment “violations of the laws and customs of War”, an indictment not included in the ICTR Statute. Also note that the Rwanda government set up The “Gacaca Courts”, a traditional court which Trials fell short of international legal standards. (see Rwanda Profile...BBC.(supra))

<sup>21</sup> An American judge and The Prosecutor at The Nuremberg Tribunal.

<sup>22</sup> See Rwanda Genocide: the fight to bring the perpetrators to Justice. Accessed at <http://www.theguardian.com/world/2014/apr/02/rwanda-genocide-fight-justice>.

<sup>23</sup> Apart from those leaders handed over to the ICTR, other accused were tried at the national courts. See Michael P. Scharf, Statute of The International Criminal Tribunal for Rwanda, accessed at <http://legal.un.org/avl/ha/ict/ict.html>

<sup>24</sup> Iain Morley QC, Prosecutor between 2005 and 2009 said “but locating the ICTR in Tanzania left many feeling detached from the Court”. See Rwanda Genocide: the fight... (supra)

<sup>25</sup> Whilst some high profile Suspects Kambanda, Akayesu, Nahimana, Burayagwiza, Ngeze and Munyakazi were arraigned at The Tribunal, others like the country’s iconic singer Simon Bikindi, former Minister of Justice Agnes Ntamabyaro, Cabinet member Beatrice Nirere were tried at the national courts.

<sup>26</sup> Despite its workload, the Tribunal did not refer certain high level cases. (see Michael P. Scharf... (supra) at p 4)

#### c. Universal Jurisdiction, Complementarity and The ICTR

The Allies at the end of World War II resolved to bring those responsible for the atrocities to book, hence the establishment of The Nuremberg and Tokyo Tribunals. The composition of the Nuremberg Tribunal and the Tokyo Tribunal showed the trials as a truly global affair and contributed greatly to the development of international criminal law, “...these Tribunals stood as the only examples of international war crimes tribunals, but they ultimately served as models for a new series of international criminal tribunals that were established beginning in the 1990s”<sup>27</sup>. Of note is the fact that these two tribunals had exclusive jurisdiction, one feature which may have accounted for their success in achieving their mandate. The idea to firmly entrench an international criminal justice system started with serious discussions in the 1950s and led to the establishment of the ICC in 1998<sup>28</sup>.

The establishment of the ICC did not however usurp the power of States to try Suspects for international crimes under the doctrine of Universal Jurisdiction therefore States are entitled to assert universal jurisdiction over international crimes<sup>29</sup>. The ICC does not therefore possess universal jurisdiction and technically, it is thought to operate largely “on the basis of delegated jurisdiction from its State Parties”<sup>30</sup> thus the entrenchment of the principle of Complementarity in international criminal justice system. The principle signifies the idea that States will have priority over The ICC in proceeding with prosecution of cases within their jurisdiction<sup>31</sup>. As has been succinctly put<sup>32</sup>, “*this principle means that the Court will complement but not supersede, national jurisdiction. National Courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the ICC will act when national courts are ‘unable or unwilling’ to perform their tasks*”<sup>33</sup> or where the crime is a most serious crime. In fact, the actual words are “unwilling and unable genuinely” to carry out the investigation or prosecution.

<sup>27</sup> The Nuremberg and Tokyo War Crimes Trials; US Department of State, Office of The Historian. Accessed at <http://history.state.gov/milestones/1945-1952/nuremberg>

<sup>28</sup> The Statute of the International Criminal Court. Also known as The Rome Statute. Adopted at a diplomatic conference in Rome on the 17<sup>th</sup> July 1998, it came into force on 1<sup>st</sup> July 2002 and has 123 States as Parties.

<sup>29</sup> See amongst others, The Prosecutor V Tadic, IT-94-1 AR 72, (2 Oct, 1995) para 62; The Prosecutor V Kallon and Kamara, Lome Accord Amnesty, SCSL-2004-15 AR 72(E) paras 67-71.

<sup>30</sup> Olympia Bekou and Robert Cryer, “The International Criminal Court and Universal Jurisdiction: A Close Encounter?” The International and Comparative Law Quarterly, Vol.56, No 1 (Jan,2007) pp 49-68 at 51.

<sup>31</sup> Linda E. Carter, “The Principle of Complementarity and The International Criminal Court: The Role of Ne Bis In Idem”, 8 Santa Clara Journal of International Law 1 (2010), pp165-198 at 167

<sup>32</sup> Roy S. Lee, quoted by Linda E. Carter...ibid

<sup>33</sup> Article 17(1&2) of The Rome Statute (the admissibility analysis) lays the basis for States jurisdiction over international crimes and where the Prosecutor can assume jurisdiction.

States may issue a warrant of arrest for a Suspect and draw up indictments against such a person regardless of whether or not it falls within its territory simply by acting under its power of universal jurisdiction. The blatant disregard for these indictments issued under universal jurisdiction reduces its strength and undermines the efficacy of the international criminal justice system. This is illustrated by States' attempts to exercise universal jurisdiction as a form of concurrent jurisdiction during the resolution of the Rwandan episode<sup>34</sup>.

To circumvent the tardiness of arrests, trials and litigation inherent in the exercise of universal jurisdiction, the ICTR, was vested with "jurisdictional primacy"<sup>35</sup>. The words "shall have primacy over the national courts of all states" could rightly be interpreted to mean that the ICTR should command obedience from national courts in exercising its jurisdiction over its specific duty. Did the provisions have the desired effect? Did the ICTR coerce the desired subservience from the national courts? I am of the opinion that the answer is No. The issue of Jurisdictional Primacy for The Tribunal is premised on the recognition of universal jurisdiction of States by the Security Council which translates to concurrent jurisdiction between the national and international providing the linkage between both jurisdictions. The primacy of The ICTR however elicited in States, a sense of erosion of Sovereignty<sup>36</sup> and the principle of Complementarity rather than resolve the problem, fueled it.

Article 8(1) of The ICTR Statute confers concurrent jurisdiction on The Tribunal and National Courts while Article 8(2) confers primacy on the ICTR. To uphold subsection 2, the national courts would need to defer to The Tribunal. The reality of the situation however suggested otherwise<sup>37</sup>. On the other hand, it could be argued that the provisions of Articles 8(1) and (2) did not really conflict in the sense that the national courts did not try persons who had been indicted by The ICTR. My argument here is that the trials conducted by the national courts were not in conformity with acceptable international best legal practices<sup>38</sup> and justice would have been better served and dispensed if the national courts had not stuck to the exercise of concurrent jurisdiction. Some of the Suspects would at The Tribunal have gotten more legally justifiable convictions rather than the death penalty so swiftly handed down at the national courts. An understanding of the criminal justice system leads to a belief that with the

release of 25000 prisoners (convicted on the basis of the 1994 genocide) in 2003, and another batch of about 36000 prisoners in 2005 to ease overcrowding of the prison system, the national trials were not up to normal procedural standard and due exercise of jurisdiction in such cases are highly suspect. The jurisdictional incapacity of The ICTR in pronouncing the death penalty was seen as a serious weakness hence the rapidity of its pronouncement by the national courts in cases before it pertaining to the genocide, and its abolition thereafter.

#### *d. Ne Bis in Idem, The ICTR and National Courts*

The Ne Bis in Idem rule is generally to the effect that no one can be tried or punished twice for the same offence. The phrase loosely translated means "not twice in the same". It is also referred to as the "Double Jeopardy" principle. Found in almost all legal jurisdictions, its purport and effect is that no legal action can be instituted twice against a person for the same cause. In the United States legal system the wordings are "no one person shall be subject for the same offence to be twice put in jeopardy of life or limb"<sup>39</sup> and The ICCPR<sup>40</sup> adopts it<sup>41</sup> as "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the Law and penal procedure of each country"<sup>42</sup>.

This principle is entrenched in the Rome Statute of The ICC<sup>43</sup> and quite expeditiously replicated in the Statutes of the (earlier) ICTY and The ICTR<sup>44</sup>. Its relevance here is in the appraisal of the jurisdictional exercise of the ICTR vis a vis the trials at the national courts. With regards to international criminal justice system, it is designed to foster and promote State prosecutions<sup>45</sup> but it is the other way round as applied to the ICTR in view of the jurisdictional primacy clause inserted in its Statute<sup>46</sup>.

Another issue arising out of this principle is the ICTR in relation to the national courts in Rwanda and the trials therein. It is necessary at this juncture to copiously reproduce the provisions of subsections 1 and 2 of Article 9 of The Statute of The ICTR:

*"1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.*

<sup>34</sup> The French in 2008 arrested Marcel Bivigabagabo who had already been declared wanted for prosecution as a war criminal by the Rwandan government and refused to hand him over to the ICTR or Kigali. A Spanish judge issues warrant of arrest for 40 Rwandan army officers but President Kagame responds by expressing complete disgust in the judge. (see generally Rwanda Profile... (supra))

<sup>35</sup> Article 8(2) of the ICTR Statute. (also Article 9 of the ICTY Statute)

<sup>36</sup> Oscar Solera, "Complementary Jurisdiction and International Criminal Justice." IRRC March 2002 Vol. 84, No 845. pp 145-171 at 147. RICR Mars.

<sup>37</sup> William A Schabas, "Genocide Trials and Gacaca Courts". Journal of International Criminal Justice, 3 (2005) pp 1-17. Oxford University Press. Also see Rwanda Profile... (supra)

<sup>38</sup> Rwanda Genocide: the fight... (supra)

<sup>39</sup> The United States Constitution. Amendment V.

<sup>40</sup> The International Covenant on Civil and Political Rights. (Adopted 16 Dec. 1966, in force 23 March 1976)

<sup>41</sup> Article 14(7) ICCPR

<sup>42</sup> With the clear exception that it will not apply where the said prosecution is by two different Sovereigns

<sup>43</sup> The Rome Statute of the ICC. Accessed at [www.icc-cpi.int](http://www.icc-cpi.int). Section 20

<sup>44</sup> Article 10 ICTY; and Article 9 ICTR

<sup>45</sup> Linda E. Carter... (Supra) at p 176

<sup>46</sup> Article 8(2) Statute of the ICTR

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if;

(a) the act for which he or she has been tried was characterized as an ordinary crime; or

(b) the national court proceedings were not impartial or independent, were designed to shield the accused person from international criminal responsibility, or the case was not diligently prosecuted.”

The issue here is in the waiver of the Ne Bis principle in section 2. I am of the opinion that Article 9(2) was not interpreted in its true spirit of disconnecting its components and thereby affected the exercise of jurisdiction by The ICTR. The Tribunal was given the mandate of retrials in the following instances:

-where the accused person is tried for a crime that is characterized as an ordinary crime i.e if in its opinion the weight or status accorded the offence has lessened it from the serious violation that it is;

-where the proceedings were not impartial;

-where the proceedings were not independent;

-were designed to shield the suspect from criminal responsibility; and

-where the case was not diligently prosecuted.

The trials at the national courts were any other thing but impartial<sup>47</sup>. Conviction in the morning and execution in the afternoon would seem to illustrate this point aptly. Were the trials at the national courts conducted with due diligence? The fact of the volume of convictions answer in the negative<sup>48</sup>. Did the national courts in the exercise of their concurrent jurisdiction over the cases it tried act independently and devoid of interference? I submit the answer is No. “Over two million Hutus fled to (then Zaire) the Democratic Republic of Congo for fear of their safety in the reprisal attacks that were sure to follow in some form or the other, when the RPF finally overran the government forces”<sup>49</sup>.

In light of the foregoing, the ICTR should have taken a tighter rein on the proceedings by exercising its jurisdiction in either prosecuting the cases itself<sup>50</sup> or taking another look at trials which seemed partially prosecuted, not independent or were not duly and diligently prosecuted. In some cases however nothing could have been done by The ICTR where the

Suspects had been tried and convicted by the national courts, and executed before they could appeal their sentences.

#### IV. CONCLUSION AND RECOMMENDATIONS

The ICTR was a right call by the international community on a most unfortunate occurrence. I agree that to a large extent the exercise of its jurisdiction in terms of procedure, structure and prosecution has gotten a pass mark. It convicted and sentenced to life imprisonment a Head of Government<sup>51</sup>; it established the principle that a person who incites the public to the commission of Genocide could be tried and punished for crimes against humanity<sup>52</sup>; it laid the foundation for judicial notice of the genocide in Rwanda<sup>53</sup>.

In the exercise of its oversight jurisdiction as evident in the combined provisions of Articles 8 and 9 of its Statute, I submit that the ICTR failed to exercise its jurisdiction judiciously, thereby allowing the charade in the name of prosecutions that proceeded at the national courts under the guise of concurrent jurisdiction. One factor could have been the volume of matters that would have accrued before it and the operational costs<sup>54</sup>, but the benefit of the jurisprudence of the additional cases would have been worth it. It should have exercised jurisdiction over most of the cases tried at the national courts and probably averted the harsh sentences, procedural defects and executions. This would seem to be the essence of its jurisdictional primacy provision.

Concurrent jurisdiction between an international court or tribunal and national courts presumes some level of friction or overlap in the exercise of such jurisdiction. I therefore recommend the following as developments in international criminal law in order to avoid the thorny situations that arise out of the exercise of jurisdiction.

The first is the stoppage of establishment of ad hoc tribunals e.g. the ICTY and ICTR to deal with cases of this nature and the strengthening of the ICC apparatus to cope effectively with this development. This will enhance uniformity in the dispensation of international criminal justice, save huge costs<sup>55</sup> incurred by the tribunals in the operation of their mandates and also show some specificity in exercise of jurisdiction over international crimes wherever they may occur. The Nuremberg and Tokyo Tribunals were good projects for a unique event and purpose but in order to make international criminal justice truly credible, there must be singularity of the global system of justice akin to municipal law of States, with a set of codified rules, thereby avoiding the need for different Statutes for each Tribunal set up.

<sup>47</sup> In 2012 the Gacaca Courts were shut down. Human Rights groups heavily criticized the Trials... (Rwanda Profile...supra)

<sup>48</sup> Report on the Completion Strategy. S/2008/322 at para 60. See Michael P. Scharf...supra.

<sup>49</sup>...and many of them have indeed been implicated in the genocide and would have been prosecuted swiftly...(see the Rwanda Genocide: the fight...supra, per Iain Morley QC at p3

<sup>50</sup> Though the ICTR complained of the workload ( Report on the Completion Strategy...supra, at p 60

<sup>51</sup> The Prosecutor V Jean-Paul Kambanda. Case No ICTR 97-23-S

<sup>52</sup> The Media Case. The Prosecutor V Ferdinand Nahimana et al. Case No ICTR-99-52

<sup>53</sup> per Roland Amoussouga, Senior Legal Adviser to the ICTR...(Rwanda Genocide; the fight...supra at p 2; also Iain Morley QC..ibid.

<sup>54</sup> the ICTR had to transfer certain cases under referral to national jurisdictions despite having spent about \$1.7b

<sup>55</sup> see note 54 above. Also read the statement of Iain Morley QC, Rwanda Genocide: the fight...supra at p 3

There is also the need to have a review of the doctrine of Universal Jurisdiction. It has not been really effective to promote and foster in national jurisdictions a sense of belonging needed as the requisite linkage intended to promote cooperation between the national and the international. It is a form of jurisdiction most times exercised whimsically<sup>56</sup> and this lowers the credence lent to the idea of international criminal justice system.

The exercise of universal jurisdiction as a form of concurrent jurisdiction with other States or International Tribunals and The ICC is fraught with inherent friction<sup>57</sup>. Out of over 1000 attempts by the various States to initiate proceedings under universal jurisdiction since 1960, only 30 trials have ever been held. There is the challenge of a State accepting the jurisdiction of another State, submitting evidence and handing over Suspects. The exercise of the principle in the United Kingdom has allowed Suspects accused of actively participating in the genocide by Rwanda to remain at liberty in Britain<sup>58</sup> in circumstances that show the inherent tension in the application of the doctrine regardless of the gravity and pertinence of the indictments. One of the Suspects, Celestin Mutabaruka, is alleged to have led a band of Hutu militia who hacked Tutsis to death with Machetes and Spears and also gouged out the eyes of their victims.

Lastly, in order to curb the menace of spurious issuance of arrest warrants by States acting under universal jurisdiction, and at the same time ensure and enhance uniformity of procedure, the power of Universal Jurisdiction should be conferred on The ICC. It is a matter of expediency<sup>59</sup>. The exercise of jurisdiction by the ICC as it stands in form of delegated States' Universal Jurisdiction<sup>60</sup>. This will stop the need to have ad-hoc tribunals and diverse State prosecution of international crimes. As Bekou and Cryer<sup>61</sup> in my opinion

rightly stated "Had the ICC been granted Universal Jurisdiction, it is possible that this would have provided a boost for the ideal of universal justice, with the ICC standing as a beacon in international affairs, embodying the ideals of the drafters without tarnish, rather than seeming to be the product of ugly compromises".

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<sup>56</sup> it is almost ludicrous in the supposed exercise of universal jurisdiction for Belgium to have issued a warrant of arrest for US Defence Secretary Donald Rumsfeld in 2004; for Spain to issue an arrest warrant for 40 Rwandan army officers in 2008; for France to have issued an arrest warrant for President Kagame in 2006. See Rwanda-Timeline..supra at p 6 ; also Rwanda Genocide; the fight...supra at p 3

<sup>57</sup> see the following articles: Cedric Ryngaert, "The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?", New Criminal Law Review: An International and Interdisciplinary Journal, Vol. 12, No 4 (Fall 2009), pp 498-512. University of California Press; Maximo Langer, "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes", The American Journal of International Law, Vol. 105, No 1, (January 2011) pp 1-49. American Society of International Law; Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court", 1 EJIL (1990) pp 67-88

<sup>58</sup> In 2009, Britain blocked the extradition of five Suspects to Rwanda on the basis that their extradition would violate Article 6 of the European Convention On Human Rights i.e the right to a fair trial (see Rwanda Genocide: the fight...supra)

<sup>59</sup> See Cedric Ryngaert, The International Criminal Court...supra at pp 499, 501 and 507. Also see Olympia Bekou and Robert Cryer, The International Criminal Court...supra at p 52 (though they concluded in their own opinion that it is appropriate the jurisdiction was not conferred on the Court in Rome)

<sup>60</sup> Cedric Ryngaert, ...supra at pp 499 and 500.

<sup>61</sup> Olympia Bekou and Robert Cryer, ...supra, Ibid.