

## THE RIGHTS OF ACCUSED PERSONS AND CONVICTED PRISONERS AFTER COMPLETION OF THE ICTR'S MANDATE

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The current completion strategy of the ICTR aims at completing all trials by 2010, as indicated in the ICTR Report on Completion Strategy submitted by letter of the ICTR President to the President of the UN Security Council, on 14 May 2009. The date of completion of all appeals remains uncertain.<sup>1</sup> One of the recurring questions that remains is that of the fate of accused persons still at large who may be arrested after completion of the Tribunal's mandate, and that of convicted prisoners who have been transferred to enforcement states. Who will guarantee the respect of their rights and conditions of detention and release after the Tribunal closes down?

To maintain international standards and fulfilment of the ICTR mandate, a number of legal and practical obligations will have to survive the life of the Tribunal. These are *residual functions*, stemming from the core mandate of the Tribunal and that simply cannot extinguish with the completion of all judicial activities. These functions, *ad hoc* or ongoing, will have to be managed in accordance with international standards to ensure ongoing protection of the human rights of those accused still at large, of convicted persons, and of victims and witnesses.

These functions have been the subject of many debates at the UN Security Council, and even though they will ultimately affect the rights and freedoms of these interested parties, many of the core issues yet have to be addressed for the first time.

Following the ICTR President' Letter to the Security Council, the Secretary General presented to the Security Council his Report on the "*Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for these*

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<sup>1</sup> UN Docs. S/2009/247, 14 May 2009, *Letter dated 14 May 2009 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council*, pp.9-10.

*Tribunals.*"<sup>2</sup> It is interesting to note that this Report is in fact essentially focused on budgetary and administrative matters and pays little attention to the conditions according to which the rights and freedoms of accused at large and of persons convicted, by often questionable judgments, will be ensured and respected. If unaddressed, a number of issues will naturally arise subsequent to the closing down of the ICTY and ICTR; issues which yet have to be properly addressed for the first time at the decision-making levels. It is indeed regrettable that the succession of ICTY and ICTR not only does not seem to be grounded on human rights, fundamental principles and core values upheld by the United Nations Charter, but also continues to be seen to perpetuate this well-known policy of "victor's justice".

The Security Council intended to set up temporary *ad hoc* tribunals, which, 15 years on, are far from having completed all their judicial work, and have yet to ensure a proper legacy of all those residual issues to a successor body. In addition to briefly addressing each of the anticipated residual functions, this paper will also attempt to raise issues and concerns that could allow us to make recommendations concerning the functions this successor body should undertake, as an independent international legal entity, similar to the current model but reduced to a small nucleus equipped with the capacity to conduct the same judicial *ad hoc* and ongoing functions, and with due regard to the rights of accused persons still at large, detainees and convicted prisoners.

From the onset, it should be noted that while it would make sense for this residual mechanism to be located in Africa for the ICTR, and in Europe for the ICTY, no decision has been taken in this regard. Consideration should however be given to the fact that all ICTR prisoners are serving their sentences in African prisons, with exceptions, and that witnesses they might rely on for judicial review are for the most part in Africa as well. Finally, the prisoners' conditions of detention must continue to be monitored to ensure compliance with the UN Standard Minimum Rules for the Treatment of Prisoners,<sup>3</sup> and such monitoring should be conducted by a body well connected to the reality on the ground. It is therefore difficult to imagine how this

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<sup>2</sup> UN Docs. S/2009/258, 21 May 2009, *Report of the Secretary-General on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for these Tribunals* (hereinafter referred to as "the Secretary-General's Report").

<sup>3</sup> Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977.

body could be located in Europe, much like it would be undesirable to set up the ICTY's residual mechanism in Africa. What matters most is that this mechanism ensures that prisoners' rights to be released – either after a successful judicial review of their cases, or because they are pardoned, qualify for early release or parole, or have completed their sentence – remain *effective* and *tangible*.

Before looking at the scope of these core residual functions, here is a brief overview of the residual functions, outlined in the Secretary General's Report as indispensable:

- 1- Trial of fugitives
- 2- Trial of contempt cases
- 3- Protection of witnesses
- 4- Review of Judgments
- 5- Referral of cases to national jurisdictions
- 6- Supervision of enforcement of sentences
- 7- Assistance to national authorities
- 8- Maintenance of the Archives.

Obviously, these constitute the natural continuation of current activities of the Tribunals. They are divided up in *ad hoc* and ongoing functions, as they will require various levels of activity or responsibility and some might, in practice, never be required at all. However, the ongoing functions will require that a permanent mechanism exist.

It should be noted that the prosecution of RPF leaders is omitted from the list. Impunity will be part of the succession.

#### **A- FUNCTIONS INDIRECTLY IMPACTING THE RIGHTS OF PRISONERS**

##### **1. Protection of Witnesses**

Rule 34(A)(iii) of the Rules of Procedure and Evidence (RPE) requires the Registrar to “[d]evelop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.” Long-term planning includes

the time after the completion of trials and appeals. Therefore, the continued protection and support of witnesses who appeared before the Tribunal is a critical residual function, an essential aspect where both defence counsels and prosecutors converge.<sup>4</sup>

It is indeed a function that can hardly be ignored by the successor body of the Tribunal. As long as prosecution and defence witnesses will need to be protected, and violations of protection orders penalised, the residual mechanism will have to uphold this ongoing function, which will require judicial capacity and enforcement capacity.

## 2. Trial of Contempt Cases

The corollary to a continued protection of victims and witnesses who appeared before the Tribunal is the continued need to ensure respect for and implementation of court orders as well as the need to sanction those who violate them. In addition, new proceedings initiated after the Tribunal closes will generate new witnesses who will require protective measures. The residual mechanism must have the capacity to order those. In addition, this mechanism should have the authority to receive and investigate allegations of interference with the administration of justice and if necessary conduct contempt proceedings against those accused, and the capacity to enforce penalties.

In light of the foregoing, this issue should have been addressed more intently than it has so far. In a Tribunal where prosecution witnesses are notorious for counting tales, Judges, under the watchful eye of Rwandan authorities, have been particularly lax in contempt proceedings against those witnesses. However, a defence investigator was once held in contempt of court.

## 3. Referral of Cases to National Jurisdictions

While it is expected, as the Tribunal is winding down, that it would refer unadjudicated cases to national jurisdictions, paragraph (a) of Rule 11*bis* of the RPE, allowing the state in whose territory the crime was committed to be considered as a referral state, will continue to pose

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<sup>4</sup> Prosecutors of ICTR, ICTY, SCSL, ECCC and ICC have committed to ‘establish a regime for the protection and support of victims providing not only physical protection, but also medical and psychological support. Such a regime should continue to operate after the closure of the *ad hoc* tribunals.’ ICTY,ICTR,SCSL,ECCC,ICC Prosecutors Roundtable Discussion on International Cooperation Agenda for Action, Arusha, Tanzania 26-28 November 2008.

problems. This is especially more so now that Rwanda effectively abolished the death penalty,<sup>5</sup> which would have otherwise disqualified it under Rule 11bis(C). Another hurdle that Rwanda, or any other national jurisdiction, must overcome is the guarantee that any transferred accused will receive a fair trial. Rule 11bis(F) gives the Tribunal the opportunity to monitor the case once transferred or revoke the referral order at any time prior to conviction or acquittal by a domestic court. For this option to be actionable, the residual mechanism must be equipped with the same monitoring and judicial capacity to revoke referral orders issued by the Tribunal, or by itself.

#### 4. Assistance to National Authorities

This function will require heavy reliance on the Tribunal's Prosecution evidence and information to contribute to ongoing domestic prosecutions. It is therefore expected that domestic prosecution and other authorities will require access to public and confidential records of the Tribunal for domestic proceedings, judicial or administrative, including immigration and asylum cases. In order to continue to "cooperate" and provide information to requesting states, the residual mechanism will need to be equipped with the judicial authority *and* administrative capacity to manage these states' requests for evidence.

In addition, the Prosecutor's obligation to disclose exculpatory evidence is an ongoing obligation under Rule 68 of the RPE. If such material emerges during domestic prosecutions, a specific process must exist to ensure proper disclosure to accused persons and convicted prisoners who could benefit from this exculpatory evidence.

If left unchecked, the process will continue to hold the Hutus as the main suspects and to ostracise them. Indeed, the Tribunal accumulated an enormous amount of intelligence concerning thousands of individuals who can potentially be faced with prosecutions, libel, restrictions on cross-border travel, etc. Will there be checks and balances controlling the type of information that is provided to local prosecution or other national authorities? A mechanism of judicial supervision must certainly be put in place in order to avoid the perpetuation of the discrimination against the Hutu.

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<sup>5</sup> Organic Law No. 31/2007 of 25/07/2007 relating to the abolition of the Death Penalty.

## 5. Maintenance of the Archives

Beyond the preservation of institutional memory for victims, as well as historical and academic purposes, the primary value of the ICTR records is judicial. The Defence considers that records should be archived in such a way that is useful to the administration of evidence in the context of applications for judicial review, as well as for potential new trials. Further, archives will be essential to all other functions of the residual mechanism.

Last but not least, inculpatory evidence against RPF leaders, currently in the possession of the Prosecution, should not only be carefully preserved, but also be subject to Rule 68 of the RPE due to their potentially exculpatory nature.

Finally, the residual mechanism must ensure that Rwanda does not become the ultimate guardian of the ICTR archives, especially not the portion of it related to prosecution evidence of crimes committed by the RPF.

### **B. FUNCTIONS PERTAINING TO THE RIGHTS OF ACCUSED PERSONS AT LARGE, JUDICIAL REVIEW AND SUPERVISION OF SENTENCES**

#### **1. Trial of Fugitives**

The Secretary-General's Report recommends that the trial of at least four<sup>6</sup> of the thirteen ICTR indictees still at large be handled by the residual mechanism, as one of the *ad hoc* functions. In practice, there might be a need for more trials if the residual mechanism does not manage to refer cases to national jurisdictions under Rule 11*bis*. Of the four indictees in question, Idelphonse Nizeyimana was arrested in early October 2009, after publication of the Secretary-General's Report. He will hence be tried by the Tribunal itself. Considering the type of high profile cases that remain to be tried, it is reasonable to expect that the residual mechanism will have the same capacity to conduct international proceedings, with first instance, appeal and judicial review, as the Tribunal has.

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<sup>6</sup> Augustin Bizimana, Felicien Kabuga, Protais Mpiranya, Idelphonse Nizeyimana, considered high level accused to be tried at the international level, in single-accused trials. S/2009/258 Report, p. 6.

The main issue, however, concerns the preservation and management of evidence resulting from witness statements against indictees still at large, and its admissibility in a trial *in absentia*. The Prosecutor's concern regarding the potential loss of evidence and of witnesses 15 years after the facts is what gave rise to the new draft Rule 71bis, adopted during the ICTR Plenary of Judges on 1 October 2009.<sup>7</sup>

While there is no doubt that it is important to secure and ensure the availability of evidence in case of trial of those indictees still at large, it should be noted that Rule 71bis, as it is intended, would allow the presentation and introduction of evidence into the trial record, albeit by a Judge, to take place before the arrest of said indictee(s), or at best during their transfer to the seat of the residual mechanism where they would stand trial. Therefore, the mechanism proposed by Rule 71bis is certainly of concern, given that it would give a Judge the authority to hear prosecution witnesses without the accused being present and/or being given the opportunity to contest the evidence being entered into the record. While the new Rule suggests that the absent accused would be represented by a permanent court-appointed counsel, who would conduct the cross-examination of prosecution witnesses and the production of defence witnesses, it is difficult to imagine how a proper defence could be mounted in the absence of instructions and details of facts that can only be provided by the accused.

Accused persons have a fundamental right to be present at their trial. Consistent with Article 14 of the International Covenant on Civil and Political Rights, the Statute of the Tribunal foresees trials in the presence of the accused.<sup>8</sup> Under Rule 71bis the trial of at least three high-profile accused would however be initiated in the absence of all checks and balances, thereby seriously compromising the principle of equality of arms and presumption of innocence. The validity of this new Rule must be placed under scrutiny and, if necessary, contested by the Defence before it is enacted, or else this new process would open the door to a practice of trials *in absentia*.

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<sup>7</sup> Note that at the time of writing, the drafting of Rule 71bis was not yet complete; therefore the position exposed in this paper might be subject to change after careful review of the text.

<sup>8</sup> ICTR St. Art. 20.4(d). However, the case law of the Human Rights Committee has not ruled out trials *in absentia*, providing that the accused has been properly informed of the proceedings and is in a position to attend. See *Mbenge v. Zaire* (No.16/1977), UN Doc. CCPR/C/OP/2, 25 March 1983, p.76. The Committee has also held that a violation of this right might be remedied if the accused is entitled to a retrial in his or her presence after apprehension. See *Maleki v Italy* (No.699/1996), UN Doc. CCPR/C/66/D/699/1996.

## 2. Judicial review of Judgments

The right of convicted persons to judicial review is imprescriptible.

Pursuant to the Statute and the RPE, ICTR Judgments can be reviewed at the request of the convicted person at any time or, of the Prosecutor within twelve months after the pronouncement of the Appeals Judgment.<sup>9</sup> To date, the ICTR has seen eleven requests for review, including one by the Prosecutor. If new facts are discovered after the closure of the Tribunal, and constitute facts that could have been decisive in reaching Judgment, this discovery can form the basis of a review and possibly the reversal of a Judgment. The potential for discovery of exonerating evidence is yet another reason why the preservation of the archives must not be left in the wrong hands.

Therefore, such request for review must be an effective part of the *ad hoc* functions of the residual mechanism, and so as long as the convicted persons continue to serve their sentences. Judicial capacity is required to deal with requests for review and relevant procedures must be put in place to render Rule 120 of the RPE effective once prisoners are transferred to a distant enforcement state with no means to ensure their representation, much less additional investigations.

The ICTR, while recognising that the unavailability of this function would impinge upon the fundamental rights of the convicted individuals,<sup>10</sup> has nonetheless rejected all ten applications for review filed by convicted persons to date. It has however granted the only application filed by the Prosecutor to review its decision to terminate the proceedings against the accused.<sup>11</sup> This does not bode well for the future of convicted persons wishing to apply for judicial review after closure of the Tribunal. What guarantees are there that the residual mechanism will be better equipped to review those cases and ensure the effective and tangible applicability of this right to prisoners locked up in distant prisons with no means to hire investigators and lawyers, file their applications, analyse the Prosecutor's eventual response, file a reply and so on?<sup>12</sup>

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<sup>9</sup> ICTR St., Art. 25; ICTR Rules of Procedure and Evidence, Rule 120.

<sup>10</sup> S/2009/258, p. 9.

<sup>11</sup> The Prosecutor v. Jean-Bosco Barayagwiza (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000.

<sup>12</sup> See also the position of prisoners transferred to Mali, who are faced with the inability and unwillingness of the Tribunal to provide legal aid to enable convicts to conduct additional investigations, seek representation and file for judicial review. "La fermeture imminente du TPIR: quell devenir pour le condamné: Point de vue des Prisonniers du Mali", 28 October 2009

### 3. Supervision of Prison Sentences, Early Release, Pardon and Commutation

The Statute does not create a positive obligation in favour of service of sentence in Rwanda. Indeed, “[a]ny of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the ICTR”, could also receive convicted persons for the purpose of sentence enforcement. The RPE provide that the Tribunal shall designate the place of imprisonment for each convicted person and that transfer to the enforcing State shall be effected as soon as possible after the time limit for appeal has lapsed.<sup>13</sup>

Beyond transfer, the Statute provides that enforcement of sentences be subject to the laws of the Enforcement State(s), albeit under the supervision of the Tribunal. While the residual mechanism will inherit this ongoing function, the question remains as to the exact terms and scope of this power of supervision over the mode of application of the laws of a sovereign state. Furthermore, any Security Council-sponsored residual mechanism will never have the benefit of the impartiality that is so characteristic of and so treasured by the International Committee of the Red Cross. Hence, the supervisory powers of the residual mechanism over the conditions of enforcement of sentences in third states might inherently become very limited and, ultimately, prove difficult to implement. Nonetheless, the prisoners have a right to serve their sentences in a prison that meets the UN Minimum Standards for Treatment of Prisoners (i), and to be guaranteed a possibility for eligibility for pardon, parole or commutation of sentence under the domestic laws of the enforcement state (ii).

#### *i. Supervision and Inspection of Conditions of Detention*

Prisoners have the right to complain against the conditions of their detention, when those are not in compliance with the UN Standard Minimum Rules for the Treatment of Prisoners, which forms an inherent part of the Tribunal’s agreements with enforcement states who have accepted to take those prisoners.

The supervision of the enforcement of sentences is indeed a continuing obligation of the Tribunal and its residual mechanism, and it will extend for as long as convicted persons are serving their sentences. While, according to the terms of sentence enforcement agreements

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<sup>13</sup> ICTR RPE, Rule 103.

signed by the ICTR with African states, the ICRC is the default monitoring body, the Tribunal may designate other bodies to inspect the conditions of imprisonment.<sup>14</sup> It also has a duty to ensure compliance with the terms of its agreement with respect to conditions of imprisonment, tracking time served, dates of release, eligibility for parole, commutation of sentence, etc. For that purpose, the residual mechanism must be given the capacity to review domestic decisions influencing the length of detention, to receive reports on the conditions of detention, to take follow-up actions based on the recommendations in the report, and to conclude new enforcement agreements to the extent necessary.

Finally, it should be noted that once convicted persons have served their sentences, they may need assistance to obtain travel documents, authorisation to return to Rwanda or support in seeking asylum. Such tasks should be managed by the residual institution. The inability of the Tribunal, on its own admission, to facilitate the resettlement of acquitted individuals to date leaves little to be desired for the residual mechanism.

ii. *Early release, Pardon, and Commutation*

The Statute provides that if, pursuant to the law of the state in which a convicted person is imprisoned, he/she becomes eligible for pardon, early release, parole or commutation of sentence, the State concerned shall notify the Tribunal or its successor body. The President, in consultation with Judges, will decide on pardon or commutation of sentence on the basis of the interests of justice and general principles of law, and taking into account, *inter alia*, the gravity of the crime(s) for which the person was convicted, the treatment of similarly situated prisoners, the prisoner's demonstration of rehabilitation and any substantial cooperation of the prisoner with the Prosecutor.<sup>15</sup> Depending on the relevant national laws of enforcement state, this Presidential responsibility could potentially exist for as long as convicted persons are serving their sentences.

So far, ICTR convicts transferred to Mali have resided in a legal void as to which authority was going to assess and adjudicate on this eligibility. Malian authorities have even been reluctant to apply domestic laws on eligibility for parole and early release to ICTR prisoners because they

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<sup>14</sup> ICTR RPE, Rule 104. Sentence Enforcement Agreement between ICTR and the Government of Benin, August 1999; Sentence Enforcement Agreement between ICTR and the Kingdom of Swaziland, August 2000, Article 6.

<sup>15</sup> ICTR St., Art. 27; RPE, Rules 124-126.

know that the final decision will be subject to review by the President of the Tribunal.<sup>16</sup> It is unlikely that the residual mechanism will overcome all these hurdles if they are not addressed well before the closure of the Tribunal.

Finally, other considerations that have also been omitted from the Secretary General's Report include the issue of legal aid in all post-conviction proceedings, as well as how to ensure that family visits take place on a continuous basis. This goes to the welfare of the prisoners, and thereby, the conditions of their detention.

In light of the foregoing, it is suggested that the issues raised above be the catalyst to a fruitful discussion and allow us to make representations to the proper authorities, notably on the following items:

1. Location of the residual mechanism of the ICTR;
2. Full disclosure of investigations, reports and statements concerning RPF crimes;
3. Control of information provided to national authorities by the ICTR and its successor body;
4. A more liberal approach for judicial review of judgments;
5. Available resources to the defence after the closing down of the Tribunal;
6. Potential dangers of the new Rule 71bis;
7. More active role of the successor body in the supervision of sentences and powers to review domestic decisions;
8. Efficient assistance to released prisoners for their relocation.

09 November 2009

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<sup>16</sup> See "La fermeture imminente du TPIR: quell devenir pour le condamné: Point de vue des Prisoniers du Mali", 28 October 2009.