

TRIBUNAL ARCHIVES : ISSUES OF CONCERN TO THE DEFENCE AND THE ACCUSED

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I. INTRODUCTION AND CONTEXT

The debate with regard to the archiving of ICTR records has been ongoing for close to three years now. It is closely and intrinsically interwoven with the discussion on the general residual mechanisms for the two sister tribunals (the ICTR and the ICTY) in respect of the general aspects of the judicial process.

In October 2007, the two Tribunals established the Advisory Committee on Archives, chaired by Justice Richard Goldstone, to examine the requirements for the future location and management of the Tribunals' archives and provide a review of locations that would be appropriate for housing them. The Committee submitted a final report in September 2008. An informal body known as the Working Group on the International Tribunals has been conducting substantive consideration of the issues with a view to

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recommendations to the Council. In May 2009 the Secretary General presented an interim report drawn from the work of the Group to the Security Council.²

In August 2008 members of African civil society held a consultative meeting in Arusha upon invitation by the Goldstone Committee to make representations to it and came up with a communiqué.³

Meanwhile, The Government of Rwanda has also been making representations and demonstrating a keen interest to keep the ICTR archives.

The issue of the administration of the archives is closely interrelated with other aspects of the residual mechanisms though there is not yet any agreement on whether the archives would be administered by, and co-located with, the residual mechanism(s).⁴

II. LOCATION

The issue of the location of the ICTR is perhaps what has elicited the greatest debate.

In this regard, the Secretary General's report emphasizes that "The institution responsible for the Tribunals' archives should comply with a number of archival standards including the principles of archival integrity, security, preservation and access. The necessity to comply with these standards will have an impact on the choice of location for the archives."⁵

a) The issues of security and confidentiality.

The issues of security and confidentiality are critical. Security must be guaranteed in the management of the Tribunals' archives to prevent unauthorized access to confidential records and to preserve the integrity and authenticity of the archives. Failure to do so

² Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals dated 21st May 2009.

³ See communiqué of the consultative meeting on the legacy, residual functions and archives of the United Nations' international criminal tribunal for Rwanda (unictr), Arusha 16-17 August 2008.

⁴ See Par 15 of the SG report.

⁵ See Par 194 of the Report

could endanger persons who provided information or testified before the Tribunals and breach the Tribunals' obligation to uphold confidentiality. Confidential records should be appropriately identified and protected from unauthorized access.

b) Access

The SG observes that who the users of the archives will be is a key consideration when determining where the archives should be located and that the interests of other potential users, and particularly of the people who were directly affected by the conflicts, should also be kept in mind.⁶

There is a primary question as to whether there should be co-management and co-location of the residual mechanisms of the two Tribunals (ICTR and ICTY) including the trial of fugitives and the monitoring of protected witnesses and hosting of archives. The common view favours the choice of locations with some proximity to the affected countries, which in effect means a location preferably in Africa for the ICTR.

POTENTIAL LOCATIONS

1. RWANDA

Rwanda has over the years been making a strong case and expressing its desire for not only full custody and management of the archives, but for transfer of trials and detainees to Rwanda. It emphasizes the important historical value of these archives in the reconciliation process and the duty of memory. With regard to the archives, it did so in a letter dated 23 March 2009 from the Permanent Representative of Rwanda to the United Nations. It reiterated its request to a representative of the UN visiting Kigali at the end of last month, arguing its case as follows:

“Regarding the ICTR, Honorable Museminali appealed to the UN to support the transfer of the unfinished cases to Rwanda as well as its archives since these are

⁶ See Par 201 and 202 of the report

part of Rwanda's history and legacy," as Rwanda considers itself as the natural inheritor of the ICTR. The Rwandan authorities insist that sheltering the Tribunal's archives would be a critical complement to the genocide memorials erected in various parts of the country. ⁷

However, the Goldstone committee observes that “ Based upon the information to hand at this stage, there is no indication as to whether any of the affected countries has a location that would meet the various requirements for the archives set out above... Some views have been expressed to the effect that security and other requirements for archives preservation and access suggest that the best location for the archives would not be in the affected countries, at least at this stage” .. adding that “In the Committee’s view, for as long as the archives contain a substantial number of confidential documents, they should not be transferred to Rwanda and the countries of the former Yugoslavia. The Committee suggested, however, that when there is no longer a substantial number of confidential documents in each of the archives, the United Nations should consider, while retaining ownership, transferring their physical custody to a country of the former Yugoslavia and Rwanda, respectively.” ⁸

It will be recalled that Rwanda has over the years been pressing for transfer of trials and prisoners to Kigali and Defence lawyers (through ADAD) have been consistently opposed to the idea. ADAD was actively involved as *amicus curiae* amongst other human rights organisations in successfully opposing motions for the transfer of trials to Rwanda. Certainly that position and the rationale behind it have not changed in the recent past nor is there likely to be a change in the near future without regime and fundamental political change in Kigali.

2. OTHER POSSIBLE LOCATION IN AFRICA

⁷ Hirondele 21st October 2009

⁸ Par 216 and 186 of the report as well as Par 246 where it is recommended “ In particular, it will be important that the choice of location takes fully into account the need for a demonstrable sense of African “ownership” of residual functions flowing from ICTR.....”

In the joint communiqué at the end of a two-day meeting of civil society participants in Arusha, the participants were categorical in asserting that the UNICTR Archives must remain in Africa, stating, *inter alia*;

“ *Recognizing* the importance of retaining the records, archives and related equipment of the UNICTR in Africa as part of African heritage and to promote long-term reconciliation and deterrence to impunity...

We, the participants of the said consultative meeting, are committed to the following:

Ownership

The consultative meeting acknowledges and accepts that the United Nations (UN) retains ownership of UNICTR records, archives and related equipment after the completion of its activities, and that all records, archives and related equipment, regardless of form, remain the property of the UN.

Custodianship

The consultative meeting has reflected on the option of jointly housing the UNICTY and UNICTR records, archives and related equipment, possibly outside Africa, and oppose this option. The participants are in agreement that the UNICTR records, archives and related equipment **must** remain in Africa...⁹

In his report the Secretary General also make reference to potential locations in Africa, especially where the UN has “an important presence” as well as Arusha.¹⁰

The following are some of the locations that have been proposed or touted as possible venues in Africa, besides Kigali;

A. ARUSHA

Arusha and the Hague have been proposed since they are the current locations of the ICTR and ICTY respectively. Such a scenario would be acceptable to the Africa Civil Society and others who are against the transfer of the ICTR archives outside Africa. This would also mean the ICTR and ICTY archives would remain separate. Arusha would probably be the least controversial location having housed the ICTR since inception without any serious opposition from any quarters. Besides, Arusha is a renowned regional conference centre and, more importantly, the current headquarters of

⁹ See page 1 of communiqué of the consultative meeting on the legacy, residual functions and archives of the united nations' international criminal tribunal for rwanda (unictr) , Arusha 16-17 August 2008.

¹⁰ See par. 218 and 219 of the report

the East African Community of which Rwanda is a member . It also has the enviable reputation of being the seat of two other International tribunals -- ; The African court of Human and people's rights and the East African Court of Justice. The committee, through the S.G report makes the following observations on this possibility:

“ ICTR suggests two scenarios regarding the capacity of Arusha to serve as the seat of the residual mechanism(s) and the Tribunals’ archives: continuing the use of the facilities currently occupied by ICTR, with considerable renovations; or constructing a new facility for the archives and moving the operational facilities of the current courtrooms and reinstalling them in the new facility. According to ICTR, the current premises do not meet the international standards for permanent storage of the archives (including in terms of the location of this building in the centre of town, and sharing the space with private entities). This would, however, not rule out continuing to use this facility on a short-term basis while a permanent custom-built archival facility is constructed....”¹¹

B. NAIROBI

The reason Nairobi has been considered is that the United Nations has a big presence there. However, it has equally been pointed out that the U.N offices in Nairobi do not have the sufficient floor space and a new building would have to be constructed for the purpose.

However, there is a historical aspect of significance in regard to Kenya and the Rwanda crisis.

Kenya was initially proposed by the UN Security Council to host the ICTR at inception. However, the then president (Daniel Arap Moi) was against the very idea of the creation of the ICTR before establishing the authors of the deaths of two Presidents in the Kigali plane crash. (President Moi had a cosy relationship with President Habyarimana and his regime and many ‘Hutu’ refugees found a safe haven in Nairobi for quite a long time). The question that would arise is why transfer the ICTR archives from Arusha to Nairobi at this stage whereas Kenya was initially reluctant to host the court. Kenya also has a dark blot on its history of human rights and the integrity of its judicial system in view of its apparent inability or unwillingness to try perpetrators of post-election violence and serious human rights violations in 2007/2008. At the time of writing this paper the ICC

¹¹ see par. 226 of the report

Prosecutor was on a High profile visit in Nairobi seeking co-operation from Kenya to enable him prosecute the suspects.

Nevertheless, Nairobi would be an ideal location given its regional and continental status as a business, communications, conference and travel hub and a long term host of a United Nations office.

However, the cost of putting up new premises for the purpose does not give Nairobi as a location any advantage over Arusha in that regard.

C. THE East African Community

The East African Community is considered here not in the strict sense of a location but as an organization that would take over the residual mechanism(s) of the ICTR in totality. In a recent address to an EAC conference, the ICTR Prosecutor in suggesting amendment to the EACJ treaty, posed the following challenge;

“Again the challenge before us, ladies and gentlemen, is this: are we willing to take over some of these responsibilities? The ICTR’s Archives need a home. Who is better positioned than you to offer a solution? Who can deny that the Residual Mechanism of the ICTR should not come naturally to the EAC? Ladies and gentlemen will you embrace this opportunity?
(Proposal)... *Amend the EACJ treaty to enhance its jurisdiction* The EACJ needs your initiative to empower it to handle the cases, structures and archives of the ICTR after the tribunal closes. This can be achieved by amending the Treaty of the EACJ and expand the jurisdiction of the EACJ to include prosecution for genocide, crimes against humanity and war crimes..”¹²

The idea of the EAC taking over the residual mechanism(s) in totality, including finding a home for the archives at whatever location within the territory appears enticing. After all the 1994 events were essentially regional and Rwanda is now a member state of the EAC.

However, there would be various obstacles this proposal;

¹² Paper presented on behalf of Justice B. Jallow Chief Prosecutor , ICTR at an EAC Peace and Security conference on 7th October 2009.

Firstly, there appears to be the concept that the UN has the ultimate ownership of the archives as Tribunals are subsidiary organs of the Security Council¹³. Thus the UN cannot be expected to “cede” its ownership of control over either the archives of any aspect of the residual mechanism. A middle group would perhaps be a scenario of co-management by the EAC Secretariat with the UN - an arrangement that may not be very practical.

Secondly, Rwanda’s membership to the EAC may be more problematic than helpful in the circumstances. Given Rwanda’s current insistence on taking over the ICTR activities, it will ultimately exert undue and embarrassing pressure on the rest of the member states to let it control what “belongs” to it as a country, in view of its unrelenting persistence on the issue.¹⁴

Thirdly, there would still be the issue of the location of the archives within the EAC as Arusha may not be the automatic choice. In this regard, Rwanda would still present a strong case with regard to custody of the records.

Fourthly, the East African Court of Justice (EACJ) is itself in stages of infancy and is far from being an independent tribunal. A good example of its weakness is the comparatively successful attempts by the Kenya government to frustrate the courts’

¹³ Par 15 of the SG report states, inter alia, “... There is agreement in the Working Group that the management of the Tribunals’ archives is one of the principal residual functions and that, as the archives are the property of the United Nations, they must be kept under its control...”.

According to UN rules contained in Staff reminder of the rules and responsibilities for managing and disposing of Secretariat documents and records (ST/AI/326 1991) “All records, regardless of physical form, created or received by a member of the Secretariat in connection with or as a result of the official work of the United Nations are the property of the United Nations”.

See also the and preamble to communiqué of the consultative meeting on the legacy, residual functions and archives of the united nations’ international criminal tribunal for rwanda (unictr) , Arusha 16-17 August 2008.

¹⁴ As recently as 4th November, After successfully lobbying to host the UN Sierra Leonean prisoners, The Kenyan Newspaper “The standard” carried this report :

“ The United Nations genocide court in Tanzania is reneging on its promise to transfer Rwandan convicts to serve the remainder of their sentences in their homeland, Rwanda’s justice minister said....Tharcisse Karugarama said he did not understand why the International Criminal Tribunal for Rwanda (ICTR) had not returned convicts when Rwandan jails were deemed sufficient for those convicted by Sierra Leone’s war crimes court..... ‘We signed an agreement with ICTR to transfer the convicts to serve out their sentence here. So far they have not done it. We don’t know why,’ he told Reuters yesterday. Last week, the UN Special Court for Sierra Leone (SCSL) moved eight people convicted of crimes during a decade-long civil war to the ‘U.N block’ in Rwanda’s Mpanga prison....”

decisions when it's selection of members of the regional parliament were challenged.¹⁵ When the court issued an injunction against the Republic of Kenya and its appointees, Kenyan politicians allied to the Executive went ballistic, attacking the personal integrity of the Kenyan Judges on the bench and ultimately pushing for an amendment to the EACJ treaty and re-organization of the court system simply because it viewed the existing court as "hostile."

Indeed, the EAC states, particularly Kenya and Uganda are not much different from Rwanda in the failure to respect and uphold the independence of the Judiciary within their own boundaries. It is difficult to envisage a truly independent EACJ that can handle the Judicial functions of the ICTR without undue external interference at this point in time or in the near future. It is thus, rather sadly, doubtful if the EAC can be trusted to effectively handle the ICTR residual mechanisms, including the archives.

D. THE AFRICAN UNION/ ADDIS ABABA

Addis Ababa (Ethiopia) has been touted as a possible location for both the archives and/or a courtroom facility. This is in its context as the seat of Economic Commission for Africa and/or the African Union. The Economic Commission for Africa has indicated that it does not have the necessary space available and the current facilities/ offices would require considerable renovations to meet the requirements for the storage of the archives and the setting up of a courtroom and that a new building would have be constructed in three years' time at a considerable cost. The same scenario would apply in the context of the African Union headquarters. However, with regard to the possibility of the African Union as an institution inheriting the ICTR residual mechanisms, there would be considerations similar to those relating to the EAC. It will also be recalled that the AU has made spirited efforts against the arrest and trial of President Bashir of Sudan by the International Criminal Court and the activities of the ICC generally in Africa, raising questions with regard to its commitment as an organization to the success of the activities of International Criminal Tribunals.

3. . POSSIBLE LOCATIONS OUTSIDE AFRICA

¹⁵ See EACJ Reference No. 1 of 2006 Peter Nyongo & others –v- the Attorney General of Kenya

The United Nations Headquarters would be the option of last resort if there is no decision by the Security Council to the contrary with regard to location. Other potential locations in Europe have also been proposed. The International Criminal Court at the Hague has been touted as a possible location because of its relationship with the United Nations and the similarity in the functions of the ad hoc tribunals. Although this would be a more logical alternative with regard to the ICTY, there is also a possible long-term strategic consideration to bear in mind. Since there are other ad hoc United Nations Tribunals (such as Special Court for Sierra Leone) that will eventually face the same fate, it might be logical to have a single location for all the archives and other residual mechanisms. After all, the argument regarding proximity of the archives and Judicial functions to the conflict area does not appear to be important with regard to the ongoing and imminent trials at the ICC in relation to situations in Africa (i.e Uganda, Sudan, Democratic Republic of Congo, Central Africa Republic and Kenya).

III. THE CONTENT OF THE ARCHIVES

The Tribunals' records may be divided into three main categories: judicial records related to the cases; records generated in connection with the judicial process and administrative records.

The following categories of documents are of special interest to Defence Lawyers:

a) Judicial records which are of the greatest interest to the Defence, are those generated in the course of or in direct relation to a trial and managed by the Court Management Section. These include transcripts, decisions, Judgements, disclosures and exhibits. These are all often sensitive documents as a great portion of them are confidential (e.g. closed session transcripts and exhibits under seal).

b) The Prosecutor has the custody of a wide range of material related to investigations such as statements and records of interviews. Since disclosure to specific defence teams by the OTP depends on the case against an accused, a whole lot of material is maintained as confidential unless it is sought by the Defence and/or disclosed

by the OTP as being exculpatory. Most Defence Counsel at the ICTR are familiar with many often unsuccessful battles for disclosure of potentially exculpatory material even when its existence and fact of it being in the possession of OTP is well within the knowledge of the Defence.

There is little doubt that there is a lot of such material that never came into the possession of the Defence during trials and which, however potentially exculpatory or relevant to the Defence of an accused, may never be disclosed given that the decision on disclosure is within the discretion of OTP unless the Defence moves a Chamber for orders but this presupposes knowledge of the existence of the relevant material.

There is equally the material relating to the crimes committed by the RPF which is of interest to Defence counsel generally as well as historians and academicians as it might not possibly ever be used in Prosecutions.

Whereas a lot of material in the above categories may be deemed confidential generally at this stage, it may gradually need to be de-classified or disclosed in the course of time for purposes of review of judgments or the 'residual' category of trials whether under the ICTR residual mechanisms or at national levels even for purposes of Prosecution of RPF.

c) There are documents in the custody of the registry which are of a special interest to the Defence teams. Of particular significance are disclosures from the Defence to the Witness Protection Unit (WVSS) and confidential information in the custody of the Defence Management Section. The identifying information of witnesses is particularly sensitive. The DCDMS holds records relating to defence teams, appointment and conduct of Defence team members (including communication between the registry and specific teams on matters relating to internal issues arising within the team) and fees. The level of confidentiality of such documents is debatable but there certainly exists material that would ideally not be subject to disclosure to third parties.

IV. VALUES AND USES OF ARCHIVES

The records have both “primary value” for the ICTR as the creating institution and “secondary value” for research and memory for other persons.

The judges, Prosecutors, Registrars and Defence counsel are the primary users of the Tribunal’s records and have the greatest interest in them. Any party in a case at the residual mechanism(s) level, or authorized parties in another jurisdiction, may also request access to other Tribunals’ records relevant to their case, such as statements of witnesses, maps and exhibits, and transcripts of closed sessions from other cases. It is in this context that Defence attorneys would naturally be concerned about the custody, confidentiality and accessibility to the archives.

Some of the most important aspects to the Defence lawyers relating to archiving are protection of witness, trial of contempt cases and access to confidential information.

a. Protection of witnesses

A great majority of Defence witnesses are protected. The issuance or variation of witness protection orders by a Chamber is an ad hoc judicial function, while the implementation of witness protection is an ongoing administrative function for the Registry. It is critical for the Defence that witness protection measures are not varied or closed session transcripts disclosed arbitrarily. The SG report makes the following observation in that regard:

“ The withdrawal or variation of any protective orders issued by the Tribunals that are no longer necessary would decrease the number of issues faced by the residual mechanism(s) related to the protection and monitoring of protected witnesses (including access by national authorities to records containing information on witnesses). The Tribunals will need to consider the best way to achieve that goal, bearing in mind the interests of the protected witnesses. Withdrawals and variations of protective orders would require judicial decisions by the competent Chambers of the Tribunals. They would further require adequate

staffing, to undertake, among other things, the substantial work of contacting the protected witnesses, where appropriate.”¹⁶

It must be recalled in this context that it is more often than not the Defence that will seek the disclosure of confidential information from other trials or from the Prosecutor.

b. Review of Judgements / Trial of contempt cases

The performance of other residual functions, will also require access to the Tribunals’ records. In case of requests for review of judgement and allegations of contempt, there will be a need to have access to the relevant original records of proceedings before the Tribunals. Likewise, when a decision is being made on the referral of a case to national authorities, or on its revocation, there will be a need to have access to records of prior similar cases, including prior decisions and orders and, where necessary, prior submissions filed and any other relevant documents. In cases of requests for pardon or commutation of sentences, the convicted persons file, including any evidence of cooperation with the Office of the Prosecutor, must also be available.

Whereas Jurists (Judges, Prosecution, Defence Attorneys, etc) will be the primary users of the archives, it must be borne in mind that their active use of the archives will diminish with time as cases are concluded even at national levels and reviews, (if any) determined perhaps in the next ten to twenty years. Thus access of the archives to the “primary” users will ultimately become less and less significant. Nevertheless the need for confidentiality of most of the archives will be a permanent aspect for purposes of witness protection.

As the primary value of the Tribunals’ records progressively diminishes, the secondary value of the archives, i.e., their memory, education and research value, will progressively prevail. They will remain important to victims, witnesses and their families as well as the public generally especially Rwandans and those from neighbouring countries. Government officials, other international tribunals and courts, such as the International

¹⁶ See Par 90 of the report

Criminal Court, journalists, historians, legal researchers, political scientists among others may have interest in the archives.

This aspect has a bearing on the location of the archives. In the long run a location close to the conflict area, i.e Rwanda , will be most ideal.

V. CONCLUSION

The discussions with regard to key aspects of the residual mechanisms, including the location and management of archives, have not yet been concluded although recommendations have been made to the security council in *the interim*.

Besides, there will be need for continuous monitoring of the pending Judicial functions even after the initial decisions on location, etc have been made. It will be important for the Defence to keep a close watch on the process(es) and actively participate in discussions on management of the archives amongst the other aspects of the residual mechanisms.