

## POST JUDGEMENT ISSUES

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### Introduction

This paper is a working document on post conviction problems. Of course, it is not complete. More work is required.

After judgment, the convicted person is incarcerated.<sup>1</sup> The underlying principle is that the judgement is final when appeal proceedings are completed. The principle of *res judicata* applies. For a convicted person, there will be few remedies to overturn the judgment. The exceptions are described below. He must serve his sentence until the applicable legal provisions allow for his release. He or she is often facing a long sentence.

We will discuss the issue of prison conditions, right to parole, pardon or commutation of sentence, comparison with sentences at the ICTR, post conviction remedies and the necessity of a political solution and changes in the rules.

### Prison conditions and prisoners' rights: unequal treatment

The ICTR has made side agreements with different countries for serving sentences. Questions ensue from these agreements concerning differential prison conditions and differential and radically unequal access to parole or release from prison.

The ICTR and the United Nations are attempting to hand over to third parties responsibility for the conditions of convicted Rwandans. The consequence will be to reduce considerably the living conditions of the detainees making them dependant on the wealth of detainee's family.

In 1998, the ICTR judges adopted the RULES COVERING THE DETENTION OF PERSONS AWAITING TRIAL OR APPEAL BEFORE THE TRIBUNAL OR OTHERWISE DETAINED ON THE AUTHORITY OF THE TRIBUNAL.<sup>2</sup> The fairly comprehensive regulation provides for relatively acceptable standards for accommodation, food, medical services, complaint procedure, work programs, equal treatment. These rules apply universally to all persons detained on the Authority of the Tribunal<sup>3</sup> and the detention is based on the authority of the United Nations.

The ICTR has adopted bilateral agreements for the Detention of convicted persons. The agreements have been made with Rwanda, Mali, Bénin, France, Italy, Sweden, and

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<sup>1</sup> All at the ICTR are have been in prison from the date of arrest: no one has had bail during trial. The presumption of innocence has no effect on personal freedom of an accused.

<sup>2</sup> Available on the ICTR website

<sup>3</sup> Preamble and Rule 1A

Swaziland. In all these agreements, the sentences would be served under the national law of the specific state. This author understands that only Mali, Benin and Italy have accepted prisoners.

Detainees in Mali and Bénin are serving their sentences under the law applicable in the respective countries and no longer have the facilities available at the Detention Unit in Tanzania. They will be making presentations at this conference on their conditions.

### **Application of Penitentiary regulations and the detention agreements**

A legal question arises from the differential treatment. Which rules should apply: the universal Tribunal rules for all persons detained under the authority of the Tribunal or the rules applicable in the country of detention. Should not all persons detained under the authority of the Tribunal have equal treatment? The consequences are important relating to food, medical services, access to the outside world, complaint procedure and commutation of sentence or pardon. At this conference there will be a discussion of the difficult conditions experienced by the detainees in Mali and Benin.

There have been problems with transfer of funds to the Bénin prison. Administration and the detainees are attempting to resolve the issue directly with the Registrar.

Detainees should have right to medical services including treatment by specialists and required medicine. They should have proper food including special prescribed diets. They should not be required to pay for their food as is happening now in Bénin. Annual family visits should be paid for by the destitute prisoners. It is imperative that conditions be equal for all detainees wherever they are serving their sentence and as least as good as the conditions in the United Nations Detention Facility in Arusha.

What is the appropriate recourse to correct these inequalities: the ICTR or the national courts? We believe it should be the ICTR. Only a United Nations Court with full right of appeal should be allowed to settle such issues.

Will this court exist? Important issues arise with regard to the ICTR residual mechanisms. The ICTR will “close” but it will have to continue to exist. A paper on the residual mechanisms will be presented at this conference.

An additional question arises concerning detention in Rwanda. Rwanda wants the ICTR convicts and the ICTR has a detention agreement with Rwanda. It is hard to conceive that the losers of the war can be handed over to the victors who have committed war crimes and the crime of aggression and who have benefitted from impunity for their crimes. Also, Rwanda has legislation which violates international standards allowing for permanent detention in complete isolation. Rwanda is unfit to have custody of its enemies: ICTR convicted persons.

## **Disparity in sentences between the ICTR and the ICTY**

It is the general view that the sentencing at the ICTR is more severe than at the ICTY.<sup>4</sup> Many reasons are suggested for the longer sentences for Rwanda convicts: reasons include the fact that there are more convictions for genocide or the apparent important role or status of the convict in Rwandan society. Others might wonder if it is simply that Africans are treated more harshly than Europeans or the preponderant influence of the Rwandan Government. This issue should be fully studied and corrected.

## **Pardon, Parole or Commutation of Sentences<sup>5</sup>**

The problem of lengthy sentences is exacerbated by the fact that sentences are being served in countries where the access to parole or commutation of sentence seems more limited. This is particularly disturbing in the context of the one sided prosecution policy of only charging Hutu who lost the war and the obvious context of total impunity for the victors – RPF warlords- in the war which lasted from 1990 to 1998 at least.

There is a subsidiary obligation for that Host Country to consult the President of the ICTR who must consult the permanent judges of the Tribunal concerning release. Article 24 of the Rules requires the President to inform the Rwandan Government of any pending pardon or commutation of a sentence.

The striking fact is that the United Nations has adopted a procedure which provides for different rules for commutation of sentences depending on the country of incarceration. In Mali, there is no statutory procedure for commuting sentences but rather a system of Presidential grace, presumably dependant on the will of the President. In Bénin, the constitution permits Presidential Grace and the Code of Criminal Procedure provides for possible parole after serving half the sentence.

Ironically, the only convicted person sent to Europe, George Ruggiu was released from his Italian prison three months prior to the end of his sentence and apparently none of the mandatory procedures were applied.

Many European countries have sophisticated systems for commuting sentences the principle being keeping prison time at a minimum. In Canada, many Accused are released at one third of their sentence. Almost all are released after two thirds of the sentence. In the case of murder, the release time is between 10 and 25 years depending on type of murder committed.

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<sup>4</sup> There is a very thorough article written by Ines Monica Weinberg de Roca, former Judge at the ICTR and Attorney, Christopher M. Rassi, former Associate Legal Officer, Sentencing and Incarceration in the Ad Hoc Tribunals, *44 Stan. J Int'l L.* 1. This article is the source of much of the statistical information provided below as well as stating some of the principles already known by this author and developed in this paper.

<sup>5</sup> Rassi et al *supra*.

At the ICTY, the system appears to function fairly well although the risk of unequal treatment exists. A considerable number of convicted persons have been released from the ICTY detention unit and also from host countries such as Spain, Norway, Finland and Austria. For example, where accused had served 2/3 of his sentence, had behaved well in prison, and local authorities recommended his release, commutation of sentence would be granted.<sup>6</sup> Where accused had served 2/3 of his sentence, had behaved well in prison, and although not expressing remorse, had agreed to deportation to Serbia, commutation of sentence would be granted.<sup>7</sup>

### **Post Conviction Remedies.**

Most convicted persons consider that they have been wrongly convicted usually due to lying witnesses. It is well known that there are many lying witnesses at the ICTR. As stated by ICTR Judge Florence Rita Arrey on July 10, 2009 at the Geneva conference on the ICTR<sup>8</sup>

“I wish to confirm that in court lies come in all shapes and sizes. We have outright falsehood. We have cautious evasions. We have clear prevarications.”

Papers will be given at this conference about perjury and lying witnesses. What will a convicted person do in the year 2013 when the witnesses who were responsible for his conviction, recant and admit they lied ?

The stark reality is that judgements are considered final after the appeal process is complete.

### **Reconsideration: no right to have a final judgement reconsidered**

In law, a Trial Chamber may reconsider its own decisions if a new fact is discovered that was not known to the Chamber at the time, if there is a material change in circumstances, or where there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.<sup>9</sup> This should also apply to interlocutory decisions of the

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<sup>6</sup> *Prosecutor v Landzo*, No. IT-96-21-ES, *Order of the President on Commutation of Sentence* (13 April 2006); *Prosecutor v Delic*, No. IT-96-21-ES, *Decision on Hazim Delic's Motion for Commutation of Sentence* (24 June 2008); *Prosecutor v Jokic*, No. IT-01-42/1-ES, *Decision of the President on Request for Early Release* (1 September 2008); *Prosecutor v Banovic*, No. IT-02-65/1-ES, *Decision of the President on Commutation of Sentence* (3 September 2008)

<sup>7</sup> *Prosecutor v Tadic*, No. IT-94-1-ES, *Decision of the President on the Application for Pardon and Commutation of Sentence of Dusko Tadic* (17 July 2008)

<sup>8</sup> INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA : MODEL OR COUNTER MODEL FOR INTERNATIONAL CRIMINAL JUSTICE ? THE PERSPECTIVES OF THE STAKEHOLDERS. This quotation was taken verbatim from the conference minutes

<sup>9</sup> *Prosecutor v Ndindiyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials* (3

Appeal court. However, it is not possible to ask the Appeals Chamber to reconsider its final judgement since the judgement is subject to *res judicata*.<sup>10</sup>

### **Review: the only post judgment remedy after the Trial and Appeal is completed.**

Article 25 of the Statute and Rule 120 of the ICTR Rules of Procedure and Evidence provides for reviewing a judgment based on the discovery of new facts which would change the judgment. This provision is quite narrow and has been interpreted narrowly.

In order to have review granted, the moving party must demonstrate that (1) there is new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings—a “new” fact; (2) the “new” fact was not known to the moving party at the time of the proceedings before the Trial or Appeals Chamber; (3) the failure to discover the new fact was not due to lack of diligence; and (4) the new fact, if proved, could have been a decisive factor in reaching the original decision.<sup>11</sup>

### **A new fact is not new evidence concerning an issue at trial**

Legally speaking, a “new fact” refers to information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings.<sup>12</sup> The new “fact” must not have been among the factors that the deciding body could have taken into account in reaching

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November 2004) at para. 21; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Harmonize and Amend Witness Protection Orders* (1 June 2005) at para. 3; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecutor’s Consolidated Corrigendum to Prosecutor’s Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza’s Motion for Protection of Defence Witnesses* (7 July 2005) at para. 7; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye’s Motion for Reconsideration of the Chamber’s Oral Decision of 14 September 2005 on Admissibility of Witness XXO’s Testimony in the Military I Case in Evidence* (10 October 2005) at para. 11; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu’s Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber’s Decision of 13 May 2005* (24 November 2005) at para. 18; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Urgent and Confidential Defence Motion Requesting Reconsideration of the 1 March 2007 Ruling Refusing a Subpoena for the Witness JPFR3* (20 March 2007) at para. 2

<sup>10</sup> *Prosecutor v. Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić’s “Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005”, 26 June 2006, para. 9.

<sup>11</sup> *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 6; *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 8; *Prosecutor v Simba*, No. ICTR-01-76-A, *Decision on Aloys Simba’s Requests for Suspension of Appeal Proceedings and Review* (9 January 2007) at para. 8

<sup>12</sup> *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 9

its decision.<sup>13</sup> In determining diligence, the moving party must have taken advantage of all mechanisms available to obtain the evidence.<sup>14</sup>

This has enormous consequences since the simple discovery, say in 2013, that a key witness was lying would not be grounds for review if his dishonesty was raised by the defence at trial or on appeal. The door is closed for this type of new evidence after the appeal has been ruled on.

In the Akayesu case in March 2001, before the Appeal Hearing, a witness BBB came forward to explain how the major witnesses including the new bourgmestre of Taba commune had conspired with the Rwandan Government to fabricate evidence. The question of a joint fabrication of evidence and the implication of the Rwandan Government was not raised at trial. The Appeals Chamber ruled that the new evidence by BBB of fabrication and the implication of the Rwandan was not a new fact.<sup>15</sup> The Appeals Chamber went on to say that the new evidence would not even satisfy the criteria for new evidence on appeal. Jean Paul Akayesu is imprisoned for life in Mali in spite of this compelling evidence.

### **Counsel on Review.**

The Appeals Chamber has generally refused convicted persons the possibility of being assigned counsel for the process of review.<sup>16</sup> Before assignment of counsel, it is necessary to prove the existence of new facts which is very difficult without proper investigation by professional investigators. Eventually, a person is entitled to assignment of counsel to prepare a document which would allow a preliminary examination by the Appeals Chamber of an application to determine whether to authorize a review.<sup>17</sup>

Given the systematic lying, the involvement of the Rwandan Government in recruiting witnesses, the Ibuka system of recruiting witnesses, a real problem exists concerning the guilty verdicts. There is important litigation pending at this very moment about a key witness against Augustin Ndindiliyimana who was forced by the RPF to make false testimony. This may only be the tip of the iceberg.

### **Conclusion**

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<sup>13</sup> *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 6; *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 9

<sup>14</sup> *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 6

<sup>15</sup> *Jean-Paul AKAYESU c Le Procureur*, ICTR-96-4-A ARRET, (REQUETE AUX FINS DE RENVOI DE L'AFFAIRE DEVANT LA CHAMBRE DE PREMIERE INSTANCE I), 16 mai 2001,

<sup>16</sup> Rutaganda (Décisions de la Chambre d'appel du 08 décembre 2006, du 31 janvier 2008, du 10 juillet 2009, etc), Ndindabahizi, Barayagwiza (Lettre du Greffe du 10 mars 2008, Décision de la Chambre d'Appel du 11 avril 2008), Kajelijeli (Lettre du Greffier du 29 mars 2009).

<sup>17</sup> *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Niyitegeka's Urgent Request for Legal Assistance* (20 June 2005)

There are so many problems faced by persons convicted at the ICTR:

- unequal prison conditions
- unequal and excessively long sentences
- unequal access to commutation of sentence
- convictions based on lying witnesses
- extreme difficulty for reviewing convictions.

It would be presumptuous to try to set forth all possible solutions. Given the inequitable and discriminatory police granting impunity to the RPF, it has been argued that all convicted persons should be released unconditionally. This may be a valid long term goal.

However, minimally, the following seems necessary:

- Change in the court rules permitting review or revision of convictions in the light of new evidence.
- Liberal access to assignment of counsel and investigatory support which could lead to review.
- Uniformity in detention conditions and access to parole.
- Political change in Rwanda and the release or pardon of all convicts in the spirit of real reconciliation and not vengeance.

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