



Under the auspices of the European Parliament's Sub Committee on Human Rights (DROI) and with the support of the Party of European Socialists (PSE)

## Background paper<sup>1</sup> to international conference The unfinished business of the UN international criminal tribunals of the former Yugoslavia (ICTY) and Rwanda (ICTR): The future role of the EU and its member states

2 April 2009, European Parliament, Brussels, Belgium

"It is clear that the legal foundations of the ad hoc Tribunals, their Statutes and Rules, and certain of their functions cannot terminate upon the conclusion of all trials and appeals. [...] Failure to ensure that these essential functions are carried out in the Tribunals' aftermath may result in violations of the rights of victims, witnesses, accused and convicted persons. It is also likely [that] such failure would critically undermine the long-term legacy of the Tribunals, the notion that such courts contribute to international peace, reconciliation and the rule of law, and the legitimacy of the nascent international criminal justice system."

Hans Holthuis, former ICTY Registrar, 13 June 2007

"The Security Council acknowledges the need to establish an ad hoc mechanism to carry out a number of essential functions of the Tribunals, including the trial of high-level fugitives, after the closure of the Tribunals. In view of the substantially reduced nature of these residual functions, this mechanism should be a small, temporary, and efficient structure. Its functions and size will diminish over time. Its expenses will be expenses of the Organization in accordance with Article 17 of the Charter of the United Nations."

Statement by the President of the Security Council, 19 December 2008

"The acknowledgment of the need for the establishment of a residual mechanism should however not hide the fact that the Security Council is yet to reach a consensus on many other substantive issues, including for example the number of mechanisms, their locations as well as their relationships with the management of the Tribunals' archives."

Adama Dieng, ICTR Registrar, 14 January 2009

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<sup>1</sup> Prepared by Robert Schaeffer, Special Assistant to International Criminal Law Services (ICLS).

## I. INTRODUCTION

The two UN International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) were established in 1993 and 1994 respectively as ad hoc Security Council organs to prosecute and try individuals responsible for genocide, crimes against humanity, and war crimes.<sup>2</sup>

In 2003 and 2004, the UN Security Council decided to close down the two tribunals under the terms of a 'completion strategy', which refers to 2008 as the target date for the completion of all first instance trial work and 2010 as the target date for the completion of all appeals work.<sup>3</sup> The first target date could not be met, as the tribunals are still – now in 2009 - very busy with many first-instance trials, not to mention a number of trials that could not be started yet.<sup>4</sup> Accordingly, the UN Security Council extended the original trial-related deadline recently until the end of 2009.<sup>5</sup>

Speaking of 'completion', 'closure' or 'end dates' is misleading as there are many issues that will need to be performed for many decades to come and which are endemic to a criminal justice institution.

The EU and its member states are strong supporters of international criminal justice and have done much to establish and support the ICTY and the ICTR. The EU has helped the ICTY in maintaining pressure on countries of the former Yugoslavia to fully cooperate with the tribunal. Numerous persons convicted by the ICTY were sent to European countries and are serving their sentences there. The EU's commitment to the tribunals is further mirrored in the European Parliament's recent vote on 12 March 2009 to recommend to the UN the extension of the ICTY's mandate. France is the first country to try two suspects transferred from the ICTR in 2007 in the context of its completion strategy. Continued support from the EU and its member states is crucial at this stage. The credibility and strong fair trial standard of the tribunals are at stake and need to be maintained. In this important phase and as further outlined below, the tribunals rely on continued support from its stakeholders to ensure that their mandates can be properly fulfilled until and following closure.

The conference will specifically address the need for the support of the two tribunals beyond the date of their completion and assess the role of the two tribunals in assisting national judiciaries- in the regions but also elsewhere- in meeting prosecutorial and judicial needs. It is designed to provide a platform for debate between government officials of European countries, representatives of the EU institutions, victims, civil society, and experts from the two tribunals. Participants will have an opportunity to identify the most pressing residual issues and to explore the role of the EU and its member states in supporting the two tribunals in the post completion process.

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<sup>2</sup> Security Council Resolutions 808 (1993), 827 (1993), and 955 (1994).

<sup>3</sup> Security Council Resolutions 1503 (2003) and 1534 (2004).

<sup>4</sup> Some examples are the trials of Radovan Karadžić, or Jovica Stanišić and Franko Simatović at the ICTY; others are those of the remaining fugitives, e.g. Ratko Mladić (ICTY) or Félicien Kabuga (ICTR).

<sup>5</sup> Security Council Resolutions 1824 (2008) and 1837 (2008).

## II. COMPLETION ISSUES / RESIDUAL ISSUES / LEGACY ISSUES

In terms of terminology, one should distinguish between completion, residual, and legacy issues. Quite naturally, the three overlap but are not congruent. Expressed in a simplified form, they refer to short-, medium, and long-term issues, respectively.

a) Completion issues refer to the work of the tribunals up until their 'closing' dates, including any work preparing for the residual issues phase.

b) Residual issues refer to a range of functions that will have to be performed for many years to come, i.e. post-closure. They are core obligations of the tribunals and stem from their nature as criminal courts. A criminal court's work is not done with the rendering of a judgment. Many obligations remain which albeit smaller in some instances cannot be neglected as they relate to crucial aspects of international criminal justice.

Regardless of whether the 'closure' of the tribunals occurs in 2010 or at a later date, certain residual issues will need to be performed for decades to come. Hence, the 'problem' does not disappear by closing down the tribunals. The work and the obligations of the international community remain.

c) Legacy issues include, inter alia, the preservation of public records and materials for posterity, and promoting and ensuring the lasting positive impact of the work of the tribunals on the national systems of Rwanda and the former Yugoslavia. Part of this refers to the archiving of tribunal documents, which is also an adjunct residual function as it supports and enables the proper performance of the various residual functions by providing the staff of a residual mechanism, certain accused, victims, national law enforcement and judicial authorities and others with much needed documentation.

## III. RESIDUAL ISSUES OF THE ICTY AND ICTR

Some of the residual issues are highlighted below. This is not an exhaustive list,<sup>6</sup> yet residual issues are most likely to include the following:

a) Referral to national jurisdictions and monitoring:<sup>7</sup> To accomplish the ambitious deadlines set by the completion strategy, the tribunals are currently seeking to reduce their caseloads through referrals of cases to national jurisdictions. A key component of such referrals is the need for monitoring the referred cases and to assess whether any progress is being made in the particular case and to review or even revoke cases where no such progress has been made. A revocation of a referral would either lead to a residual mechanism (see further below) instituting referral

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<sup>6</sup> For a longer list see Letter dated 19 December 2008 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, para. 9. See also G. Oosthuizen/R. Schaeffer, Complete Justice: Residual functions and potential residual mechanisms of the ICTY, ICTR and SCSL, Hague Justice Journal, Volume 3, Number 1 (2008), pp. 50-57 with further references (this publication is available at [http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol\\_3%281%29/Residual\\_functions\\_EN.pdf](http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_3%281%29/Residual_functions_EN.pdf).)

<sup>7</sup> Monitoring of referred cases is currently being conducted by the Organization for Security and Cooperation in Europe on behalf of the ICTY and the African Commission on Human and Peoples' Rights on behalf of the ICTR.

proceedings in order to refer the case to a different national jurisdiction or to conduct trial proceedings itself before the residual mechanism.

b) Trial of high-level fugitives: Should especially high level fugitives remain at large beyond the closure of the tribunals, a residual mechanism will need to seek their apprehension, and once caught, will need to conduct full pre-trial, trial, and possibly appeals proceedings.

c) Continued protection of victims and witnesses: Protected witnesses may receive threats after the tribunals have closed down. The protected witness needs to be able to contact and notify a trusted, reliable, and capable authority, which can relocate him or her, where necessary, and provide him or her with continued protection. The protection of victims and witnesses cannot stop at the time of tribunal 'closure' and is a clear example of the ongoing obligations of the international community. Failure to effectively protect victims and witnesses may also have a discouraging effect on potential victims and witnesses in terms of participating in cases before the International Criminal Court (ICC) or other internationalized fora.

d) Contempt proceedings: An effective witness protection programme is a key component to encourage witnesses to testify, yet there is a risk that, for instance, persons acquitted by the tribunal may reveal confidential information about protected witnesses from his or her trial. In such instances, protective measures, relocation arrangements, and confidential issues need to be backed up by being able to issue binding orders and being in a position to institute contempt proceedings should its orders be breached. Since protective measures are continuing beyond the tribunals' closure, the possibility of contempt proceedings needs to continue as well.

e) Continued enforcement and supervision of sentences: After the closure of the tribunals, a residual mechanism will need to be in a position to negotiate with states on issues such as the transfer of convicted persons to give testimony in domestic proceedings, to supervise prison sentences, parole and commutation of sentences.

f) Review proceedings: When new evidence is discovered in a given case that points to the innocence of someone convicted by one of the tribunals, requests for review from the convicted persons need to be processed, possibly resulting in conducting review proceedings, including possibly re-hearing witnesses.

#### IV. RESIDUAL MECHANISM

It should be clear that some mechanism must continue to exist beyond closure of the tribunals because fundamental issues are at stake: If there were to be no mechanism for any remaining trials, indictees could enjoy impunity for their actions. If victims and witnesses were not continuously protected, the international community would sacrifice their human rights for financial considerations. If a convict were to be deprived of a mechanism to have his conviction reviewed, his fair trial rights and the rule of law would be undermined. If there was no mechanism to respond to future requests for information and mutual legal assistance by judicial authorities investigating and prosecuting suspects from the former Yugoslavia and from Rwanda, such national investigations and prosecutions would be seriously hampered, potentially leading to complete impunity of the many suspects not yet tried before national courts. In short, the rule of law does not allow the tribunals to

close down without a residual mechanism in place. Such a need was recently recognized by the Security Council in a presidential statement on 19 December 2008.

There are several options in relation to how a residual mechanism could look like. It is not yet public what the options under discussion in the Security Council are. The most obvious option entails 'downsized' tribunals, leaving the ICTY and ICTR in place but with a downsized mandate and staff in order to address any residual issues. This option has many advantages (ranging from archiving to location and staff retention) but may run counter to the idea of ending the lives of the ad hoc tribunals.

Another option is to involve the ICC in the process. In many respects, the ICC presents the new generation of international criminal justice and is starkly different from the tribunals (permanent, own international organization, broader territorial jurisdiction). To entrust the ICC with the residual issues of the tribunals seems like a practical solution. However, its numerous differences when compared with the tribunals might make such a transfer practically difficult. There are also significant legal hurdles. Furthermore, the ICC is currently experiencing a surge in judicial activity and might not be in a position or willing to take on additional tasks that might be high in numbers in the first years after the tribunals have 'closed down'.<sup>8</sup>

A more prudent and possibly cheaper solution could be the establishment of a joint ICTY-ICTR residual mechanism. The similarities between the ICTY and the ICTR in terms of their legal basis, their substantive law, and their practices are numerous. On top of it, the ICTY and ICTR have a joint appeals chamber and used to share a chief prosecutor, hence are also practically experienced in joint activities. It might also be considered that such a joint residual mechanism would also cover and support the residual issues of the Special Court for Sierra Leone, an internationalized court backed by several EU member states which is set to 'close down' even sooner than either the ICTY or ICTR.<sup>9</sup>

## V. POTENTIAL ROLE OF THE EU AND EU MEMBER STATES

The EU and its member states can play an important role in preparing for a proper transition of the tribunals into the residual issues phase. They have a strong responsibility to ensure that the rule of law prevails over financial considerations when discussing completion, residual, and legacy issues. The EU and its member states can work for this goal not only by advocating for it in the UN, and especially the Security Council and General Assembly budgetary bodies, but also by showing a strong commitment for the execution of the tribunals' residual work, such as cooperation with relocation agreements, enforcement of sentences and receiving cases from the tribunals under Rule 11bis. EU member states need to actively complement the work of the tribunals, including investigating and prosecuting suspects who are found to be living on their territories and who are not extradited or who cannot be tried before the tribunals anymore, to ensure justice and accountability.

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<sup>8</sup> For a more detailed analysis of this and the other options, see ICLS Briefing Paper prepared for the Open Society Justice Initiative, marked draft and circulated on 23 and 24 September 2008, *The residual functions of the UN international criminal tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone: the potential role of the International Criminal Court*.

<sup>9</sup> See e.g. Oosthuizen/Schaeffer, *supra* note 6, pp. 64-66; The Special Court for Sierra Leone is in particular need of support for residual work now, as it is not funded from the regular UN budget, unlike the ICTY and ICTR.

An important first step has been taken with the Security Council's acknowledgement of the need for a residual mechanism. Still, the potentially more difficult issue of how such a residual mechanism would look like seemingly remains unsolved. The EU and its member states could use their influence in advocating a common position with regard to the most practical residual mechanism solution. Any concrete support, apart from financial contributions, for a residual mechanism would very much depend on how it would look and what its exact mandate would be. The mandate and scope of work of the residual phase in turn depends very much on the progress that will be made in the final stages of the completion phase.

The example set for the residual issues of the tribunals will also be relevant for existing and future temporary international or internationalized criminal justice institutions such as the Special Tribunal for Lebanon or the Extraordinary Chambers in the Courts of Cambodia, hence have an impact on the entire system of international criminal justice and the promise of 'no impunity'.

