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**« THE ICTR'S CHALLENGES IN THE RELOCATION OF ACQUITTED
PERSONS, RELEASED PRISONERS AND PROTECTED
WITNESSES »**

PRESENTED

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AT

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HOCCRIMINAL TRIBUNALS AND NATIONAL PROSECUTING AUTHORITIES*

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I. Introduction

1. This topic calls to light the multi-faceted challenges that are facing the ICTR in the dispensation of justice, aimed at putting an end to impunity. The topic further offers us a unique opportunity to share with you the numerous challenges in the relocation of protected witnesses, acquitted persons and released prisoners.
2. ICTR's experience over the last fourteen (14) years has shown that International criminal justice dispensation can only be successful in meeting those challenges if and when there are political will and a clear demonstration of cooperation from member States in addressing them. From its inception until today, ICTR still encounters several obstacles in the relocation of protected witnesses, acquitted persons and released prisoners. Indeed, those challenges are made critical by the absence of any specific provisions in the ICTR Statute that could have directly placed an express obligation on the shoulders of member States to assist the Tribunal in the relocation of the protected witnesses, acquitted persons and the released prisoners.
3. The key operative provision of article 28 of the ICTR Statute relates to cooperation and judicial assistance that member States shall offer to the ICTR in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. This provision is limited in its scope as it speaks of the obligation of member States to comply without undue delay with any request for assistance or an order issued by the Trial Chamber, including but not limited to the following:
 - a) The identification and location of persons;
 - b) The taking of testimony and the production of evidence;
 - c) The service of documents;
 - d) The arrest or detention of persons;
 - e) The surrender or transfer of the accused to the ICTR.
4. This provision only deals with investigation and prosecution. It does not

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therefore apply to request for relocation following an acquittal or a completion of a sentence. As a result, the Registrar who is in charge of the Registry, one of the three organs of the ICTR and responsible for the administration and servicing of the Tribunal, is called upon to play a central role in tackling those key challenges, which are presented as follows:

II. The Challenges in the Relocation of ICTR Protected Witnesses

5. The issue of relocation of protected witnesses has posed crucial challenges since the inception of the Tribunal. It is worth noting that the ICTR has not been as successful as its sister International Criminal Tribunal for the Former Yugoslavia (ICTY), in concluding many cooperation agreements with member States for the relocation of protected witnesses.
6. A series of challenges faces the Tribunal in the absence of any such Agreements. This situation confined ICTR into a rather untenable position. So far, the Tribunal has not been able to rally effective support around the need for member States to extend protection to ICTR's vulnerable witnesses by way of accepting them on their territories.
7. A very limited number of member States have however shown slightly more sympathy toward the ICTR's intervention in favour of some critical prosecution witnesses or potential witnesses for whom the ICTR, through the good offices of the Prosecutor and the Registrar, undertook to explore and negotiate specific arrangements for their relocation in foreign countries. States like Australia and Canada have exchanged letters with ICTR confirming their willingness to receive a very few prosecution vulnerable and protected witnesses whereas the United Kingdom has also accepted in principle to sign such an agreement with the ICTR.
8. As a matter of general principle, external relocation of prosecution protected

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witnesses, who reside in Rwanda, to foreign countries does not enjoy the support of the Government of Rwanda, which has adopted a clear policy on this matter. However, internal relocation of such witnesses in Rwanda has been effectively implemented with a full cooperation of the Government of Rwanda.

9. The internal relocation process in Rwanda of ICTR protected witnesses from both the Defence and the Prosecution is guided by a policy and specific guidelines that are implemented in close cooperation with law enforcement agencies and relevant officials in Rwanda. Any internal relocation process is carried out in Rwanda on the basis of authentic national police reports or coherent intelligence reports that are reviewed and agreed upon by the ICTR Witnesses & Victims Support Section of the Registry. This process is fully funded by the ICTR.
10. The relocation of Defence witnesses or potential witnesses in foreign countries falls within the category of exceptional resettlement measures that have been implemented in very special and strictly limited cases by other UN sister agencies to whom such matters have been referred to. There are specific conditions that must also be met by such witnesses in order to enjoy the international protection in accordance with the protection policy considerations that are applicable in the said UN Agencies such as the Offices of the UNHCR or the UN Higher Commissioner for Human Rights.
11. The relocation of ICTR protected witnesses to a third country at the time the Tribunal is planning to wind down its operations, is and will remain, at this critical stage of its completion strategy, one of its thorniest challenges in the absence of any willingness from member States to receive such vulnerable witnesses who are protected by virtue of the Tribunal's orders.

III. The Challenges in the Relocation of ICTR Acquitted Persons

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12. The situation of acquitted persons before the Tribunal is one of the most critical challenges that ought to be absolutely addressed. It is worth noting that since its inception up to date, five persons have been acquitted by the ICTR:

- a) Mr. Ignace Bagilishema, acquitted by the Trial Chamber on 7 June 2001 and his acquittal was confirmed by the Appeals Chamber on 3 July 2002;
- b) Mr. Emmanuel Bagambiki, acquitted by the Trial Chamber on 25 February 2004 and his acquittal was confirmed by the Appeals Chamber on 8 February 2006;
- c) Mr. André Ntagerura, acquitted by the Trial Chamber on 25 February 2004 and his acquittal was confirmed by the Appeals Chamber on 8 February 2006;
- d) Mr. Jean Mpambara, acquitted on 12 September 2006; No appeal was lodged; and
- e) Mr. André Rwamakuba acquitted on 20 September 2006 and no appeal was filed.

13. The ICTR Registrar held extensive bilateral negotiations with the French authorities with the support of their Defence counsel, which have enabled both Mr. Bagilishema and Mr. Mpambara to be relocated to France where they were reunited with their respective families.

14. After a protracted process involving bilateral negotiations and court proceedings initiated by the Counsel for Mr. Bagambiki in Belgium, Mr. Rwamakuba and Mr. Bagambiki have finally been relocated to Switzerland and Belgium respectively, where they also joined their families.

15. Despite some lengthy and arduous bilateral negotiations with some member

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States and the UNHCR, the Registrar has not yet been able to find a country for Mr. Ntagerura. As a result, Mr. Ntagerura is still under the care of the ICTR. The situation of Mr. Ntagerura is a vivid illustration of the complexity of the challenges that are facing the Registry in complying with the directions given by the ICTR Judges.

16. On 26 February 2004, Trial Chamber III of the ICTR ordered the immediate release of Mr. André Ntagerura following his acquittal on 25 February 2004. Paragraph IV of the pronouncement of the Trial Chamber's decision reads, *inter alia*, as follows:

“DIRECTS the Registrar to release immediately André Ntagerurawhen satisfied that ..., the necessary practical arrangements have been made including required consultations with the relevant national and international authorities as well as any other organization deemed relevant for such practical arrangements to be made, in the interim, the Registrar is requested to ensure that André...[is] place in a safe house.’

17. The Trial Chamber further subjected the immediate release of Mr. André Ntagerura to the fulfilment of other conditions including the provision of an address where he will reside. The Defence Counsel of Mr. Ntagerura, on his own, actively endeavoured to find a place for his client and moved to request the Registrar, in view of the precariousness of the security situation of his client, that an asylum be granted to him in Tanzania pending his transfer to the country in which he will choose to reside.

18. Acting under the overall umbrella of Article 28 of the ICTR Statute, the Registry immediately sought assistance from UNHCR to that effect while stressing that the enjoyment of the freedom of movement by a person who, despite his acquittal by the International justice, is still under the regime of restricted liberty, will depend on the assistance that UNHCR may offer.

19. UNHCR was quick to point out that it is consistent with its mandate, both

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generally as a United Nations member organization and, specifically, as a rights protection agency, to cooperate, to the extent possible with the ICTR, bearing in mind the specific protection responsibilities of UNHCR in relation to released persons or acquitted persons. Although UNHCR expressed its keen interest in assisting the ICTR, it has, however, indicated that the very fact that Mr. Ntagerura was implicated as an accused person in an ICTR trial could form the basis of his exclusion from refugee status within the meaning of Article 1F of the 1951 Convention and/or Article I (5) of the Organization of African Unity (OAU) Convention, including through retro-active cancellation of refugee status if this was already granted.

20. UNHCR highlighted that, due to the fact that Mr. Ntagerura was acquitted of criminal responsibility by the Tribunal, he may have a well-founded fear of persecution, and return to Rwanda therefore may not be possible, as he has already claimed. Therefore, under those circumstances, Mr. Ntagerura may launch a claim for recognition of refugee's status in Tanzania.
21. Finally, the ICTR Registry managed to get the support and cooperation of the Tanzanian Government which accepted in May 2004 to grant temporary asylum in the country to Mr. Ntagerura pending his relocation to a third country. The Government requested to be kept informed on any subsequent developments with regard to any re-settlement formalities as soon as they are completed.
22. It is therefore under those special conditions that Mr. Ntagerura has been living temporarily in Tanzania under the care of the ICTR. Mr. Ntagerura proceeded to petition the Tribunal to compel Canada to receive him. The Appeal Chamber recently disposed of the matter on 18 November 2008, and requested the Registrar to seize the UNHCR in order to seek its cooperation.
23. The case of Ntagerura clearly illustrates the challenges facing ICTR as well

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as any accused person who is acquitted of any violations of international humanitarian law for which the ICTR is competent. These challenges are critical in the event that the acquitted person does not wish to return to Rwanda or to the country of his arrest. As it can be noted, neither the ICTR Statute nor its Rules of Procedure and Evidence deal with such situations, except to place a heavy burden on the shoulders of the Registry, which bears the responsibility for the safety and security of accused persons and acquitted persons while they are before the Tribunal, under its custody, or protective care.

24. It is gainsaying that, at this point in time, the ICTR acquitted persons are not immune from being subjected to the application of the “exclusion clauses” by the UNHCR, which requires careful and assiduous examination. This situation gives rise to legitimate questions as to the actual consideration and legal weight that are given to ICTR acquittal decisions by all external stakeholders including member States and UN Agencies. The lack of political willingness and the absence of positive obligations on the member States in the ICTR statutory provisions render the challenges quite daunting.

IV. The Challenges in the Relocation of ICTR Released Prisoners

25. In order to enforce the sentences handed down by the ICTR, the United Nations, up to date, has concluded seven separate Agreements with the following States:
- a) The Republic of Mali on 12 February 1999;
 - b) The Republic of Benin on 18 August 1999;
 - c) The Kingdom of Swaziland on 30 August 2000;
 - d) The Republic of France on 14 March 2003;
 - e) The Republic of Italy on 17 March 2004;
 - f) The Republic of Sweden on 27 April 2004; and
 - g) The Republic of Rwanda on 4 March 2008.
26. Termination of enforcement of ICTR as per those Agreements should occur

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in the following circumstances:

- a) When the sentence has been completed;
- b) Upon pardon of the convicted person or upon completion of the sentence as commuted in accordance with the provision of those Agreements;
- c) Following a decision of the Tribunal, as provided for in the provision of the Agreements;
- d) Upon the demise of the convicted person.

27. The Tribunal also may, at any time, decide to request the termination of the enforcement of the sentence in a given State and transfer the convicted person to another State or to the Tribunal for the remaining of the sentence.

28. So far, two ICTR prisoners have been released in Arusha after having served their sentences at the United Nations Detention Facility. They were not transferred to other states for the enforcement of their sentences. They are as follows:

- a) Mr. Elizephan Ntakirutimana, (sentenced to 10 years of imprisonment);
and
- b) Mr. Vincent Rutaganira (sentenced to 6 years of imprisonment).

29. Three more prisoners are expected to be released in December 2008, July and August 2009. One of them has already been transferred to Italy where he is serving his sentence while the other two are still in Arusha awaiting their transfer to the States of enforcement of their sentences.

30. For the prisoner who is in Italy, it is expected that his/her relocation after release will not be an issue for the ICTR. However, the experience so far gathered by the ICTR, has shown that upon release of the first prisoners in Arusha, they both requested ICTR to assist them to relocate to third countries.

31. Until now, ICTR has yet to be successful in negotiating with member States

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for their relocation to third countries. It is worth mentioning that the member States that have been approached by the ICTR responded negatively to its request. ICTR has, however, provided accommodation to the released prisoners pending their relocation.

32. In accordance with the Agreements concluded with the various States, unless the parties agree otherwise, the Tribunal is to bear the expenses related to the repatriation or return of the convicted person upon completion of his/her sentence to Rwanda or another country where he/she is lawfully resident. The current policy of the ICTR does impose an obligation on the Registry to find a State for a released prisoner, who is free of his movement. The Registry may only assist financially and administratively the released prisoner in getting travel documents and securing fund for his transportation to the relocation State of his own choosing, if and when necessary.

33. Finally, in case of death of the prisoner immediately upon his/her release in the enforcing State, the cost of transportation and return of the body of the deceased to the family members of the deceased, for burial, shall be borne by the Tribunal. In the event that the body is to be buried in the enforcing State, such a cost may be borne by the enforcing state, if the family of the deceased does not take possession of the body.

V. Conclusion

34. There is an expectation that the individual member States of the United Nations will enforce orders and judgements of the ICTR. Thus, under the Host Country Agreement that ICTR has concluded with the Government of the United Republic of Tanzania, it is expressly provided that on conviction the person shall be sent out of Tanzania as soon as practicable.

35. Article 26 of the ICTR Statute provides as follows:

“Imprisonment shall be served in Rwanda or any of the States on a list of

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States which have indicated to the Security Council of their willingness to accept convicted persons, as designated by the International Criminal Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda”.

36. The important point to be noted in this Article is that the imprisonment is served in accordance with the applicable law of the State concerned. This means that the nature of imprisonment for persons convicted of the same offence and sentenced to imprisonment for the same period will vary in accordance with the laws of imprisonment of the State where such imprisonment will be served.
37. The second point to observe is that the overall supervision of the convicted person serving sentence will remain with the Tribunal or a body designated by it or by the Security Council (after the closure of the ICTR). At present, one acquitted person is still under the care and protection of the Tribunal in Tanzania for an unforeseeable future while awaiting transfer to a state willing to receive it. The ICTR continues its best efforts to find suitable countries for the relocation of protected witnesses and released prisoners.
38. The current situation and the similar foreseeable situation of future acquitted persons and released prisoners who have or would have completed their sentences are important challenges that must be urgently addressed as the Tribunal moves forward to the closure of its operations.
39. It is of paramount importance that viable and sustainable solutions be found for these acquitted and released persons as to the countries where they will be transferred after acquittal or after they have served their sentences.
40. The effectiveness of an ad hoc international Tribunal such as the ICTR will remain seriously challenged until member States show a firm commitment to support ICTR. This can be achieved through an enhanced cooperation and

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assistance of all United Nations member States including UN Agencies in those challenging areas.

41. Although, the ICTR can be proud of itself because of its honourable track records, it goes without saying that in order to successfully complete its work within the timeframe that has been prescribed by the Security Council as part of its completion strategy, the ICTR must receive full support in meeting those critical challenges. Failure of supporting ICTR in that respect might seriously hamper the foundation of its effort to ensure a lasting contribution to national reconciliation in Rwanda, restoration and maintenance of peace and security in Rwanda, the Great Lakes Region and to the development of a very effective international criminal justice system.
42. ICTR legacy in those key areas must be enhanced and supported by a residual mechanism that shall guarantee the availability of willing countries, which would accept the relocation of protected witnesses, acquitted persons and released persons after the closure of the ICTR.

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