Beyond 2010
Few Legacy & Succession Issues Related to the End of the ICTR Mandate

Thank you Mr. Ambassador.
Excellencies,
Distinguished Delegates,
Ladies and Gentlemen,
The presentation I am making this morning is titled Beyond 2010. It attempts to look into few legacy and succession issues related to the end of the mandate of the ICTR.

1. As per the directions of the Security Council, endorsed by the Tribunal, the ICTR is expected to complete all its activities by 2010. At that point, it is hoped that all pending appeal cases would have been completed. As has been clearly stated earlier on by Prosecutor Jallow inter alia, the end of the appeal process does not necessarily mean the end of the judicial process as envisaged by the Tribunal’s statute. After the appeal judgment, parties still have the possibility –under certain conditions though, of asking for the revision of the case if they believe they have come across information said not to have been available to them at the time of the proceedings. This possibility is opened to the Prosecutor for a period of one year after the rendering of the appeal judgment. In the case of the defence, the option of requesting a revision of the case has no time limit and can therefore be exercised for example many years after the closure of the Tribunal. But how would this right be practically

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1 Jean-Pelé Fomété (Dr.), Senior Legal Adviser & Chief, Court Management Services at the ICTR, Chairperson of the ICTR Legacy Committee. The views expressed in this paper does not necessarily reflect the views of the United Nations or of the ICTR.
exercised, say in 2020 when convicted person X decides to request for the revision of its case? Where should he file his request, since the ICTR Registry in charge of receiving submissions from the parties would have then ceased to exist? Which body should review the request? How would this person have access to the official records of his or her case?

2. The handling of requests for revision is one example of a much bigger number of issues that would have to be dealt with when the ICTR winds down. All those issues have been captured under the umbrella concept of legacy issues. This generic appellation refers in fact to at least three groups of issues, functions or matters that would survive the legal existence of the Tribunal or would be created by its closure. The first group of issues are of a judicial nature. The second set of issues relate more closely to the concept of heritage or legacy that the tribunal would be leaving to the mankind. The third group of issues is of a more administrative nature. There is an underlying institutional dimension to the efforts aimed at resolving the issues raised in each of the three categories above.

Judicial Issues
3. The first group of issues, those of a judicial nature refers to functions whose continuation is mainly provided for by the statute of the Tribunal. These residual judicial issues include:

a. The establishment of a mechanism to address requests from convicted persons who are entitled to submit a request for review of judgement based on new facts not known at the time of trial and/or appeals. When the ICTR winds down, who is going to take care of these matters?
   i. Should it be the International Criminal Court?
   ii. Should it be An Ad Hoc panel of judges appointed by the Security Council on a case by case basis?
iii. Or should it be a fixed ad hoc panel of judges appointed by the Security Council?

iv. Or should it be an ad hoc panel of judges taken from a roster of judges carrying out the judicial activity of the Tribunal at the time of completion? Etc. The options are still open since the decision on this point and on many others we will be talking about remain to be taken.

b. The supervision of the enforcement of sentences, the early release of convicts, the commutation of sentences and pardon is another set of issues that would survive the ICTR.

i. The supervision of the situation of ICTR convicts serving their sentences is currently undertaken by the International Committee of the Red Cross (ICRC). Initial exchanges with this body indicate that it may NOT be willing to continue this exercise after 2010. Another institution should therefore take over this supervisory role come 2010.

ii. Concerning the commutation of sentence, pardon and early release of convicted persons, the standard provision of the agreements between the UN and states on the enforcement of sentences requires the receiving country to notify the Registry if, pursuant to its applicable law, the convicted person is eligible for commutation of sentence, pardon or any form of early release. The notification is submitted to the president of the Tribunal who shall determine, in consultation with the Judges of the Tribunal whether the proposed action is appropriate. The President’s determination is communicated to the hosting state by the Registrar.
iii. When the ICTR closes its doors, what authority should be empowered to grant pardons or commute sentences?

iv. What authority should be empowered to take other decisions on sentencing such as transferring a convicted person from one state to another? Countries under agreement with the UN on the enforcement of ICTR sentences can request in fact that a prisoner they are hosting be taken away by the Tribunal if further enforcement has become impossible “for any legal or practical reason”. When informed, the Registrar has something like six days to take the prisoner away.

c. The third set of residual functions relates to witness protection and monitoring of witness relocation agreements with third countries that will have to be carried out after the ICTR closes down. Possible issues to be attended to may include the following:

i. Violation of protective measures ordered by the ICTR during its existence.

ii. Review of applications for the modification of protective measures.

iii. WHO should attend to those issues? Member states in charge of the implementation of the court orders or an ad hoc international mechanism?

d. The fourth set of issues has to do with the monitoring of cases referred to national jurisdictions under Rule 11 bis and or possible revocation of such referrals and eventual return of cases to the Tribunal’s jurisdiction. The transfer of cases to national jurisdiction is an important element of the Completion strategy of the ICTR.
i. But what body should be in charge of monitoring the compliance to the ICTR standards of cases transferred to national authorities? Prosecutor Jallow indicated that during the existence of the Tribunal, this function could be carried out by the African Commission on Human and Peoples Rights.

ii. Assuming a case being handled by a national jurisdiction fails to meet the established standards, what body should order the revocation of the referral? Supposing the said case is referred back to the “tribunal”, what authority should be in charge?

e. To the four sets of statutory residual functions of judicial nature listed above, could be added a fifth group encompassing “unresolved issues” left behind by the ICTR. The fate of the acquitted persons will fall in this group if no solution is found to the problem created by their current situation.

4. From an institutional point of view, what types of mechanisms could best take over the management of the residual functions? It will be for the Security Council to decide in due course. Few options could be envisaged. They include:

   a. Setting up a single mechanism that would look after matters left by the ICTR, the ICTY and the SCSL.
   b. Establishing a skeleton body for each of the defunct organizations geographically closer as possible to Rwanda, Former Yugoslavia or Sierra Leone.

5. Centralized or decentralized, the successor structure could rely on existing UN offices to perform some of its duties. For example, a protected witness needing assistance in Cameroon could be referred to the UNDP Officer in charge of Human Rights, Justice or Governance issues.
6. **We now move on to the second broad group** of issues under the generic concept of legacy issues, the ones related to the wider question of the heritage the ICTR will be handing over to posterity.

**Legacy/Heritage Issues**

7. In this context, the *archives and records* of the ICTR are an important element of its legacy. They will continue to be needed by many stakeholders including the United Nations, national or international courts dealing with similar crimes, governments, universities, scholars, NGOs, victims groups, etc. Because they represent the official record of the work undertaken by the Tribunal, the archives should become part of the history of Rwanda, serving as witness to what had occurred. The Judicial Archives of the ICTR is an irreplaceable collection of recorded material that has been recognized internationally *inter alia* by being nominated for the *UNESCO Memory of the World* Prize in 2005. Our audio visual collection alone will comprise, come 2008, of 13 000 audio cassettes, 7000 DVCAM video tapes, 7000 VHS video tapes and 15000 audio CDs or a total of **40.000** unique hours of recordings. It is therefore important that bold and innovative approaches be used to develop the most appropriate framework for the management of the Tribunal’s archives after 2010.

8. One of the most frequently asked questions concerning our archives is the “where” question. Where the records should be actually kept and preserved? The following question is a “how” question and relates to the issue of the access to the said records.

   a. On the “where” question, the interim answer is that original records of closed cases are – as property of the
United Nations, to be transferred to the Archives and Records Management Section in New York as per established rules and regulations.

9. Simply depositing ICTR Archives with UN HQ Archives only is NOT in the best interests of African researchers or the continued process of reconciliation in Rwanda. This is why copies of the public records should be made available to as many as possible stakeholders and in the most varied formats. Since most of the records are available in digital format, they can be easily replicated and disseminated. A final decision from the UN headquarters remains to be taken on this course of action. Venues considered for the deposition of copies of the public records could include:

a. Rwanda of course. No effort will be spared to achieve this goal. Electronic copies should be made available to as many institutions as possible. Serious consideration should be given to establishing an institution that could host the entire collection (audio, video, paper as well as electronic). Discussions with interested stakeholders should be undertaken to work out the most appropriate format that such institution could take including a kind of Genocide Foundation.

b. On the African Continent, the African Union has expressed the wish of hosting a copy of the collection. A similar interest has been expressed by many other institutions in a number of African countries. Ideas floated here and there include looking at the possibility of making the important work done by the ICTR in Arusha also acknowledged forever in a form or another: keeping a copy of the collection in Arusha for example. It is worth
noting, in this regard, that Arusha will be the seat of the African Court of Human and Peoples Rights.

c. The ICTR’s archives would continue bearing their importance all over the world. Many international organizations, NGOs and universities across the globe have formally expressed the wish of hosting our collection, including maintaining the current access via the internet of the final public collection of ICTR records. The Municipality of The Hague, in The Netherlands has embarked on a campaign positioning itself as the world centre for Legal Heritage and, in this respect, is offering to receive the originals or copies of the records of all existing ad hoc tribunals and special courts.

Administrative issues

10. The third group of issues that may have to be dealt with even long after the closure of the Tribunal, the administrative ones, are of a lesser interest for this presentation. They deal with issues such claims that could be lodged against the Tribunal as a legal entity by contractors for example.

11. The important point to mention at this juncture though is the efforts undertaken by the United Nations to see to it that required arrangements are in place prior to 2010.

a. In the framework of the Inter Tribunals Cooperation, ICTR and ICTY have been exchanging informally on the wide array of legacy and succession issues. Whatever comes out of those exploratory exchanges would certainly be looked into by the relevant offices at the UN Headquarters, especially by the Office of Legal Affairs prior to involving member states.
b. In the meantime, the Secretary General has already brought some of those issues to the attention of member states on 17 October 2005, through his report on *Staff retention and legacy issues* submitted to the General Assembly.

c. Forthcoming steps would certainly culminate in the review of the issues by the Security Council probably in the framework of its regular assessment of the level of implementation of the ad hoc tribunals’ completion strategies.

**CONCLUSION**

12. In conclusion, it appears that the ball of international justice will indeed continue rolling even after the closure of the Tribunal mainly through:
   a. The performance of residual judicial functions provided for by its statute in different areas such as the protection of witnesses, the revision of cases, the monitoring of cases transferred to national jurisdictions, the enforcement of sentences, etc. Or

   b. Through the historical value of its records and case law as facilitated by appropriate mechanisms for the preservation and dissemination of the said records.

13. Solutions to the issues highlighted are yet to be decided upon. ICTR and ICTY have been working together to come up with a working document that could serve as basis of discussions by all stakeholders in the framework of established UN procedure. The authority to decide on all those questions remains with the Security Council and other relevant UN bodies. As we move closer to the completion of the Tribunals mandates, the need for anticipating on what would happen is more than ever crucial.
A much bigger involvement of Rwanda, through its Government, its academic institutions, its judiciary and its vibrant civil society would help a great deal in capturing its needs and somehow influencing the decision-making process.