

Complete justice: Residual functions and potential residual mechanisms of the ICTY, ICTR and SCSL

Gabriël Oosthuizen and Robert Schaeffer *

Summary

The international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), as well as the Special Court for Sierra Leone (SCSL) are due to close in the next few years. Technically, their complete closure in the immediate future is impossible, as there are a number of so-called residual issues that will need to be addressed for many years to come. These include the supervision of prison sentences, determinations on pardons and commutations, the potential review of earlier convictions, the continued protection and support of victims and witnesses, determinations on referrals and deferrals with regard to national proceedings, and the arranging of residual trials of at-large indictees caught after the courts' closure. These ongoing obligations or residual functions – most of which involve judicial, registry, prosecutorial and defence activities – must be addressed by some form of residual mechanism or mechanisms. Options include extending the lifespan of the courts, establishing a joint residual court or transferring functions to another court. Comprehensive solutions are required and the international community will have to make a decision soon. At stake are fundamental human rights issues, the integrity, legitimacy and strengthening of the evolving international criminal justice system, and the legacy of the ICTY, ICTR and SCSL.

* * * * *

The international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) are set to close in the next few years. Yet each has so-called residual functions that will need to be performed for many years after their closure. What are these residual functions? Via which mechanism or mechanisms could they be completed? This article briefly addresses these questions.¹ The overall

* Gabriël Oosthuizen is executive director of International Criminal Law Services Foundation (ICLS), a Hague-based NGO (www.icls-foundation.org). Robert Schaeffer is an ICLS assistant. The views expressed in this article are their own, and do not reflect the views of ICLS

¹ The article is based on the January 2008 briefing paper, *The residual functions of the UN international criminal tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone and*

purpose is to draw attention to and stimulate more public debate and action on pressing issues of real importance.

1 Background

The ICTY and ICTR were created by the United Nations (UN) Security Council (SC) in 1993 and 1994, respectively.² The SC, acting pursuant to Chapter VII of the UN Charter, vested both courts with considerable powers, including the ability to refer non-cooperation by states to the SC.³ The SCSL was created by agreement between the UN and the government of Sierra Leone in 2002.⁴

The current completion strategies of the ICTY and ICTR, reflected in SC resolutions 1503 (2003) and 1534 (2004), refer to the end of 2008 as the target date for the completion of their trials, and to the end of 2010 for the completion of appeals and other remaining work. Both courts have recently indicated that the targets are likely to be missed by at least a year.⁵ The SCSL's completion strategy is under review. A reasonable projection for the case that will most likely last the longest – that of the former Liberian president, Charles Taylor – would seem to be mid-2009 for the trial's conclusion and early to mid-2010 as the end date of any appeal; this would make the SCSL the first of the three courts to close.⁶

potential mechanisms to address them (marked “draft”), prepared by ICLS for the Open Society Justice Initiative (OSJI). It is an updated version of the February 2007 briefing paper, *The residual functions of the UN international criminal tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone*, also prepared by ICLS for OSJI.

² SC resolution 808 (1993) and SC resolution 955 (1994). Unless otherwise indicated information on the three courts is available at the websites of the ICTY (www.un.org/icty), ICTR (www.ictor.org or www.un.org/ictor) and SCSL (www.sc-sl.org). The information used in this article is generally updated as of early March 2008.

³ See e.g. ICTY Statute art 29; and ICTY RPE rule 7bis.

⁴ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 Jan 2002 (SCSL-establishment agreement), concluded pursuant to SC resolution 1315 (2000).

⁵ For the ICTY, see e.g. statement of ICTY president to SC, 10 Dec 2007 (10 Dec 2007 statement); assessments and reports of ICTY president and prosecutor to SC on completion strategy, attached as annexes I and II, respectively, to letter dated 12 Nov 2007 from ICTY president to SC president (S/2007/663, 12 Nov 2007), pars 2, 42-44 of annex I (hereafter, ICTY president report) and pars 38-39 of annex II (hereafter, ICTY prosecutor report). For the ICTR, see e.g. address of ICTR president to SC, 10 Dec 2007; statement of ICTR prosecutor to SC, 10 Dec 2007; and report on completion strategy of the ICTR, annexed to letter dated 16 Nov 2007 from ICTR president to SC president (S/2007/676, 20 Nov 2007), pars 54-58.

⁶ See e.g. Oosterveld V and Gurd T, *The Special Court for Sierra Leone: Options for Addressing Residual Functions after Physical Closure*, 8 Feb 2008, paper prepared for residual functions expert-group meeting convened by SCSL in February 2008 (Oosterveld and Gurd), p 2. See section 4 below for more information on the meeting.

2 Residual functions⁷

Regardless of the mentioned completion dates, each court has various residual functions which will have to be performed for many years thereafter. Speaking of ‘completion’, ‘closure’ and ‘end dates’ can be useful but is ultimately misleading. The concept of residual functions also does not convey the sense that these are core, ongoing obligations, chiefly of the international community, some of which will be life-or-death matters and will concern fundamental human rights.⁸ Residual functions stem from the nature of the ICTY, ICTR and SCSL as criminal courts.

By way of example, some key residual functions are highlighted in the following subsections; the specificities of each court are not covered. The functions are drawn from the courts’ governing instruments, including their statutes and rules of procedure and evidence (RPE).

Most residual functions will entail some combination of judicial, registry, defence and prosecutorial activities. ‘Judicial functions’ refers to duties performed by one or more judicial officers, including the president of each court, who are vested with the authority to make legal assessments and issue binding decisions addressed to various parties and entities, including states. Registries administer and service the courts, including the prosecution and defence organs or components. For example, they provide protection and other services to victims and witnesses, handle personnel issues, serve as the courts’ channel of communication, manage court records and materials and provide security and language services.

2.1 Supervision and pardon and commutation of prison sentences⁹

ICTY, ICTR and SCSL prison sentences will have to be enforced beyond 2035.

At present, the governing instruments provide that sentences are served in willing states under sentence-enforcement agreements concluded with the courts; SCSL sentences are to

⁷ The article does not address the overlap, differences, and interplay between post-closure legacy and post-residual legacy issues on the one hand and residual functions on the other. In this regard see e.g. Aptel C, *Planning for Residual Issues for International and Hybrid Tribunals: Briefing Paper*, prepared for residual functions expert-group meeting convened by International Center for Transitional Justice (ICTJ) and the law faculty of the University of Western Ontario (UWO) in February 2007 (Aptel briefing paper), p 6. See section 4 below for more information on the meeting.

⁸ See also Oosterveld and Gurd p 2.

⁹ See e.g. ICTY Statute arts 27 and 28, ICTY RPE rules 103, 104 and 123-125, ICTY Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, 9 July 1998, and ICTY Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal, 15 Aug 2006 (ICTY early-release practice direction); ICTR RPE rule 125; and SCSL Statute art 22 and SCSL RPE rule 103.

be served in Sierra Leone or in other states.¹⁰ Sentences are served in states designated by the presidents of each court.

Conditions of imprisonment are governed by the enforcing state's law. Bodies such as the International Committee of the Red Cross (ICRC) may be asked to inspect conditions, but they report to the relevant court, which retains overall supervision responsibility and can also ask the state to report on suggested variations of conditions.

If a convicted person becomes eligible for pardon or commutation under the state's law, the state notifies the court's registrar accordingly, who then seeks relevant information and submissions from the state and prosecutor to forward to the president and assists in arranging the participation of the convicted person in the process. The president, in consultation with other judges, decides whether pardon or commutation is appropriate on the basis of various legal and other grounds. If determined to be inappropriate, the state must transfer the convicted person to the court or another state as arranged by the registrar.

Supervision, pardon, and commutation are fairly straightforward functions. Supervision involves registry, judicial and defence activities; pardon and commutation additionally involve prosecutorial activities. The related residual functions will have to involve the same components.

2.2 Review of earlier convictions¹¹

Evidence pointing to the innocence of convicted persons may be discovered at any time. Though more likely to happen sooner rather than later, it could happen beyond 2060 in ICTY, ICTR and SCSL cases. It would be a violation of fundamental human rights to remove or unfairly limit the right to review of a conviction on single or multiple charges.

At present, the relevant procedures of the courts basically involve the president (who assigns judges for review); a chamber determining whether an application is meritorious and, if applicable, reviewing the judgment; the prosecutor; the defence; and the registry. Review judgments can be appealed.

The authority and capacity to review earlier convictions will have to be retained in some form. Even if based on procedures more streamlined and limited than the current ones, this

¹⁰ See e.g. Agreement between the United Nations and the Government of the French Republic on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia, 25 Feb 2000; and Agreement between the Government of the Republic of Rwanda and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, 4 March 2008. The SCSL has concluded sentence-enforcement agreements with at least three other states (Oosterveld and Gurd, p 3).

¹¹ See e.g. ICTY Statute art 26, and ICTY RPE rules 119-121. The relevant ICTR and SCSL provisions are essentially similar, but see ICTR RPE rule 123 and SCSL Statute art 21(2). See also ICTY report to SC on completion strategy, 21 May 2004, annex I, par 79.

residual function will entail judicial, prosecutorial, defence and registry activities. Should the need arise to conduct full review proceedings, considerable resources will be required.

2.3 Protection and support of victims and witnesses¹²

The authority and capacity to provide post-closure protection and support to victims and witnesses of both pre-closure and post-closure proceedings will have to be retained for decades. Lives may depend on it. Failure to do so effectively may also discourage victims and witnesses from participating in the work of other international and internationalised fora, including the International Criminal Court (ICC).

At present, the three courts have specialised victim and witness sections. They are tasked with, for example, recommending the adoption of protection and security measures to judges; providing physical and psychological rehabilitation support services; and developing long-term plans for the protection of witnesses who have testified and who fear for their lives. As necessary, they also assist victims and witnesses to relocate, sometimes abroad; to this end, the courts have entered into relocation agreements with some states.¹³

Furthermore, a judge or chamber may order appropriate measures for the privacy and protection of victims and witnesses. These include prohibiting public disclosure of identities or whereabouts by assigning pseudonyms and expunging names and other identifying information from the courts' public records. At the ICTY and ICTR, they may also order that protective measures remain in force when cases are referred to national jurisdictions for trial¹⁴ (see sub-section 2.4 on referrals).

Specific residual protection and support services – based, like other residual functions, on the current governing instruments of the three courts – will have to include the following (in addition to the functions mentioned above):

- (i) Arranging protection and support in residual (i.e. post-closure) trials, appeals and review proceedings.
- (ii) Serving as the contact point for protected victims and witnesses and for states in which victims and witnesses have been relocated temporarily.

¹² See e.g. SCSL Statute art 16(4), and SCSL RPE rules 34 and 75; ICTY Statute art 22, ICTY RPE rules 11*bis*(D), 34 and 75, and ICTY early-release practice direction par 11; ICTR RPE rules 34(A) and 11*bis*(D); and SCSL Statute art 16(4), and SCSL RPE rule 34.

¹³ For example, more than 20 ICTR witnesses have been relocated, some outside Rwanda; only a few of the about 100 relocated SCSL victims and witnesses have been relocated abroad.

¹⁴ See e.g. ICTY and ICTR RPE rules 11*bis*(D)(ii) and 75. See also Rwanda's Organic Law no 11/2007 of 16 March 2007 concerning transfer of cases to Rwanda from the ICTR and from other states, art 9: "... When the testimony or deposition of a witness, who was subject to a protection order of the ICTR, is admitted into the record, the identity of the witness shall not be disclosed to the public unless the ICTR authorizes such disclosure. If such a witness is called for cross-examination the fact that the individual testified at the ICTR will not be disclosed to the public unless authorized by the ICTR or the witness."

- (iii) Keeping track of protected victims and witnesses to inform them of the impending early release of convicted persons against whom they sought protective measures, and of proceedings to lift or change protective measures ordered on their behalf.
- (iv) Monitoring and assessing threats (or overseeing a third party tasked with monitoring and assessing threats) to ensure that protective measures remain effective and are respected as well as issuing revised protective measures if necessary. (The authority and capacity to enforce compliance via full contempt proceedings is an important dimension of the residual protection function.)
- (v) Reviewing the necessity of relocation abroad, and assisting with the transfer of protected victims and witnesses to another state (usually, the home state) if relocation is no longer required.

The residual protection and support of victims and witnesses will entail judicial, registry, prosecutorial, and defence activities. This function will require specialised skills and services, and, at least initially, considerable resources.

2.4 Referral of cases to national jurisdictions, revocation of referrals, and deferral of national proceedings¹⁵

Rule 11*bis* of the rules of the ICTY and ICTR covers the referral of cases to national jurisdictions for trial, as well as the revocation of earlier referrals.

The referral mechanism helps the two courts to reduce their caseloads by providing the possibility to refer cases of mid- to low-level indictees (both in-custody and at-large) to national jurisdictions.¹⁶ At the prosecutor's request or on their own motion, a three-judge panel (referral panel) determines whether a case should be referred to a national jurisdiction willing and able to accept the case, taking into account considerations such as whether the accused will receive a fair trial and the level of responsibility of the accused. Referral decisions can be appealed. The prosecutor may send observers to monitor national proceedings.¹⁷

A residual referral function will be required if the international community wants some or all ICTY and ICTR cases that have not yet gone to trial by the courts' completion dates (including those of at-large accused) to be referred, post-closure, to national (or other)

¹⁵ This sub-section is assumed to be irrelevant to the SCSL for the reason set out in footnote 22.

¹⁶ Cases involving 13 ICTY accused have been referred to former Yugoslavia jurisdictions for trials. ICTR attempts to refer cases to national jurisdictions have experienced some setbacks; referral efforts, including to Rwanda, are continuing. Two cases have been referred to France; referral attempts to the Netherlands and Norway have failed.

¹⁷ For example, the Organisation of Security and Cooperation in Europe (OSCE) monitors cases referred to Bosnia and Herzegovina on behalf of the ICTY, and the ICTR prosecutor has requested the African Commission on Human and Peoples' Rights (ACHPR) to monitor any cases that may be referred to Rwanda. See e.g. ICTY president report par 34 and ICTY prosecutor report pars 11 and 12; and ICTR press release, "ICTR Prosecutor Requests Transfer of First Case to Rwanda", 12 June 2007.

courts. Any residual ICTY and ICTR mechanism(s) should remain centrally involved in determining such referrals.¹⁸

Regarding revocations, at any time following a referral order but before an accused is found guilty or acquitted by a national court, a referral panel may, at the request of the prosecutor, revoke the order and make a binding request to the state for the return of the accused to the custody of the ICTY or ICTR. Orders revoking referrals may be necessary where national proceedings violate the fair-trial rights of the accused or where the state fails to try the accused, for example.

A residual revocation function will be required in case referrals to national jurisdictions decided prior to closure¹⁹ and after closure must be revoked. If revoked cases are not to proceed before the residual mechanism(s), it should have the capacity and authority to refer such cases to other jurisdictions. Though a situation requiring the exercise of a residual revocation function is unlikely to arise in practice, it should be formally provided for.

With some variation, the governing instruments of the ICTY and ICTR allow the prosecutor to propose to a trial chamber designated by the president that a formal request be made for a national court to defer to the competence of the international court.²⁰ The grounds for such a proposal could include an accused being charged only with an ordinary crime or a lack of impartiality by the national court. The trial chamber may issue a formal request to the state for deferral to its competence. If the state fails to comply, the chamber may request that the president report the matter to the SC.

After their closure, ICTY and ICTR accused still at large may be apprehended by national authorities, which may then want to try them domestically. In some instances this may be unacceptable to the international community, which may want to try them internationally. If so, the capacity and authority to request or order—if necessary, with the backing of the SC—other courts to defer to the competence of an international forum will need to be retained.

¹⁸ It could be problematic to decide now or in the future on an automatic or semi-automatic referral from the two courts or their residual mechanism(s) or from national jurisdictions (e.g. ones that may apprehend at-large accused) to one or more other national jurisdictions that have agreed in advance to try such cases. Apart from questions about the feasibility of such an option, it is difficult to imagine that a state would unconditionally agree in advance to try such cases regardless of when the need may arise.

¹⁹ This is especially true for the ICTR, where the trial or appeal phases of cases referred to national jurisdictions will continue or commence after closure.

²⁰ See ICTY RPE rules 9-11. See also ICTY RPE rule 7*bis*. ICTR RPE rule 9 differs from ICTY RPE rule 9; ICTR RPE rules 10 and 11 are worded similarly to ICTY RPE rules 10 and 11.

2.5 Residual trials in presence of accused²¹

At the time of writing, four ICTY indictees and thirteen ICTR indictees are at large.²² They include some of the highest level accused, such as Ratko Mladić and Radovan Karadžić at the ICTY and Félicien Kabuga at the ICTR. Some of them may still be at large when the courts close. Should any of them be apprehended later, any residual mechanism(s) must have the capacity and authority to conduct trial and appeals proceedings of the accused who cannot or should not be tried by national courts in the former Yugoslavia, Rwanda or elsewhere. Especially in relation to the highest level accused, sound international policy reasons exist for the preference that they face justice before an international court. The ICTY president recently urged the SC “to make it clear that the trial of these fugitives by the international community does not hinge upon the International Tribunal’s proposed Completion Strategy dates.”²³

Moreover, the alternative option, namely, letting the highest level accused face justice before national courts, may also be problematic. Very few states are willing and able to undertake such costly and complex trials, and this is unlikely to change. There may also be concerns about whether such accused would receive fair trials in particular countries.

Accordingly, any residual mechanism(s) must, for example, be able to press national and international authorities to apprehend at-large accused; request and arrange for their transfer into its custody; detain them; prosecute and try them fairly and expeditiously; and

²¹ The international community may want to consider the legality and pros and cons of vesting a residual mechanism with the authority to conduct post-closure trials *in absentia* and/or quasi-*in absentia* proceedings similar to that provided by rule 61 of the rules of the ICTY and ICTR for at-large accused. The overall advantages of these – controversial – options are not immediately apparent.

²² For the purposes of this article, it is assumed that the single at-large SCSL indictee – Johnny Paul Koroma – is deceased. Should this turn out to be wrong, this and some other sub-sections would apply *mutatis mutandis* to the SCSL. The international community may have to consider planning for the residual functions of the SCSL on the basis that he is alive and may come into the custody of the court in the near future (see Oosterveld and Gurd p 4). However, the notion that a Sierra Leonean court (without, or with the participation of foreign personnel as with the War Crimes Chamber system in Bosnia and Herzegovina) would conduct residual trials, review proceedings and the like should be approached carefully. At present there are significant constitutional, legal, political, and practical obstacles to such option (see Oosterveld and Gurd p 13 for references to some of these).

²³ 10 Dec 2007 statement. See also e.g. statement of ICTY prosecutor to SC, 15 Dec 2006 (“This time, however, I believe it is essential to also seek fresh guidance on fundamental issues of the completion strategy — namely, a strong message is needed from the Council in relation to the fugitives, especially Karadžić and Mladić. And that message should be that their trial can begin in The Hague at any time until 2010, and a mechanism will be established for them to be tried in The Hague after that date... I wish nevertheless to draw the attention of the Council to some negative reactions from victims’ groups in Bosnia and Herzegovina. I forwarded to the presidency of the Council a letter from the association Women Victims of War from Sarajevo. I have received more such letters in the meantime. On 30 November, I met victims’ groups in Sarajevo. Many of them are bitter about the completion strategy because they believe that all high-level cases, including of course Karadžić and Mladić, must be tried in The Hague... They see the Tribunal as a promise of justice and as a concrete sign that the international community cares about their suffering. They find it profoundly unjust to envisage closing the Tribunal before it has successfully completed its task. Of course, Karadžić and Mladić are, in their minds, the two individuals most responsible for genocide, war crimes and crimes against humanity committed in Bosnia and Herzegovina. There is no place other than The Hague to try them.”).

supervise the enforcement of any eventual sentences. Such residual trials will entail the full range of judicial, prosecutorial, defence and registry activities, requiring considerable resources.

2.6 Management, preservation and use of records and materials for residual purposes

The ICTY, ICTR and SCSL hold and manage vast amounts of public and confidential records, evidence, data and other materials in various languages and in a variety of formats (records and materials).²⁴ For years after these courts' closure, arrangements will have to be made for direct, immediate, and easy access (including by electronic means, if appropriate) to properly organised, maintained and secured public and confidential records and materials that may be needed for the effective and proper performance of other residual functions.

The three courts and other stakeholders have started addressing residual (and legacy) issues pertaining to such records and materials.²⁵ For example, expert consultants have been contracted for advice; consultations on records preservation and records disposal with the UN archives section have been launched; and discussions have been held with other stakeholders, including The Hague city council, which has apparently expressed an interest in setting up a centralised international criminal justice archive.²⁶ The ICTY and ICTR also recently commissioned a study on their archives; the first interim report of the Advisory Committee on the Archives of the UN Tribunals for the former Yugoslavia and Rwanda (ACA) is expected in the near future.²⁷ There are many residual records and materials issues, only a few of which are highlighted here.

Records and materials required for residual functions will include the following:²⁸

²⁴ See e.g. ICTR website for work of registry's judicial records and archives unit. The records and materials of the ICTY and ICTR belong to the UN, and will eventually become the responsibility of the UN Archives and Records Management Section of the Secretariat (UN archives section) in New York, unless an alternative arrangement is made (Huskamp Peterson T, *Temporary Courts, Permanent Records*, United States Institute of Peace, Special Report no 170, Aug 2006 (archiving report), pp 2 and 4-5). See archiving report p 5 on SCSL records; that position is seemingly under review.

²⁵ See e.g. ICTY annual report 2006/7 (14th annual report) par 120; SCSL annual report 2006/7 (4th annual report) p 49; and ICTR annual report 2006/7 (12th annual report) par 74, and ICTR completion strategy dated [29 May] 2006, annex 7.

²⁶ ICTY 2005/6 annual report par 113.

²⁷ The ACA's report will provide the courts with an independent analysis of how best to ensure the future accessibility of archives, considering potentially appropriate locations for housing of materials. In particular, the ACA will make recommendations as to whether the two courts ought to pursue the establishment of a single joint archive, two separate archives, or multiple archives. The SC will make the final decision regarding the archives. See ICTR Press Release, "Tribunals Launch Archiving Study", 9 Oct 2007. The ACA's recommendations will have to be aligned with the outcomes of the international community's decisions in relation to the other residual functions of the three courts.

²⁸ See e.g. ICTY RPE rules 41 and 81.

- (i) With respect to cases that remain active (cases of at-large accused, for example) or cases that may be reactivated (pardon and commutation or review functions, for example), records and materials such as certain chamber decisions, transcripts and audiovisual recordings of proceedings, and courtroom exhibits. Such records and materials are currently maintained by the registries.
- (ii) With respect to cases that remain active or that may be reactivated, records and materials that are maintained by the prosecutors, including case preparation and investigators' notes, potential evidence that has not been tendered in court, and records of cooperation by accused and convicted persons with the prosecutor.
- (iii) Details of victim and witness protection measures in force.
- (iv) Certain official communications and agreements with states.²⁹

In addition to the judicial, prosecutorial, defence and registry components of any residual mechanism(s), others may require access to records and materials for residual purposes.³⁰ For example, national authorities trying cases referred to them by the three courts or by any residual ICTY, ICTR and SCSL mechanism(s) may require access to both public and confidential records and materials maintained by such a mechanism or mechanisms, which must retain the authority and capacity to assess and execute requests for access and assistance.³¹

This residual function will entail judicial, prosecutorial, defence, and registry activities. This is a potentially resource-intensive function.

3 Potential residual mechanisms

Given the discussion above, it is clear that the international community will have to devise one or more mechanisms for the performance of the various residual functions of the ICTY, ICTR and SCSL.

3.1 General considerations

When searching for the most appropriate solutions, the following general considerations may be relevant:

²⁹ See also ICTY RPE rule 54*bis* (concerning national-security issues). There is no such provision in ICTR RPE or in SCSL RPE (but see latter's 'national security' reference in closed-session provision (rule 79)).

³⁰ See also SCSL Practice Direction on the Procedure Following a Request by a State, the Truth and Reconciliation Commission, or Other Legitimate Authority to Take a Statement from a Person in the Custody of the Special Court for Sierra Leone, adopted on 9 Sept 2003 and amended on 4 Oct 2003. The practice direction points to another potential residual function relevant to all three courts.

³¹ Some of the confidential records and materials relevant to the performance of residual functions would eventually be made public. The mechanisms must also have the capacity and authority to declassify confidential records and materials, and if not pre-determined, to decide what will happen to records and materials that are of no further residual use.

- (i) The specificities of each court – including their relationships with the host states, with the states where their subject-matter crimes have been committed, and with the SC – should be comprehensively analysed.
- (ii) Each residual function should be dissected carefully to ensure that all of its dimensions are comprehensively identified and understood. Some may be simpler, and others more varied and complex, than they appear.
- (iii) All residual functions of each court should be considered together to ensure that the interplay among all functions and their various dimensions is comprehensively understood.
- (iv) It may be simpler, cheaper, and more effective to devise one or more multi-functional residual mechanisms, instead of several different mono-functional ones.
- (v) The residual mechanism(s) should be practical, effective and vested with the necessary legal authority. A very important aspect of this consideration is that the necessary links and hierarchies of authority must be put in place among the various functions and those responsible for performing them. For example, the judicial component should have the authority to make determinations binding the prosecutorial and registry components. The same consideration applies to links and hierarchies of authority vis-à-vis external entities such as states and inter-governmental and non-governmental organisations (NGOs). The authority of the ICTY and ICTR, stemming from their bases in Chapter VII SC resolutions, should be retained in the residual mechanism(s), thus enhancing their potential effectiveness. The same aspect equally applies to any external entity to which residual functions may be delegated or transferred: if required, it must have the authority to issue binding residual orders to states, organisations or individuals, for example. Another aspect concerns physical arrangements. For example, for major residual functions the judicial component should ideally be located in the same – secure – premises as the registry (including the residual records and materials management, victims and witnesses and language services sections) and prosecutorial components. The mechanism(s) should be easily accessible to all parties and stakeholders.
- (vi) Mandates, governing instruments, rules, procedures, and structures for residual purposes should be devised, and the necessary amendments should be effected. For example, the governing instruments of the ICTY, ICTR and SCSL could be revisited with the aim of increasing the role and powers of single judges, including the chief residual judge (president). However, such revision must not be in breach of international law.
- (vii) The transfer and additional delegation of some residual functions – or dimensions of functions – to external entities could be considered. (‘Transfer’ means the complete handing over of all responsibility for the proper and effective performance of the

function. ‘Delegation’ implies that the delegating authority retains ultimate control and responsibility.³²) This should be done with great circumspection, bearing in mind considerations such as effectiveness when considered in relation to other residual functions; hierarchies of authority; and the human rights of affected parties.³³

- (viii) The mechanism(s) should be flexible and elastic – they should be able to change shape as necessary, and increase and decrease their capacity quickly and efficiently, especially in relation to major functions such as full review proceedings or residual trials – and they should be able to handle the projected workload. Detailed assessments would have to be made of the projected short-, medium- and long-term residual functions workload of each of the three courts. This would be a challenging exercise, due to the fact that it is impossible to know whether or how frequently certain residual functions would arise. Some residual functions are likely to arise regularly for at least 10-15 years. Detailed estimates will have to be made of the number of permanent and temporary personnel, including short-term external experts, who would be required to perform such ‘regular’ functions.³⁴ Establishing and maintaining rosters of personnel on ‘stand-by’ will have to be considered.
- (ix) The residual mechanism(s) should have sufficient sources of funding and be cost-efficient. The costs associated with the ICTY, ICTR and SCSL are high, which is the primary reason for the pressure brought to bear on the courts to meet their completion strategy deadlines. It is against this background that the most appropriate residual mechanism(s) will have to be devised. The costs associated with any residual mechanism(s), although likely over time to be much lower than that of the current courts, could still be substantial. However, the need to keep the costs of any residual mechanism(s) as low as possible must not jeopardise the rights of the accused, convicted persons or victims and witnesses, nor must it harm other important interests. The issue of funding is, and may remain, most critical for the SCSL. This court relies on voluntary contributions from UN member states. Its struggle to raise money may well increase during the residual phase.³⁵ Some SCSL residual functions will arise earlier than those of the ICTY and ICTR.

³² Current examples of delegation are the inspection of prison conditions by the ICRC and other bodies on behalf of the ICTY, and the monitoring of national proceedings by the OSCE and ACHPR on behalf of the ICTY and ICTR, respectively.

³³ With respect to all residual functions delegated and transferred to external parties, the relevant rules and procedures of the residual mechanism(s) should allow for a variety of interested parties, including human-rights organisations, to bring any concerns to the attention of the residual mechanisms, as an extra safety measure. Giving such parties standing before the ‘central’ residual mechanisms in certain circumstances could also be considered.

³⁴ Arrangements should be put in place to ensure that the mechanisms offer sufficient job security and career advancement opportunities so that they attract qualified and experienced personnel.

³⁵ See e.g. Oosterveld and Gurd pp 7-8.

3.2 Residual mechanism options: general comments

In the light of the above considerations, what appear to be the most appropriate and realistic residual mechanism options for the ICTY, ICTR and SCSL, at least over the short-to medium-terms?

3.2.1 *Transferring all residual functions to one or more external entities*

It would be unworkable to split and completely transfer all residual functions of each court to different external entities. Establishing the necessary links and hierarchies of authority among different states and/or organisations would be impractical, if not impossible. Considering the kind of residual functions that are likely to arise, there is a need for a sufficiently centralised residual mechanism or mechanisms with the authority and capacity to properly perform and coordinate the functions and with the authority to issue decisions that bind states, individuals and other entities when necessary. This need will be pronounced over the short-to medium-terms, and it limits the options. An effective residual functions system cannot rely on non-binding undertakings of cooperation among different entities.

Transferring all the residual functions of one or more of the courts to a single state would also be unworkable. For example, few if any states – including the states of the former Yugoslavia, Rwanda and Sierra Leone³⁶ – have the capacity to perform all residual functions of one or more court, and most if not all capable states may be unwilling to take on such a burden. Questions relating to the authority of such a state to perform residual functions vis-à-vis external entities, including other states, the UN, and foreigners, would also arise.³⁷ Furthermore, the review by a national court of the earlier conviction by an international court of a high-profile accused, or the prosecution and trial of a high-profile accused such as Mladić by national authorities would be incongruous.

Transferring all residual functions of one or more of the three courts to non-judicial entities and NGOs cannot be seriously considered. Is a complete transfer to another international or internationalised court an option?

Transfer to the ICC *as such* – that is, for example, having ICC judges, prosecutors and registry personnel performing residual functions in their capacity as ICC personnel and in the name of the ICC – appears to be an unrealistic option at present.³⁸ There are substantive differences between the legal basis of the ICC and those of the ICTY, ICTR and SCSL. It is a treaty body, with 106 states parties to its constituent treaty, the 1998 Rome Statute of the International Criminal Court (ICC Statute) and not all permanent members of the SC and other UN member states are party to the ICC Statute. The ICC's

³⁶ See also footnote 22 in relation to Sierra Leone.

³⁷ It is possible but doubtful that a Chapter VII SC resolution obliging all states and other entities to cooperate with the state would work.

³⁸ See e.g. provisional exploration of possibility of ICC performing such residual functions or e.g. offering use of its facilities in Coalition for the International Criminal Court (CICC), Non-paper, Work in Progress, *Residual Functions and the ICC*, 30 Aug 2007 (CICC non-paper), pp 2-3.

jurisdiction stretches back to July 2002, and despite some similarities, there are also substantive differences between ICC law and the law of the other three courts. Additionally, the ICC's relationship with the UN, including the SC, differs markedly from that of the ICTY and ICTR.³⁹ Seeking amendments to the ICC Statute in order to address these hurdles would be a lengthy and complicated process – with an uncertain outcome.

Amendments may be proposed only after 1 July 2009. Proposals require consensus among the states parties or failing that, approval by a two-thirds majority, and an amendment would enter into force for states parties one year after instruments of ratification or acceptance have been deposited by seven-eighths of them.⁴⁰ As a short-to medium-term option, this would be impossible. Even if some way could be found to circumvent or simplify the amendment procedure, other potential obstacles remain.⁴¹ Among them is the fact that some actors may oppose the idea. These actors include some state parties to the ICC Statute, as well as states that are not party to ICC Statute but whose approval in the SC is required for the transfer of the residual functions of the ICTY and ICTR.

However, more in-depth analysis and thorough consultations among all the different decision-makers and stakeholders may prove the foregoing cautionary notes to be misguided.

The question of whether ICC judges, prosecutors and registry personnel could perform residual functions, not as ICC personnel but as personnel of one or more residual mechanisms, without any amendment to the ICC's governing instruments, also requires more analysis.⁴² At first glance, it appears as if there may be various obstacles. It may be practically difficult, especially while the volume of residual functions work is still relatively high. There may be political opposition among the states parties to the ICC Statute and in the UN. It is also unclear whether the relevant governing instruments would allow ICC personnel to don one or more non-ICC hats.⁴³

³⁹ See e.g. ICC Statute arts 2, 5-33, 53(2) and (3), 87(5) and (7), and 115; and the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 Oct 2004.

⁴⁰ See ICC Statute arts 121-123.

⁴¹ If necessary, arrangements can probably be put in place to ensure that the states parties to the ICC Statute and other donors to the ICC would not bear the costs associated with the transfer of residual functions. See e.g. ICC Statute arts 115 and 116, which state that expenses of the ICC are covered by assessed contributions made by states parties, funds provided by UN, and voluntary contributions. These provisions suggest that the funding arrangements of the ICC and three courts can be reconciled or co-exist. See e.g. ICTY Statute art 32, which states that expenses of the ICTY are borne by the regular budget of UN, and ICTY 2006/7 annual report pars 113-116, which refer to voluntary contributions as well; and SCSL-establishment agreement art 6 which states that the SCSL's expenses are borne by voluntary contributions from the international community, and SCSL annual report 2006/7 pp 9, 37-39 which also refer to a decision to seek funding from private sources.

⁴² Technically such a solution would seemingly constitute neither delegation nor transfer of residual functions. It would be more akin to the continuation of the relevant court.

⁴³ See e.g. ICC Statute art 40(3) ("Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.").

At present there is no other international or internationalised criminal court to which the residual functions of the ICTY, ICTR and SCSL can be transferred and transferring all functions to a non-criminal court would be impractical.

However, any residual mechanism(s) may consider seeking the agreement of an appropriate international or internationalised court such as the ICC (and the relevant host state and other stakeholders) to use the *facilities* of that court in order to perform some or all their residual functions.⁴⁴ For example, the trial of Charles Taylor has been moved to The Hague due to special security considerations; he is detained in the ICC detention facility, and his trial is taking place before the SCSL using the facilities of the ICC.⁴⁵ The viability of various options could be considered and explored with the ICC, the states parties to the ICC Statute, the Netherlands, the SC and other UN member states, as well as other stakeholders. One option that may be worth considering is for the three courts to use the facilities of the ICC for their residual functions; they would share a residual registry and have a stand-by roster of judicial and prosecutorial staff for each residual court. If the need arises, the permanent staff, donning the hat of the relevant residual mechanism, could be supplemented by temporary personnel.

3.2.2 *Extending the lifespan of the three courts: the residual ICTY, ICTR and SCSL option*

The possibility of extending the lifespan of the ICTY, ICTR and SCSL, in effect transforming them into residual courts, could be considered.

The three residual courts could perform their residual functions separately, except that the existing joint ICTY-ICTR appeals chamber arrangement could continue for as long as necessary. Their privileges, immunities, and international legal personality could remain in place. The mandates and constituent instruments, rules, personnel-recruitment and other relevant governing instruments and agreements, including headquarters agreements, could be amended to reflect their – narrower – residual functions mandate and needs. Structures and procedures tailored to ensure maximum responsiveness to residual function needs, which may change overnight, could be devised. The maintenance by the SC or another body of a roster of stand-by personnel for each residual court from which the residual president, prosecutor and registrar could appoint personnel on a case-by-case basis, could be considered.

⁴⁴ But see CICC non-paper pp 3-4 and 6-7, where it is pointed out that at the relevant time the ICC may be too busy to offer a residual mechanism the use of its courtrooms and archiving facilities; it suggests that detailed studies of such cooperation should be undertaken in order to ensure that the work of the ICC is not negatively impacted by any such option.

⁴⁵ See e.g. SC resolution 1688 (2006); and *Prosecutor v Taylor*, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague, SCSL-03-1-PT, Trial Chamber II, 23 June 2006. As is at present the case with the ICTY and ICTR, the SCSL may sit elsewhere, using its own law, rules and procedures, but subject to the conclusion of the necessary host-state agreements. See SCSL-establishment agreement art 10. With respect to ICTY see e.g. SC resolution 827 (1993), operative par 6 and ICTY RPE rule 4.

The status and powers of the ICTY and ICTR as Chapter VII SC bodies should remain in place. Consideration could also be given to bringing the SCSL more fully under the umbrella of the UN, perhaps also on the basis of a Chapter VII SC resolution. Regardless of whether such a change is considered necessary, serious efforts should be made to place the funding arrangements of the SCSL on a more sustainable footing. In a resource-tight environment, the SCSL faces an uphill battle for funding, even though its residual functions phase is likely to be less costly than those of the ICTY and ICTR. Consideration could be given to establishing a joint funding arrangement for the three courts.

To ensure continuity and to take advantage of existing host government and host city relations, the principal seats of the residual ICTY, ICTR and SCSL could remain in The Hague, Arusha and Freetown, respectively, subject to the agreement of national and city authorities. A residual SCSL's principal seat should remain in Freetown for as long as security permits, and only significant cost savings should justify a consideration to move. It is unclear whether moving the principal seat – and maintaining a satellite office or presence in Freetown, as would be required, especially to deal with certain registry functions, including victim and witness protection – would be cheaper than other options, particularly during the first years of the residual phase. The importance of having such an in-country court, if appropriately linked to the national system, should not be underestimated (see final paragraph in sub-section 3.2.3).

Circumstances permitting, the residual ICTY, ICTR and SCSL could seek to use some facilities of appropriate external entities in their host cities.⁴⁶ Moving the principal seat of the residual ICTR to Rwanda and of the ICTY to a state of the former Yugoslavia should receive serious consideration, circumstances permitting.⁴⁷ Detailed studies would have to be undertaken to determine whether any such move would save costs.⁴⁸ Field offices could be maintained as necessary.

If possible and appropriate, the residual ICTY and ICTR should seek to refer cases (be they trials of accused apprehended post-closure, or cases whose referral to national jurisdictions has been revoked) to other jurisdictions, with priority being given to referrals to Rwanda and states of the former Yugoslavia.

⁴⁶ Regarding possible use of ICC facilities see sub-section 3.2.1. Some facilities of other Hague-based courts may be appropriate. Other facilities outside The Hague could also be considered. The building housing the ICTR in Arusha also houses the East African Court of Justice, the court of the East African Community. The city also hosts the merged African Court of Human and Peoples' Rights and the Court of Justice of the African Union. A residual ICTR could consider whether seeking to share some facilities, or make use of facilities such as the courtroom of either court if the need arises, would be practical and cost-effective.

⁴⁷ There may well be much political wrangling about which state of the former Yugoslavia a residual ICTY could move to.

⁴⁸ The drawbacks of moving the principal seat of the residual ICTY from The Hague nearer the former Yugoslavia (to Vienna, for example) would perhaps outweigh the advantages that such a move might entail. Regarding the ICTR, at present, and assuming that the Tanzanian authorities would agree to a residual ICTR remaining in Arusha and that moving to Rwanda is not an option, there appears to be no significant advantage to moving its seat to another country in eastern or central Africa.

Each residual court would have to retain control and authority over – and have direct and immediate access to – some categories of records and materials required for residual functions. Should there be any doubt about the safety of the records and materials of the SCSL in Freetown, additional efforts should be made to store originals and/or copies at a safer location, with the most sensitive records and materials being stored in a high-security location. The three residual courts would continue making their public records and materials available for public use, also via their websites, and their outreach and other capacity-building activities could continue, funding permitting.

Some – non-judicial – residual functions of each residual court could be delegated (and possibly transferred) to external parties. This may result in cost savings in some instances.

The projected workload and nature of the remaining residual functions of each residual court would be regularly monitored. When appropriate, alternative residual mechanism options could be considered.

3.2.3 Joint residual mechanism for two or three courts

The possibility of establishing a joint residual ICTY-ICTR-SCSL court could also be considered. So could the possibility of a joint residual ICTR-SCSL court or ICTY-ICTR court, with a different mechanism being devised for the remaining court. The advantages, if any, of such options may increase as the volume of residual functions work of the three courts decreases.

Regarding a joint residual ICTY-ICTR court, the ICTY and ICTR have the same legal basis and have similar powers. They used to share a prosecutor, and still share an appeals chamber, which means that appeals judges apply different law, depending on whether they are dealing with an ICTR or ICTY case. There are few differences between their substantive rules, procedures, structures and practices, suggesting that merging them is possible.

One possible permutation of a joint residual ICTY-ICTR court could resemble the following. It would have its principal seat in The Hague and a main satellite office in Arusha or, circumstances permitting, in Rwanda. Another permutation could be for it to have its principal seat in Arusha, and a main satellite office in The Hague, or, circumstances permitting, in the former Yugoslavia. The principal seat could follow the heaviest projected workload. By way of example, only the former permutation is highlighted below; not all considerations highlighted in relation to the former permutation would apply to the latter permutation.

Major residual functions such as trials, full review proceedings and certain victim and witness protection and support functions of the ICTR component could be conducted at the main satellite office in Arusha, which should be able to expand and contract as necessary (just like the principal seat of the joint court in The Hague). Performing such major

functions in Arusha rather than in The Hague may be cheaper and more practical as well as preferable from a policy perspective. It would, for example, contribute to maintaining the visibility, and potential rule of law and reconciliation impact, of its work in Rwanda, the region and elsewhere in Africa. Most other ICTY-ICTR residual functions would be performed from the joint principal seat in The Hague. Residual functions motions and other correspondence of the residual ICTR component of the joint court could continue to be filed, and maintained and managed along with pre-residual phase records and materials, at the Arusha office (in cases where they cannot be filed electronically from elsewhere). The main documentary collections (of the registry and prosecution) would have to be sufficiently mirrored in the ICTR-related collections of the joint court in The Hague; electronic data-storage and data-transmission measures would be put in place. The necessary field office(s) should be maintained in Rwanda and the former Yugoslavia, including for victim and witness support functions.

A small number of permanent judges, prosecutors and registry personnel could be appointed to the joint residual court. They would apply either ICTY or ICTR law, depending on the specific case. Large parts of the governing instruments of the two courts could be merged. At least initially, there could be a division of labour among some personnel with some working only on ICTR matters and others only on ICTY ones. The mechanism could have a joint budget, although measures allowing UN member states and other donors to channel support to certain activities of either of the two components could be devised if necessary.

As suggested above, the joint residual court could delegate (and possibly transfer) some non-judicial residual functions to external parties, and the possibility of the joint court using some facilities of another appropriate body in The Hague and Arusha could also be examined. This option would have to be supported by the relevant Dutch, Rwandan and Tanzanian authorities in particular. The mandates and other relevant governing instruments of the two courts would have to be amended.

Establishing a joint residual court for the ICTY and ICTR could result in cost reduction and efficiency gains.

The situation of the SCSL is unique due to its location in the country where its subject crimes were committed. The advantages of having a residual SCSL court in Sierra Leone include accessibility for victims and witnesses, the visibility of its work in the country, and the possibility that its presence and work may assist in rebuilding the Sierra Leonean justice system and serve as a symbol against impunity for egregious crimes in the region as a whole. However, the funding of a residual SCSL court may prove to be a significant consideration. Sierra Leone is unable to significantly contribute towards a residual court, regardless of where it is located. If the international community cannot devise a sustainable funding arrangement for a residual SCSL based principally in Sierra Leone, alternative options must be considered. One could be a joint residual court with the ICTY and/or ICTR located outside Sierra Leone but with a satellite office remaining in the

country. However, the legal basis of the SCSL differs from that of the ICTY and ICTR. The associated differences could complicate fashioning a joint residual mechanism, but should not be insurmountable. The kinds of considerations highlighted in respect to a possible joint ICTY-ICTR residual court would also apply in the case of a joint court involving the residual functions of the SCSL.

4 Conclusion

Some internal court discussions about residual function issues began about two and a half years ago,⁴⁹ marking what appears to be the first attempt to deal with these issues in a comprehensive and systematic manner. The ICTY, ICTR, and SCSL are increasingly focusing on residual issues, over and above the archiving issues previously mentioned. For example, the ICTY and the ICTR submitted joint discussion papers to the Office of Legal Affairs of the UN Secretariat in late 2006 and in 2007, and are engaged in residual issues discussions with the SC Working Group on the *ad hoc* International Tribunals.⁵⁰ For undisclosed reasons, these papers are still confidential. The SCSL recently convened a practical, wide-ranging expert-group meeting on residual functions in Freetown. Attended by the Sierra Leone government, the court's key donors and supporters, representatives of the court's four components, and international and national experts and stakeholders, the meeting is a solid basis for more focused and detailed internal planning purposes and for engagement with donors and other stakeholders. The meeting also is a basis for undertaking comprehensive workload and cost-projection assessments of the kind that are now seemingly required in relation to all three courts.⁵¹ Thus far, only a handful of governments have started to engage seriously with the issues, and there has been very little civil-society discussion and action.⁵²

Considering the range of residual function issues that the international community – including governmental and non-governmental stakeholders – will have to consider, negotiate and determine, time is of the essence. The current completion dates for the ICTY, ICTR, and SCSL are around the corner. Yet there is seemingly little sense of urgency. It also appears that the little discussion that is taking place could benefit from

⁴⁹ See e.g. SCSL completion strategy, 18 May 2005, par 3. See also briefing by SCSL president to SC, 24 May 2005, p 6.

⁵⁰ See e.g. ICTY president report, par 43. The UN secretary-general has also brought residual functions to the attention of the UN General Assembly (GA); see e.g. report of secretary-general to GA in respect of ICTY and ICTR, *Staff retention and legacy issues*, A/60/436, 17 Oct 2005, pars 19-24 and 28.

⁵¹ The meeting report is being prepared. It is unclear whether it will be publicly available. The Oosterveld and Gurd paper was prepared as discussion paper for the meeting, which was held in February 2008.

⁵² For example, the OSJI was among the first to realise the importance and urgency of the issues, commissioning the first comprehensive study in 2006. In February 2007, the ICTJ and the law faculty of the UWO convened an invitation-only expert-group meeting themed "Planning for Residual Issues for International and Hybrid Tribunals". Held under the Chatham House rule, it brought together a wide range of decision-makers, stakeholders and experts. A meeting report, *Report: Residual Issues Expert Meeting* (undated) was circulated among participants afterwards. The Aptel briefing paper was prepared as discussion document for the meeting.

more openness and broader participation. This would help to ensure that all perspectives, including those of victim and witness groups, are considered in the crafting of the most appropriate residual mechanism solutions.

From a practical point of view, extending the lifespan of the ICTY, ICTR and SCSL for a handful of years, progressively downsizing them, and giving each a more limited mandate tailored for residual function purposes seems like the most appropriate general short-term solution. During those few years, every effort should be made to apprehend top fugitives who ought to face justice before international courts and to oversee and assist national authorities in completing proceedings in cases referred to national courts.⁵³ Following such an interim period, after the completion of the bulk of the major residual functions, the three courts and the international community should have a clearer picture of the scope and scale of the remaining residual functions, on the basis of which longer term residual function solutions, including the possible establishment of a joint residual mechanism coupled with the delegation and transfer of some residual functions, may be better assessed.

Regardless of the process and solutions eventually decided on for the residual phase of the ICTY, ICTR and SCSL, they should not violate the human rights of any parties involved, compromise the fight against impunity for atrocity crimes around the world, or negatively affect the development of the international criminal justice system and the real and potential legacy of the three courts.

The example set by these three courts in dealing with their residual functions will be relevant to existing and future temporary international and internationalised criminal courts, including the Extraordinary Chambers in the Courts of Cambodia and the special tribunal for Lebanon. Against that background, and considering the possibility of establishing a joint residual court, the question arises whether it is worthwhile for the international community to consider devising a permanent, flexible residual mechanism that would be able to perform the residual functions of other past, current and future international and internationalised criminal courts.⁵⁴

⁵³ See e.g. ICTY prosecutor report, par 38: "... It is fundamentally important that, for legal and practical reasons, prosecutorial options are preserved and that the institution continue to exist as a legal entity - albeit radically downsized - after 2010. The Tribunal's indictments, arrest warrants and rulings must continue to have effect to ensure that fugitives apprehended after 2010 will face international justice. It is equally important that the archives, which form part of the legacy, remain available, accessible and useful to all those interested..."

⁵⁴ The authors are indebted to Kelly Dawn Askin – who has referred to it as a standing “war crimes office” – for this idea.