



## **CLOSING THE INTERNATIONAL AND HYBRID CRIMINAL TRIBUNALS: MECHANISMS TO ADDRESS RESIDUAL ISSUES**

*Briefing Paper<sup>1</sup>  
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### **1. Introduction: The Process to Date**

The establishment of temporary international criminal tribunals has given rise to complex legal, technical, and political questions regarding their post-closure residual functions. Under the latest estimates of its completion strategies, the International Criminal Tribunal for the former Yugoslavia (ICTY) expects to complete its final appeal in 2014.<sup>2</sup> The International Criminal Tribunal for Rwanda (ICTR) expects to complete its work by 2013.<sup>3</sup> The final appeal before the Special Court for Sierra Leone (SCSL) is expected in 2011, and the Extraordinary Chambers in the Courts of Cambodia (ECCC) and Special Tribunal for Lebanon (STL) are expected to conclude their proceedings no earlier than 2012.<sup>4</sup>

The purpose of this paper is to assist participants attending the Expert Group Meeting on Mechanisms to Address Residual Issues on 4-5 February 2010. The meeting will focus on specific residual functions and the need for residual mechanism(s) rather than the broader question of the legacy of these tribunals or their broader societal impact.

This paper covers the following areas:

- i) key developments in the process to date (current section);
- ii) principles underlying the debates;
- iii) the essential functions of residual mechanism;
- iv) considerations governing structure of residual mechanisms;
- v) considerations regarding archives;

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<sup>2</sup> UN Doc. S/2009/589 (13 November 2009).

<sup>3</sup> UN Doc. S/2009/587 (12 November 2009).

<sup>4</sup> Special Court for Sierra Leone Completion Strategy (June 2009), para. 5. The ECCC's founding law states that it "shall automatically dissolve following the definitive conclusion of the proceedings," (Art. 47 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea). The STL Agreement presumes an initial three-year life of the Tribunal, to be extended by agreement between the parties (Art. 21(2) of the Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, 6 February 2007).

- vi) the relationship between residual mechanisms and national authorities;
- vii) funding and oversight; and
- viii) the way forward.

**a. The 2007 Expert Meeting**

In February 2007 the co-organizers of the present event hosted an expert group meeting on legacy and residual issues in New York that brought together representatives of interested States, the UN Office of Legal Affairs (OLA), the ICTY, ICTR, SCSL, and ECCC. Civil society representatives from the former Yugoslavia and Sierra Leone also attended. The discussions succeeded in the preliminary task of identifying a series of residual functions, the need for the subsequent articulation of judicial and administrative mechanisms to handle those functions, and identifying the range of further technical and legal planning necessary.<sup>5</sup> Since the 2007 meeting, considerable progress has been made within the tribunals themselves, OLA, and among interested States. In 2007, the ICTY and ICTR produced a joint discussion paper for OLA that further elaborated their own analysis of the continuing functions and possible options for meeting these.<sup>6</sup> The Registrars of the ICTY and ICTR also established a joint Advisory Committee on Archives chaired by Richard Goldstone that issued its final report and recommendations in September 2008.

**b. The Security Council Informal Working Group on International Tribunals**

In 2000, the members of the Security Council established an Informal Working Group on International Tribunals to consider matters that arose from the Council's role in relation to the ICTR and ICTY. During 2008, this group began dedicating increased attention to residual issues and intensified its activity. With Belgium as Chair, the group sought to identify draft elements for a possible Security Council resolution to address the topic.

On 19 December 2008, the Security Council adopted a presidential statement that acknowledged the need for an *ad hoc* mechanism to carry on essential functions of the Tribunals after their closure, and requested the Secretary-General to prepare a report on the administrative and budgetary implications of possible options for locating the Tribunals' archives and residual mechanism(s).<sup>7</sup> During 2009, under Austrian chairmanship, the Informal Working Group continued with an in-depth examination of the residual functions that the Tribunals identified as essential to be carried out after their closure. In order to increase transparency, raise awareness, and provide an opportunity to hear the views of expert speakers and the broader UN membership, on 8 October 2009, Austria organized an Arria formula meeting on residual issues of the ICTY and ICTR that was open to all UN Member States. Invited speakers included the presidents of the Tribunals and OLA, as well as representatives of ICRC and ICTJ. The meeting met with great interest and provided the Working Group with useful input for its deliberations. On 3 December 2009, Austria's Permanent Representative to the UN reported to the Security

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<sup>5</sup> See Final Report of the 2007 Expert Group Meeting "Planning for Residual Issues for International and Hybrid Criminal Tribunals," available at [www.ictj.org/static/Prosecutions/ICTJ\\_ResidualIssues\\_rp2010.pdf](http://www.ictj.org/static/Prosecutions/ICTJ_ResidualIssues_rp2010.pdf)

<sup>6</sup> See discussion of this report in UN Doc. S/2008/849 (31 December 2009).

<sup>7</sup> See UN Doc. S/PRST/2008/47 (19 December 2008).

Council that it was conducting a first reading of a new draft resolution on creating an “International Residual Mechanism for Criminal Tribunals.”<sup>8</sup>

**c. The Special Court for Sierra Leone’s Process**

The SCSL is expected to complete its operations as early as 2011, before either the ICTY or ICTR. The imperative to find a solution to residual issues facing the SCSL is urgent and involves several factors unique to its hybrid status, including the fact that its legal authority comes from a treaty, not the Security Council. In February 2008 the SCSL held an expert group meeting in Freetown, Sierra Leone, to discuss its residual issues with government representatives from Sierra Leone and other members of the SCSL Management Committee. The SCSL hired a consultant, Fidelma Donlon, to undertake a detailed survey and feasibility assessment of options for residual mechanisms and coordinate discussions with national and international stakeholders. This report (“SCSL Report”) was completed in December 2008 and highlighted the importance of closely coordinated planning of completion strategies with residual institution development.<sup>9</sup> It categorized ten residual functions as either “ongoing” or “*ad hoc*,” and recommended that a Residual Special Court for Sierra Leone (RSCSL) be established with a small permanent secretariat, as well as a residual President and Prosecutor, to succeed the SCSL. The report also recommended that further discussions be held to determine whether the RSCSL could share an administrative platform with the ICTY and/or ICTR, possibly hosted by the ICC. The report used financial forecasting as a basis for recommending a long-term funding mechanism that is not dependent on voluntary contributions. In March and July 2009, respectively, the SCSL Management Committee and the SCSL president informally met with the members of the Security Council Informal Working Group to exchange information about the development of their residual mechanism preparations.

**d. The Report of the Secretary-General**

A major development on residual issues was the publication in mid 2009 of the UN Secretary-General’s Report prepared by the Office of Legal Affairs (“Secretary-General’s Report” or “Report”), as requested by the Security Council Presidential Statement.<sup>10</sup> The Secretary-General’s Report draws on the discussions of the Informal Working Group, consultations with the relevant UN departments and tribunal officials on staffing and cost estimates, feedback from national authorities on some 13 possible locations, as well as key documents that included the SCSL Report and the report of the Advisory Committee on Archives of the Tribunals. The Report lists eight possible functions of a residual mechanism that are described in greater detail in section 3 below. The Report’s core recommendations include ensuring jurisdictional and structural continuity between the tribunals and residual mechanism(s), transferring all functions that are necessary to support trials of fugitives, and co-locating and co-managing the tribunals’ archives with the residual mechanism(s). The Report recognizes the importance of ensuring that the archives and residual mechanism(s) are not too distant from the affected countries and

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<sup>8</sup> See UN Doc. S/2009/687 (31 December 2009).

<sup>9</sup> Fidelma Donlon, “Report on the Residual Functions and Residual Institution Options of the Special Court for Sierra Leone,” 16 December 2008 (SCSL Report).

<sup>10</sup> Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals, UN Doc. S/2009/258 (21 May 2009) (Secretary-General’s Report).

proposes establishing either separate mechanisms or a shared mechanism that retains branches in both Europe and Africa.

Further details considered are discussed in the following sections of this paper. The Report also identified a series of steps that the tribunals should take before closing to facilitate the efficient transition of work to a residual mechanism. The Security Council has endorsed these steps,<sup>11</sup> such as developing record retention policies and review of witness protection orders. The presidents of ICTY and ICTR reported to the Security Council in December 2009 on the tribunals' progress in this regard.<sup>12</sup>

While the focus of the Report is the ICTY and ICTR, the Secretary-General acknowledges that other UN-assisted tribunals will also require residual mechanisms to fulfill largely similar residual functions, echoing some of the recommendations contained in the SCSL Report. To the extent possible, it is useful to consider the potential relevance of any such structures for future *ad hoc* international and hybrid tribunals. The ECCC (which is part of the Cambodian jurisdiction) and STL are still some way off from planning their completion; in fact, the STL has not issued its first indictment. However, both courts could benefit from advanced planning, for example in relation to document retention policies and regular reviews of witness protection orders.

## 2. The Principles Governing Residual Issues

In establishing the ICTY and ICTR, the Security Council endowed them with clear mandates to “take effective measures to bring to justice the persons who are responsible” for the crimes that had taken place in the former Yugoslavia and Rwanda.<sup>13</sup> These measures were designed to contribute to “the restoration and maintenance of peace” in the case of the ICTY, and to “the process of national reconciliation and to the restoration and maintenance of peace” in the case of the ICTR, by ensuring redress for the most serious violations.<sup>14</sup> The mandates, contained in the Security Council Resolutions and Statutes of the respective courts, did not contain time limits, nor did they contemplate only partial fulfillment. When the tribunals close, residual issues and the need to establish appropriate follow-up mechanisms to deal with them persist because they are directly related to the core mandates of the courts; as a matter of principle, they should not only be consistent with the founding documents, but also further the objectives of these courts.

There are several broad principles that underpin the original mandates of each tribunal and that therefore also should be recalled to guide debates and decision-making on residual mechanisms as well. First, *serious international crimes must not go unpunished*. The Secretary-General's Report, along with the Presidential Statement of the Security Council, made it clear that any follow-up process must aim at ensuring that there is no impunity for any of the fugitives. The

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<sup>11</sup> See Letter dated 28 September 2009 from the President of the Security Council addressed to the Secretary-General (International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda), UN Doc. S/2009/496.

<sup>12</sup> See UN Doc. S/PV.6228 (3 December 2009).

<sup>13</sup> See UN Doc. S/RES/827 (25 May 1993) and UN Doc. S/RES/955 (8 November 1994).

<sup>14</sup> See Secretary-General's Report, paragraphs 75 and 201: “The Tribunals were established as temporary and *ad hoc* organs to contribute to the process of national reconciliation and to the restoration and maintenance of peace in the affected countries,” and “It should be recalled that each Tribunal was established as a measure under Chapter VII of the Charter to contribute to the process of national reconciliation and to the restoration and maintenance of peace in the affected countries.” See also UN Doc. S/RES/808 (22 February 1993) and UN Doc. S/RES/955 (8 November 1994).

failure to enforce existing international arrest warrants that have been backed with Chapter VII authority, or the inability to meet the UN's own basic standards for the treatment of victims of crime, undermine the credibility of the notion of an international rule of law.

Second, *minimum standards of due process must be respected*. Any proceedings before a residual mechanism – or the decision to refer such proceedings to a national jurisdiction – must meet these minimum international standards for the conduct of trials or other criminal proceedings. This has been repeatedly emphasized by the tribunals themselves, as well as by the Secretary-General. One consequence is that fugitives must have rights similar to accused who have appeared before the tribunals, under the principle of equality before the law. The provision of legal aid has to date received little attention as a significant residual issue, but offers an example of when refocusing attention on the overarching principles offers important guidance.

Third, *the rights and interests of the individuals concerned must be taken into account*, ranging from the accused, to those convicted, victims, and protected witnesses. The need to assist national authorities by providing support for ongoing investigations and prosecutions by States, which includes access to archival material, may potentially be a useful complement to a residual mechanism in fulfilling the original mandate. Similar considerations govern the obligation to ensure that witnesses who have given testimony on the basis of reassurances about their protection can rely on that protection after the closure of the tribunals' doors. The implications of failure in this regard would go beyond the residual mechanism but would also put at risk public trust in other international judicial processes such as the ICC.

Fourth, the tribunals were each given a clear mandate to *put an end to these crimes*, and this has implications for the way in which the Tribunals finish their work. While this implies that fugitives cannot be allowed to escape justice, it also underlines the critical nature of these courts' archives, which are the central bulwark against revisionism in the future. Thus, access policies surrounding the archives and their ongoing utility towards further accountability, memory, reconciliation, and peace-building are critical to ensure respect for these principles. This consideration is mentioned in the Secretary-General's Report and the possibility of establishing information centers, but it also pertains to local capacity-building going forward and broader aspects of the tribunals' legacy. The Tribunals' contribution to public debate about the past and dispelling notions of collective responsibility that fuel cycles of violence should not be undervalued, even if partial and incomplete. While legacy is not the focus of this paper or the Expert Group Meeting discussions, its relevance to the central issues should be part of the principled considerations.

### **3. Functions of Residual Mechanisms**

The essential functions of residual mechanisms have been identified by the Tribunals themselves and are now largely accepted to include the following eight categories, narrowed down from the original twelve functions identified at the 2007 expert meeting:<sup>15</sup>

- i. Trial of fugitives;
- ii. Trial of contempt cases;

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<sup>15</sup> Secretary-General's Report, para. 13. The SCSL Report identifies Defence Counsel and Legal Aid Issues; Prevention of Double Jeopardy; and Support to Compensation Claims as additional functions.

- iii. Protection of witnesses;
- iv. Review of judgments;
- v. Referral of cases to national jurisdictions;
- vi. Supervision of enforcement of sentences;
- vii. Assistance to national authorities; and
- viii. Management of the archives.

Identifying this list of functions is useful in order to plan for the necessary resources, including staff to carry them out. On the basis of the Report of the Advisory Committee on Archives and the subsequent work on archives in the last few years, much more is known about the staff and space needed to maintain the Tribunal archives over time. But while the functions themselves may be broadly agreed at this point (perhaps with the exception of whether Defence issues and legal aid should be conceived of as a separate residual function), the scope of the work that each will entail is still under discussion.

For instance, the Secretary-General's Report comments that trials of fugitives that should be carried out by a residual mechanisms may be as few as two for ICTY and four for ICTR,<sup>16</sup> or many more as there are still 13 current fugitives from ICTY/R and potentially one from Sierra Leone.<sup>17</sup> This depends on whether more referrals are anticipated, mainly from the ICTR but also from the SCSL. This key decision may have significant impact on the scope and cost of a residual mechanism.

In order to give some very tentative estimates of staffing and costs, the Secretary-General's report sets out some examples of possible "minimum level," "middle level," and "maximum level" residual functions that the residual mechanism might take on.<sup>18</sup> The Report does not recommend a specific outcome but merely lays out options. Minimum level functions include trials of fugitives, managing the archives, and the Prosecutor's assistance to national authorities. The trials of fugitives will in themselves entail a range of other functions (contempt proceedings, witness protection, review of judgments), if only in respect of those trials. Middle level functions identified by the Report include fulfilling some of those functions in respect of Tribunal cases, including contempt proceedings, witness protection, and enforcement of sentences. Maximum level functions are all the functions listed above. However, from a financial perspective the different models laid out in the Secretary-General's report show that the real cost variable is whether a *trial or trials of fugitives* are held by a residual mechanism or not, rather than how many other residual functions are performed by the residual mechanism.

One possible way to conceive these functions is to divide them into "*ongoing functions*" and "*ad hoc functions*," as was done in the SCSL Report.<sup>19</sup> For instance, trials of fugitives or contempt proceedings could be perceived as *ad hoc* functions that require a flexible staffing structure to respond, whereas ongoing functions that need to be carried out continuously, such as enforcement of sentences and witness protection, require a standing staffing structure.

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<sup>16</sup> ICTY and ICTR have indicated these six accused would need to be dealt with as single-accused trials. See Secretary-General's Report, para. 18.

<sup>17</sup> SCSL Report, para. 6.

<sup>18</sup> Secretary-General's Report, Section VI.

<sup>19</sup> SCSL Report, para. 9.

The Secretary-General's Report tentatively estimates *staffing costs* for a residual mechanism that would carry out these ongoing functions for ICTY and ICTR to be between \$3.5 million to \$5 million annually. Other costs will need to be added to this include the following: premises; transfer of the accused; legal aid; witness protection; enforcement of sentences; and costs on maintaining the archives. What accounts for a dramatic increase in costs are the trials to be held by a residual mechanism. This is estimated to jump to around \$15 million with just the first fugitive, requiring a staff of 88.<sup>20</sup>

#### **4. Considerations Governing Structure of Residual Mechanisms**

The structures of residual mechanisms are subject to the assumptions outlined in the Secretary-General's Report, i.e. that residual mechanism(s) should be small and efficient, commensurate with the reduced work of the mechanism(s). The Secretary-General's Report also suggests that the most efficient, economical solution is likely to be to attach the administrative management of the mechanism(s) to an existing UN office or to another international organization, such as the International Criminal Court. Similarly, the Special Court for Sierra Leone has discussed and explored sharing administrative management with a number of organizations, some of which are in Freetown (UNDP, UNIPSIL), or others outside of Freetown (STL, ICC, ICTY/ICTR residual mechanism) and the City of The Hague.

An issue still under debate is whether national systems should play a role in carrying out any of the eight essential functions laid out above. While the issue remains undecided, the following considerations have been raised in this debate:

- In some areas this will amount to “giving the national jurisdictions entirely new areas of competence to pronounce on matters that had previously been exclusively under an international jurisdiction.”<sup>21</sup> Also, the procedural and substantive legal framework of the Tribunals, jurisprudential background, and language of the cases would generally be foreign to national courts, and that would create difficulties.
- Some legal systems have significant gaps in their laws or lack resources.
- The rights of the accused should be borne in mind at all times and should not be subject to disparity.
- Effective witness and victim protection, and related functions such as the power to hold those who violate witness protection in contempt, is essential to maintaining public confidence in the international criminal justice system.<sup>22</sup>
- In the discussion concerning archives, technical, legal, financial, and political considerations have been raised in considering whether these could be hosted at the national level.

All these elements tend towards one or more residual mechanisms that will carry out the essential residual functions of the Tribunals. The Secretary-General's Report presumes that the basic structure of the Tribunals will need to be replicated within a residual mechanism, i.e. the Office of the Prosecutor, a Registrar (also encompassing an Office for the Defence), a President,

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<sup>20</sup> Secretary-General's Report, para. 144. An *ad hoc* mechanism will certainly entail other costs.

<sup>21</sup> Secretary-General's Report, para. 76.

<sup>22</sup> Secretary-General's Report, para. 29.

and a Chambers. The Report gives various suggestions on how these structures may be kept flexible.<sup>23</sup>

At the same time, it is still appropriate to consider – even if residual functions are not carried out by national systems – whether there are aspects of the work of residual mechanisms that *require proximity to affected populations* as a way of securing and enhancing the legacy of the ICTY/R, SCSL or any other Tribunal. If a residual mechanism based outside the country holds trials of high-ranking fugitives, this gives rise to the need for outreach to affected populations to maximize the impact of the trial. Any important judicial decisions such as review of a judgment or a decision on a sentence will similarly require an explanation to affected populations (particularly where the decision is made to release someone). The need for outreach will not end, at least until the trials are finished. Witness protection also may require a ground presence of the residual mechanism. These functions should not be viewed purely in terms of cost but also in terms of upholding the Tribunals’ core mandates and the principles cited above (Section II), particularly with respect to witnesses who have put their safety in the hands of the international community.

In terms of replicating structures, both standing and flexible, there are obvious incentives to working out *joint approaches* between Tribunals in order to achieve efficiencies. This debate is already being explored in the context of the ICTY/R, and the Secretary-General’s report comments that “establishing one residual mechanism in one location, with both of the Tribunals’ archives co-located with and co-managed by the mechanism, would probably offer the greatest cost-effectiveness (depending on the location chosen).”<sup>24</sup> It is rather logical that such a combination of resources could also create efficiencies for the SCSL (as well as eventually for the STL and ECCC). In this respect, the Report notes that in respect of all UN-assisted criminal tribunals, “Rather than establish a series of stand-alone and potentially costly residual mechanisms, there would be a certain logic, and possibly economies of scale, in leaving the door open for them each to be attached to one common administrative hub at some point in the future.”<sup>25</sup> While the SCSL is due to make decisions on residual mechanisms first, it would seem prudent to leave the door open to potentially joining any solution formulated by the ICTY/R.

However, certain drawbacks in combining the residual functions of all the Tribunals need to be overcome:

- The differing legal bases, including the statutes, of the *ad hoc* and hybrid tribunals, and how these could be reconciled. Specifically the fact that the *ad hoc* ones are subsidiary organs of the Security Council, while the SCSL, ECCC, and STL are not;
- The implications of the legal basis for questions such as ownership over the archives;
- The different funding bases and oversight structures;
- The wide differences in geography and victim groups;

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<sup>23</sup> For example, should there be a stand-by administrative capacity with a variable judicial branch that would be extended or limited on an *ad hoc* basis? See the discussion in paragraphs 110 and 257 of the Secretary-General’s Report.

<sup>24</sup> Secretary-General’s Report, para. 119.

<sup>25</sup> Secretary-General’s Report, para. 220.



- Their contextual peculiarities such as the nature of the conflict or of the crimes committed;<sup>26</sup> and
- The question of time lines, since the need for a residual mechanism for SCSL is likely to arise before that of the *ad hoc* tribunals.

Hybrid tribunals also raise some unique considerations:

- *Need for further negotiations.* The legal foundations of the SCSL, ECCC, and STL rest on bilateral agreements between the UN and the governments of Sierra Leone, Cambodia, and Lebanon respectively.<sup>27</sup> Each of these must be directly re-negotiated and amended in order to proceed with a residual mechanism, which already places the hybrid tribunals in a different position to that of the *ad hoc* Tribunals, which require a further Security Council resolution. The same legal basis would need to be used for residual mechanisms as for the establishment, i.e. a newly negotiated agreement. Unlike other hybrid courts, the ECCC forms part of a national court, which may give rise to further considerations.
- *Mixed composition.* The residual mechanism of a hybrid would ideally reflect the mixed composition of these courts. This would mean that judicial rosters maintained by a residual mechanism should include both international and national judges. This raises certain complications for the ECCC, because the Cambodian judges (who form a majority at each level of the court) are paid by the Cambodian administration of the court, albeit through bilateral contributions from other States. Similarly, a residual mechanism's prosecutorial capacity for hybrid tribunals would possibly have to reflect the mixed nature of those tribunals.

However, cooperation between the *ad hoc* and hybrid tribunals may be possible in certain areas. Bearing in mind that conducting trials of fugitives is likely to be the most expensive residual function, it may be possible to achieve efficiencies in this area. This mimics current practice. Tribunals have already been collaborating by using each other's office space and courtrooms (e.g. SCSL and the ICC; SCSL and the STL).

Joint solutions should be fully considered. For instance, the context-specific needs of each Tribunal might be met through compiling multiple rosters of judges drawn from the different tribunals, but centrally administered and able to compose different Trial Chambers depending on the case (i.e. a SCSL Trial Chamber for the Johnny Paul Koroma case, but an ICTY Trial Chamber for the Radko Mladić case). There may be similar arguments for keeping the original archives of various tribunals in a central place.

Some have argued that The Hague is an obvious place to hold further trials because of the possibility of collaborating with or using the facilities of the ICC, the only permanent international criminal justice institution.<sup>28</sup> Moreover, four of the five current tribunals have

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<sup>26</sup> For instance, while the Special Tribunal for Lebanon does not have jurisdiction over international crimes, it does have such over crimes defined under Lebanese law.

<sup>27</sup> The STL is in a complex position with an Agreement that was entered into force at the request of the Government of Lebanon through a Chapter VII Security Council resolution.

<sup>28</sup> The Hague currently hosts the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia, the Special Tribunal for Lebanon, the International Criminal Court, and several other international

present or past links with The Hague. Plans for the ICC's permanent premises, to be completed in 2014, could still be adapted to meet the needs of residual mechanisms. The ICC has expressed willingness to collaborate with both with ICTY/R and with the SCSL, although such cooperation may be complex in practice.

On the other hand, The Hague is far removed from affected populations, be they in Sierra Leone, Rwanda, the former Yugoslavia, or elsewhere. The Secretary-General's report on the ICTY/R comments on the fact that each tribunal is context-specific and argues in favor of at least two mechanisms or branches, located in Europe and Africa. There is a particularly strong argument that the archives should be located as close as possible to the affected communities, particularly so that national historians and journalists would have access. The desire of the Governments of Sierra Leone and Rwanda to host their own archives, as well as to assume other residual functions, should play a central role in considerations, as should any regional developments on the support for international justice in Africa. Several locations in Europe and Africa other than The Hague were considered in the Secretary General's Report, though many of these do not have courtroom facilities or capacity for tribunal archives.<sup>29</sup> In any case, many of these locations would need to be supplemented by in-country activities that assist to solidify the legacy of *ad hoc* tribunals.

## **5. Considerations Regarding the Archives**

A number of important parameters must guide the thinking on the Tribunals' archives. First, the preservation of the confidentiality of some records should be guaranteed as these could impact the lives and reputations of individuals as well as matters of state security. Second, it is important to highlight the difference existing between the original archives and copies of the archives. In order to maintain the integrity of the original archives and in keeping with basic archiving principles and good practice, each of the original archives should remain as a complete entity and not be broken up by transferring the public records to one place and the confidential documents to another. Obviously there is more flexibility with copies of the public records of the archives (all the non-confidential documents) that can be reproduced and be made available in several different locations. Third, while some of the archives are the sole property of the UN, as is the case for ICTR and ICTY, the archives of the hybrid tribunals are joint property of the UN and the governments concerned, thus requiring further agreement on how they should be used or where they can be housed.<sup>30</sup>

In the coming years, the judicial use of the records and archives and their accessibility to support judicial work should remain the priorities. These archives will be needed for judicial use at two levels: for any judicial work to be performed by the residual mechanism(s), such as trials of fugitives; and by the countries concurrently competent to investigate, prosecute, and try the

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organizations. The Government of the Netherlands has also indicated willingness to host the Tribunal archives and to assume the cost.

<sup>29</sup> Secretary-General's Report, paragraphs 185, 221, and 247.

<sup>30</sup> While the ECCC is considered part of a domestic court, its' archives should still be viewed as joint property since the ECCC was established pursuant to an agreement between the UN and the Government of Cambodia. Specific consideration should be given to the "integration" of the archives of the United Nations International Independent Investigative Commission (UNIIC) – which belong to the UN – into the archives of the Special Tribunal for Lebanon that are arguably the joint property of the UN and of Lebanon.

crimes falling within the Tribunals' mandates (including notably the countries where the ICTY and ICTR refer cases under Rule 11*bis*). It can be expected that many more cases will be tried in domestic jurisdictions than before residual mechanism(s). In the coming years, national authorities of other countries will also probably continue to request access to the Tribunals' records to obtain information relating to suspected criminals found in their jurisdiction or to review the files of prospective immigrants.

Any residual mechanism will need to access the archives for all of its residual functions whether it is to try fugitives, ensure protection of witnesses, etc. This led the Advisory Committee on Archives to note that maintaining the archives can be deemed an adjunct residual function, necessary to enable the performance of other residual functions. The performance of each function not only necessitates accessing the archives but interestingly will also in turn create new original records, which will constitute the archives of the residual mechanisms but also closely relate to the Tribunals' archives and arguably form a part of the Tribunals' original archives. These will also need to be organized, reviewed for possible declassification, and maintained. Practically, it thus appears crucial and also more efficient *to co-locate the archives with the residual mechanism(s)*, as recommended by both the Advisory Committee on Archives and the Secretary-General's Report.

If co-location with a residual mechanism is accepted, there would not really be a need for separate decisions on archives. The decision as to whether there should be a joint location for all the Tribunals' archives or separate locations would be subsumed under the decision pertaining to whether there should be a single residual mechanism or several of them. Each tribunal's archives would be located with the relevant residual mechanism, whether or not centralized. Whatever the decision, suitably qualified staff understanding the nature of the records, their organization, and providing all due guarantees to ensure their security and confidentiality must be employed or retained by the residual mechanism(s) to perform these functions, including providing access to national authorities and to adequately manage and preserve the archives.

The *symbolic value* of archives should not be underestimated. Those most directly affected by the crimes expect –legitimately– to have ready access to the archives. Although locating the original archives outside the countries or regions directly concerned might not provide the emotional, psychological, and healing impact that might be provided if the physical location of the original archives were in these countries, the *public information* contained in the archives (not the confidential records) should be made easily accessible to populations most directly affected by the crimes. Local researchers, journalists, historians, and others from each of the affected countries should have easy access to the documents. Such access may be provided by establishing “archives branches” or “information centers” in each of the concerned countries. These centers would provide ready access to copies of all the public documents contained in the archives,<sup>31</sup> could advise users and mediate and support their access to certain records, and could also possibly offer educational and outreach services to students, civil society groups, victims' associations, and the general public.

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<sup>31</sup> This appears relatively inexpensive and technically uncomplicated when the archives for the most part are in digital form.

It can be argued that ultimately, over the very long-term, all the original documents in the archives will be public in keeping with best practices, the UN classification system, and States' practice (as explicitly stated for example in the United Kingdom Official Secrets Acts: all classified documents are declassified after a certain time period). By the time of the confidential documents held in the Tribunals' archives are declassified, it can be expected that any residual mechanism(s) will have completed their tasks and close down. At this stage, it may be possible and desirable to envisage that each original archive be physically transferred to the countries primarily concerned by the crimes and the Tribunals.

More discussion is needed on what the archives' branches or information centers should comprise, how they might collaborate with locally driven memorial and existing documentation initiatives, whether they should be tasked to do outreach work on behalf of the residual mechanism(s) and for how long, what the cost implications would be, and also to secure appropriate and sustainable funding. Special considerations will also apply in each case depending on the demand of various locally affected constituencies for information.

## **6. Relationship with National Authorities**

Even if many of the core functions are reserved for a residual mechanism, the activities of any residual mechanism are likely to include several functions that are complex in nature, both technically and politically, and depend on carefully planned relationships with various national authorities. These functions will require experienced staff, preferably on both sides.

First and foremost for the ICTR is still the issue of *referring cases* (under a Rule 11 *bis* or similar procedure). Many decisions remain outstanding, in particular in respect of the ICTR. For the SCSL, a decision will need to be made about whether to refer the case of the single remaining fugitive, Johnny Paul Koroma, to a national court prior to the SCSL's closure,<sup>32</sup> holding a trial by the residual mechanism or that mechanism retaining the power to make a future referral. In the case of the ECCC, if the third investigation currently under way is not completed before the court's closure, some expect that this case could be referred to the ordinary Cambodian courts (although many are likely to strongly oppose this approach).

The issue of *continued oversight* of such trials is particularly complex and requires close coordination by the residual mechanism with national authorities as well as with other actors, including for instance regional organizations such as the Organization for Security and Cooperation in Europe or the African Commission on Human and Peoples' Rights. The principles of fairness to the accused and equality before the law demands that subsequent proceedings are held to the same international standards as proceedings before the tribunals. An adequate legal framework needs to exist at the domestic level. In addition, the Secretary-General's Report emphasizes the importance of ensuring that the most serious crimes do not go unpunished. Complex questions may arise if cases are inadequately pursued at the domestic level, for instance, through bringing less-than-full charges or giving lenient sentences.

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<sup>32</sup> Due to the general amnesty contained in the 1999 Lomé Accord currently still in place in Sierra Leone, this should not be a Sierra Leonean court. Whether Johnny Paul Koroma is alive or dead is unknown.

A related issue pertains to *sharing of evidence or other material* for the purposes of subsequent national investigations/prosecutions. The ICTY has useful experience in this regard due to its interactions with the Bosnian War Crimes Chamber. These situations may not entail the full referral of a completed investigation or case, but may still require significant cooperation analogous to mutual legal assistance regimes. Considerations such as witness protection should be taken into account in such arrangements. The archives will need to manage material provided under guarantees of confidentiality and ensure consultation with the provider in the event of requests for its release. For example, where subsequent national declassification of material occurs, a residual mechanism likewise may need to review requests for access to such material and vice versa.

As mentioned above, delegating functions such as the *review of sentences, convictions or conditions of detention* to national jurisdictions is complex and probably not advisable. But even if a residual mechanism takes primary responsibility for these functions (including issues related to family access), this will still require cooperation with States enforcing sentences. Aside from the procedural steps required to ensure the continuity or necessary amendment of existing enforcement of sentence agreements, a residual mechanism--particularly in the case of a shared mechanism--needs to have the capacity to handle the necessary relationships with a large number of different host States and their respective correctional regimes.

A residual mechanism will also need to carry out *review of witness and victim protection measures* and supervise ongoing witness protection.<sup>33</sup> This includes the variation of protection measures, which requires factual assessments by the relevant parties and judges. Many protective measures are dependent on enforcement by local authorities and will require close ongoing coordination by the residual mechanism(s) with national police and others. Given the presumption of a dramatically downsized residual witness protection capacity, this will be an immediate priority in transitioning to a residual mechanism.

If information centers are to be opened, this too will require careful liaison with national authorities and civil society. National archives or academic institutions may provide possible locations for such information centers. From Bosnia-Herzegovina to Cambodia and elsewhere well-established independent documentation centers already serve some similar functions to the envisaged information centers and may be keen to receive copies of the public documents contained in the Tribunals' archives.

## **7. Funding and Oversight**

To date, the ICTY and ICTR have been funded through assessed contributions, whereas the hybrid tribunals are funded mainly through voluntary contributions. While the ICTY/R report to the Security Council and General Assembly, the SCSL, ECCC and STL are overseen by their respective Management/Steering Committees, which supervise the non-judicial aspects of their work.

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<sup>33</sup> This may be a particular concern for the STL, which is likely to face complications with witness protection due to the nature of the crimes.

It is worth reflecting on the experience of the Special Court for Sierra Leone with voluntary contributions. In his October 2000 report on the establishment of the SCSL, the Secretary-General criticized this mode of financing, expressing his opinion that “a special court based on voluntary contributions would be neither viable nor sustainable.” To a significant extent, this prediction has proved true in practice. One lesson from the hybrid tribunals and particularly the Special Court for Sierra Leone is that voluntary contributions place many demands on the institutions that rely on them. Senior officials spend significant time (and expense) raising money. Voluntary contributions are not reliable and make future planning very difficult. In 2004, the SCSL required a grant from assessed contributions for \$16.7 million to be able to continue its work (another installment was accepted later, bringing the total of \$27 million). In 2008 it required emergency funds from the European Commission. A group of just four States has borne 80 percent of the costs of the SCSL. Although each contribution demonstrates important political support, most of the 50 States contributing to the Court have only donated a few times and usually small amounts (\$10, 000 or less). This raises a real question of sustainability of voluntary contributions in the long term, particularly as new demands for funding arise to deal with new situations.

Realistically, a residual mechanism may require funding for up to 50 years to fully finish its duties. In the absence of trial activity, it can only be expected that difficulties in raising voluntary contributions would increase. The other hybrid tribunals may face similar problems in the future. This makes assessed contributions an attractive prospect for hybrid tribunals. States that are committed to the SCSL, STL, and ECCC should consider all options for sustainable funding. Art. 6 of the Agreement between the UN and Government of Sierra Leone allows the Secretary-General and Security Council to explore alternate means of funding for the SCSL. The STL Agreement contains a similar provision.<sup>34</sup> Consideration should also be given to joint funding mechanisms for all of the UN-supported tribunals.

As subsidiary organs of the Security Council, the *ad hoc* International Criminal Tribunals have always benefited from assessed contributions, and so will their residual mechanism(s).

This does not mean that voluntary contributions and other such sources of funding (such as in-kind contributions) should not be utilized. In fact, it may be possible to supplement assessed contributions for certain functions with voluntary contributions. A *trust fund for voluntary contributions* could supplement a regular budget of assessed contributions. It may be prudent for residual mechanisms to plan for specific staff positions related to fund-raising (much as with the ICC Trust Fund for Victims). However, functions such as trials of fugitives, witness protection, review of judgments, enforcement of sentences, legal aid, etc. cannot afford to be jeopardized due to lack of funds.

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<sup>34</sup> See “Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon,” 6 February 2007, Art. 5: “Should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal.”

This raises a related question of oversight of the Tribunals and whether the functions of the currently serving Management Committees require a continuation of that role. If voluntary contributions continue to either form part of or supplement a residual mechanism, there may be a role for contributing States to continue serving in a similar role. However, any portion funded through assessed contributions would be subject to relevant UN budgetary procedures, and those processes would need to be reconciled.

## **8. The Way Forward: Questions to be Addressed**

It appears that a number of important and complex points need to be addressed in the process of establishing the residual mechanism(s). These include the following:

- What are the residual functions to be carried out by the residual mechanism(s)? How is this planned to evolve over time? Which entities will deal with those functions not transferred to residual mechanism(s)? Is it appropriate to transfer functions to national authorities or to the ICC?
- What will be the relationship between residual mechanisms and national authorities?
- How will the structural and jurisdictional continuity between the Tribunals and residual mechanism(s) be achieved? What are the resulting necessary decisions that need to be made by the Security Council, or other relevant actors?
- Will there be one (joint or co-located) residual mechanism, one mechanism with two branches, or several mechanisms? Where should it/they be located? Will the archives of each Tribunal be co-located with the relevant residual mechanism(s)?
- What will be the structure of the residual mechanism(s)? Should it reproduce the same three-organ structure as the Tribunals (namely the Presidency/Chambers, the Office of the Prosecutor, and the Registry)? What are the considerations that should govern the operations of these organs (i.e. should their functions be the same as before, and should they be full time or part time? Will part of the structure of the residual mechanism(s) be *ad hoc* and activated on an as-needed basis, such as the trials of fugitives? If so, how will it be triggered and by whom?
- How will residual mechanism(s) be adequately financed?
- Will the trial capacity of the residual mechanism(s) be based on a roster(s) of judges and other personnel (prosecutors, investigators, etc.)? If so, how will this roster(s) be established and renewed/updated and by whom?
- What are the implications in terms of completion dates and processes? Should there be a progressive transition? If so, what should its steps and calendar be? Which steps are to be taken by the Tribunals themselves to prepare for their closing and ensure jurisdictional continuity? How can tribunals currently early on in their mandate make adjustments to their work to enable for a smooth completion in the future?
- Will “archive branches” or “information centers” be established in the affected countries notably to provide ready access to the public portion of the archives? How can these be made sustainable?