

## **The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda**

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## Abstract

By Security Council Resolution 1966 (2010), the Security Council established the International Residual Mechanism for Criminal Tribunals as the legal successor to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. In the creation of the Residual Mechanism, the Security Council appears to have intended to ensure the continuation of the work of the Tribunals and thereby safeguard their legacies. Accordingly, the Statute of the Residual Mechanism continues the jurisdiction of the Tribunals, mirrors in many respects the structures of the Tribunals, and ensures that the Residual Mechanism's Rules of Procedure and Evidence are based on those of the Tribunals. However, the Statute of the Residual Mechanism is silent with regard to the weight the Judges of the Residual Mechanism must accord to ICTY and ICTR judicial decisions. While there is no doctrine of precedent in international law or hierarchy between international courts, this omission by the Security Council does have the potential to negatively impact the legacies of the Tribunal by allowing for departures by the Residual Mechanism from the jurisprudence of the Tribunals, which lead to similarly situated persons being dissimilarly treated. Nevertheless, even if the Residual Mechanism does adopt the jurisprudence of the Tribunals as its own, as a separate legal body it will still have to answer constitutional questions regarding the legitimacy of its establishment by the Security Council. While it can be anticipated that the Residual Mechanism will find itself validly constituted, the wisdom of the Security Council's decision to artificially end the work of the Tribunals by the establishment of the Residual Mechanisms will ultimately turn upon the question of whether any inherent unfairness could be occasioned to persons whose proceedings are before the Residual Mechanism. It will be suggested that the Security Council has provided the Residual Mechanism with sufficient tools to ensure that its proceedings are conducted in *para passu* with those of the Tribunals and that the responsibility of ensuring the highest standards of international due process and fairness falls to the Judges of the Residual Mechanism.

## A. Introduction and Background

The International Criminal Tribunal for the former Yugoslavia [ICTY] and the International Criminal Tribunal for Rwanda [ICTR] [collectively, Tribunals], have cultivated a rich legacy since their establishment in 1993 and 1994, respectively. One important means of ensuring the endurance of this legacy is the International Residual Mechanism for Criminal Tribunals [Residual Mechanism].

In 2010, the Security Council, acting pursuant to its Chapter VII powers issued Resolution 1966, which established the Residual Mechanism as the legal successor to both the ICTY and the ICTR. The Residual Mechanism was conceived as a means of closing down both Tribunals' prior to the conclusion of their mandates, while simultaneously ensuring the full completion of their respective mandates by the Mechanism itself.<sup>1</sup>

The Statute of the Residual Mechanism<sup>2</sup>, annexed to Resolution 1966, contains various provisions demonstrative of the Security Council's intention to ensure continuity between the work of the Mechanism and the work of both Tribunals. Most explicitly, Article 2 provides that the Residual Mechanism "shall continue the functions of the ICTY and ICTR, as set out in the [Mechanism's] Statute". Additionally, Article 1 stipulates that the Residual Mechanism shall continue the jurisdiction of both Tribunals, and further provisions provide a structure and organization to the Mechanism which largely mirrors that of both Tribunals.<sup>3</sup> Furthermore, the provisions governing fair trial rights reflect those encapsulated in the ICTY and ICTR Statutes,<sup>4</sup> including those regulating the right to appeal and request for

<sup>1</sup> An important function of the Residual Mechanism not discussed in this paper is the management of the Tribunals' archives. See the Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s), UN Doc. S/2009/258, 21 May 2009, paras 15, 43-59, 87 [Report of the Secretary-General].

<sup>2</sup> Statute of the International Residual Mechanism for Criminal Tribunals, SC Res. 1966, 22 December 2010, Annex One [Statute of the IRMCT].

<sup>3</sup> Arts 2 and 3 Statute of the IRMCT; Art. 11 Statute of the International Criminal Tribunal for the former Yugoslavia [ICTY Statute]; Art. 10 Statute of the International Criminal Tribunal for Rwanda [ICTR Statute], see *infra* section B. I. 2 'Structure and Organisation'.

<sup>4</sup> Art. 19 Statute of the IRMCT; Art. 21 ICTY Statute; Art. 20 ICTR Statute.

review.<sup>5</sup> Of further significance is a provision ensuring that the Residual Mechanism will base its Rules of Procedure and Evidence on those of both Tribunals.<sup>6</sup> Indeed, the Security Council has elevated a number of the Tribunals' Judge-made Rules to the status of statutory provisions of the Residual Mechanism.<sup>7</sup>

Yet, Resolution 1966 lacks explicit guidance regarding the weight the Judges of the Residual Mechanism must accord to ICTY and ICTR decisions. It is therefore not self-evident that the Residual Mechanism will follow the jurisprudence of the Tribunals' regarding the interpretation and application of its Rules of Procedure and Evidence or its substantive case law, and thereby, truly continue the work of the Tribunals' as the Security Council appears to have intended.

This may have been an intentional omission on the part of the Security Council. After all, the Residual Mechanism is a new and distinct judicial institution, and there is no doctrine of precedent in international law. Furthermore, had the Security Council wished to ensure that the Residual Mechanism follow the jurisprudence of the Tribunals, it could have explicitly provided the same in the Statute of the Residual Mechanism.

On the other hand, the Security Council may not have been particularly attentive to this issue. Instead, by endowing the Residual Mechanism with the jurisdiction originally exercised by the ICTY and ICTR, by incorporating elements from their respective Statutes and Rules of Procedure and Evidence into the Residual Mechanism's statutory framework, and by specifically ensuring that the Residual Mechanism's own Rules of Procedure and Evidence would be based on those of the ICTY and ICTR, the Security Council may have assumed that the Judges of the Residual Mechanism would consider themselves bound by the Tribunals' jurisprudence.

<sup>5</sup> Arts 23 and 24 Statute of the IRMCT; Arts 25 and 26 ICTY Statute; Arts 24 and 25 ICTR Statute. A party can submit a request for review of a decision of the Trial Chamber or Appeals Chamber when a new fact has been discovered that was not known to the parties at the time of the decision and that could have been a decisive factor in reaching the decision. See Rule 119 ICTY Rules of Procedure and Evidence (last amended 20 October 2011); Rule 120 ICTR Rules of Procedure and Evidence (last amended 1 October 2009).

<sup>6</sup> SC Res. 1966, 22 December 2010, para. 5, Art. 13 Statute of the IRMCT.

<sup>7</sup> See Arts 1(4), 6, 24 Statute of the IRMCT; Rules 77, 11*bis*, 119 and 120 ICTY Rules of Procedure and Evidence; Rules 77, 11*bis*, 120 and 121 ICTR Rules of Procedure and Evidence.

Although this assumption is not unreasonable, neither is it self-evident. Ultimately, it will fall to the Judges of the Residual Mechanism to decide what weight – be that binding authority, persuasive authority, or no weight at all – will be accorded to which of the Tribunals decisions. The decision of the Judges in this regard is an important one that has the potential to either bolster the legacy of the Tribunals’, or significantly undermine it through departures that may result in unfairness to accused persons whose cases are transferred to the jurisdiction of the Residual Mechanism, or which may otherwise call into question the integrity of the Tribunals’ proceedings. Furthermore, even if the Chambers of the Residual Mechanism concludes that it is generally bound by the jurisprudence of the Tribunals, it will undoubtedly be required to independently address the legality of the Security Council’s decision to establish the Residual Mechanism in the first place, as well as other objections concerning the fairness of transferring Tribunal proceedings to the Residual Mechanism.

In this article, I undertake a three-part analysis in favor of the Residual Mechanism’s adoption of ICTY and ICTR precedents.

First, I examine the Statute of the Residual Mechanism, comparing a sampling of its provisions with analogous provisions in the Statute and Rules of Procedure and Evidence of both Tribunals in order to demonstrate the implicit intention of the Security Council to ensure continuity between the work of the Tribunals and that of the Residual Mechanism.

Second, I address the Security Council’s lack of guidance in Resolution 1966 regarding the weight of ICTY and ICTR decisions within the context of the jurisprudence of the Residual Mechanism. In doing so, I examine possible reasons for this deficit and possible measures the Judges of the Residual Mechanism will take to address this issue. I then explain why, in order to truly ensure continuity between the Tribunals’ work and that of the Residual Mechanism, to guarantee the rights of accused persons whose cases are transferred to the Residual Mechanism, and to otherwise preserve the Tribunals rich substantive and procedural legacy, it is important that the Judges of the Residual Mechanism generally treat the decisions of the Tribunals’ Appeals Chamber as binding precedent in the jurisprudence of the Residual Mechanism.<sup>8</sup>

<sup>8</sup> While I talk about Tribunals, meaning both ICTY and ICTR, they are separate institutions with their own Statutes. However, they share a common Appeals Chamber and this has resulted in a consistency of substantive and procedural jurisprudence between the two Tribunals. That said, neither Tribunal considers itself bound by the

Finally, I consider the inevitable challenge to the legality of the Security Council's establishment of the Residual Mechanism as a Chapter VII measure, as well as possible fairness challenges that might be made by those persons whose proceedings will come before the Residual Mechanism and the potential impact of these challenges on the Tribunals' legacies.

In order to put this issue into context, before embarking upon an examination of the Statute of the Residual Mechanism as contained in Annex I of Resolution 1966, I will briefly describe the purpose behind the establishment of the Residual Mechanism through Resolution 1966. I will also describe the operative paragraphs of the Resolution and the Transitional Arrangements found in Annex II of the Resolution, which address, among other things, the end dates of the Tribunals, the period of operation of the Residual Mechanism, the respective competencies of each institution and the handover of responsibilities between them.

The Residual Mechanism, like the Tribunals,<sup>9</sup> was established by the Security Council in Resolution 1966 pursuant to Chapter VII of the United Nations Charter.<sup>10</sup> Following the failure of the Tribunals to meet their indicated Completion Strategy dates of 2008 (for the end of all trials), and 2010 (for the end of all work), Resolution 1966 constituted a political decision by the Security Council to close the Tribunals, while at the same time continuing their necessary functions through an alternative mechanism.<sup>11</sup> While at least one of the five permanent members of the

jurisprudence of the Appeals Chamber of the other. That jurisprudence is of persuasive value only. See *infra* note 95.

<sup>9</sup> SC Res. 827, 25 May 1993; SC Res. 955, 8 November 1994.

<sup>10</sup> SC Res. 1966, 22 December 2010.

<sup>11</sup> The Tribunals were established as *ad hoc* and temporary measures and their completion strategies were designed to meet concerns regarding the efficiency and length of the Tribunals proceedings. For the history of the matter see: GA Res. 53/212, 10 February 1999; GA Res. 53/213, 10 February 1999; SC Res. 1329, 30 November 2000; Advisory Committee on Administrative & Budgetary Questions [ACABQ], ICTY – Revised budget estimates for 1998 and proposed requirements for 1999 of the International Tribunal for the Former Yugoslavia, UN Doc. A/53/651, 9 November 1998, paras 65-67; ACABQ, International Criminal Tribunal for Rwanda (ICTR) – Revised estimates for 1998 and estimates for 1999, UN Doc. A/53/659, 11 November 1998, paras 84-86; GA Res. 53/212, 10 February 1999, para. 5; GA, Financing of the ICTY and the ICTR, UN Doc. A/54/634, 22 November 1999; GA-SC, Report of the ICTY, UN Doc. A/55/382-S/2000/865, 14 September 2000; SC Res. 1329, 5 December 2000; Report of the Secretary-General pursuant to paragraph 6 of Security Council resolution 1329 (2000), UN Doc S/2001/154, 21 February 2001; SC,

Security Council advocated for the complete closure of the Tribunals, i.e. the end of the work of the Tribunals, by the end of 2010, it was accepted by other members of the Security Council that this would not be possible.<sup>12</sup> A number of residual functions would necessarily continue for an undefined period following the Tribunals' closure, including the trial of fugitives, protection of victims and witnesses, review of judgments and pardon and commutation of sentence.<sup>13</sup>

### I. Resolution 1966 – Operative Paragraphs

The operative paragraphs of Resolution 1966 provide that the purpose of the Residual Mechanism is to continue the jurisdiction, rights, obligations, and essential functions of the Tribunals,<sup>14</sup> and imposes upon all States an obligation to cooperate fully with the Residual Mechanism.<sup>15</sup>

Regarding the timeline of the Residual Mechanism, Resolution 1966 provides that the ICTR branch of the Residual Mechanism will commence functioning on 1 July 2012 and the ICTY branch on 1 July 2013.<sup>16</sup> Additionally, the Tribunals are requested to take “all possible measures to expeditiously complete all their remaining work” by 31 December 2014.<sup>17</sup> Consequently, for a period of time, the Tribunals and the Residual Mechanism will operate side by side, and the Tribunals will complete those proceedings of which they are already seized while the Residual Mechanism will take on all new matters which may arise.

Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, S/2002/678, 19 June 2002; SC, Statement by the President of the Security Council, S/PRST/2002/21, 23 July 2002; SC Res. 1503, 28 August 2003; SC Res. 1534, 26 March 2004.

<sup>12</sup> SC Res. 1966, 22 December 2010, was adopted 14-0-1 (Russian Federation); the Russian Federation explained their abstention by stating that the Tribunals had had sufficient time to complete their work: Statement of the Representative of the Russian Federation during the adoption of SC Res. 1966, UN Doc. S/PV.6463, 22 December 2010, 3.

<sup>13</sup> These functions were described in the Report of the Secretary-General, *supra* note 1. This Report was devised by the Secretary-General in response to the Security Council's request for decision-making guidance on key areas regarding the creation of an ad hoc mechanism(s) to perform certain essential functions of the Tribunals after their closure, and contains a number of recommendations in that regard.

<sup>14</sup> SC Res. 1966, 22 December 2010, para. 4.

<sup>15</sup> *Id.*, paras 8-10.

<sup>16</sup> *Id.*, para. 1.

<sup>17</sup> *Id.*, para. 3.

The Resolution provides that the Mechanism will operate for an initial period of four years from its commencement date, with a review of its progress by the Security Council prior to the end of that initial period and every two years thereafter. The Resolution states that “the Mechanism shall continue to operate for subsequent periods of two years following each such review, unless the Security Council decides otherwise”<sup>18</sup>.

Finally, the Resolution conveys the Security Council’s “intention to decide upon the modalities for the exercise of any remaining residual functions of the Residual Mechanism upon the completion of its operation” and “to remain seized of the matter”<sup>19</sup>.

## II. Resolution 1966 – Annex II – Transitional Arrangements

Resolution 1966 provides that its provisions, including the Statute of the Residual Mechanism, as well as the Statutes of the ICTY and ICTR, are subject to the Transitional Arrangements.<sup>20</sup> The purpose of the Transitional Arrangements is to ensure a smooth transfer of functions from the Tribunals to the Residual Mechanism.<sup>21</sup>

The Transitional Arrangements provide that at the commencement of the Mechanism, the ICTY and ICTR shall have the competence to complete all trial or referral proceedings pending before them.<sup>22</sup> Further, “if any fugitive is arrested more than 12 months, or if a retrial is ordered by the Appeals Chamber more than 6 months prior to the start of the Mechanism”, the ICTY and ICTR shall have the competence to conduct and complete that trial or to refer it to a national jurisdiction as appropriate.<sup>23</sup> If a fugitive is arrested 12 months or less, or a retrial ordered 6 months or less prior to the commencement of the Mechanism, the ICTY and ICTR shall only have the competence to “prepare the trial of such person, or to refer the case” to a national jurisdiction if appropriate. As of the commencement date of the Mechanism, competence over the case will transfer to the Mechanism, including the trial or referral of the case if appropriate.<sup>24</sup> If a fugitive is captured, or a retrial is ordered on or after the commencement of the

<sup>18</sup> *Id.*, para. 17.

<sup>19</sup> *Id.*, paras 18-19.

<sup>20</sup> *Id.*, para. 2.

<sup>21</sup> *Id.*, para. 3.

<sup>22</sup> *Id.*, Annex Two, Art. 1(1) Transitional Arrangements [Transitional Arrangements].

<sup>23</sup> Art. 1(2) Transitional Arrangements.

<sup>24</sup> Art. 1(3) Transitional Arrangements.

Mechanism, then only the Mechanism has the competence to conduct the proceeding.<sup>25</sup>

The ICTY branch of the Residual Mechanism will not conduct any trials in relation to persons indicted for substantive crimes because all ICTY fugitives have now been arrested. The only possible application of these provisions to the ICTY will be in the case of an order for re-trial by the Appeals Chamber. The likelihood of the Appeals Chamber rendering such an order is not beyond the realm of possibilities, as demonstrated by its judgment in the *Prosecutor v. Haradinaj et al.* case.<sup>26</sup> In contrast, there are nine remaining ICTR fugitives, and therefore a real possibility that the Residual Mechanism will conduct a trial for substantive crimes.<sup>27</sup> Prior to determining the appropriateness of doing so, pursuant to Article 6 of the Residual Mechanism's Statute, the Residual Mechanism will have to consider whether the case could be transferred to a national jurisdiction for trial.<sup>28</sup>

The Transitional Arrangements provide that the Tribunals shall have competence to conduct all appeals that have commenced before them with the filing of the notice of appeal, and that all other appeals will be dealt with by the Residual Mechanism.<sup>29</sup> Thus, the Residual Mechanism will have jurisdiction over all appeals of ICTY judgments or sentences that commence on or after 1 July 2013 and all appeals of ICTR judgments or sentences that commence on or after 1 July 2012. As can be ascertained from the current ICTY trial schedule contained in the most recent report by the ICTY President to the Security Council, the Residual Mechanism may take on some of the appellate work of the ICTY, at least in respect of appeals in the *Karadzic, Mladic* and *Hadzic* cases.<sup>30</sup> For the ICTR, there is the possibility

<sup>25</sup> Art. 1(4) Transitional Arrangements.

<sup>26</sup> *Prosecutor v. Haradinaj et al.*, Judgment, IT-04-84-A, 19 July 2010; See also ICTR case *Prosecutor v. Tharcisse Muvunyi*, Judgment, ICTR-2000-55A-A, 29 August 2008, where a partial retrial was ordered by the Appeals Chamber.

<sup>27</sup> SC, Letter dated 12 May 2011 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, Annex III, UN Doc. S/2011/317, 18 May 2011; Bernard Munyagishari was arrested in 25 May 2011, see Statement by Justice H. B. Jallow, Prosecutor of the ICTR to the United Nations Security Council, 6 June 2011.

<sup>28</sup> Art. 1 Transitional Arrangements; Art. 6 Statute of the IRMCT.

<sup>29</sup> Arts 2(1), 2(2) Transitional Arrangements.

<sup>30</sup> GA-SC, Eighteenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law

of appeals in the cases of the nine outstanding fugitives if those cases are unsuccessfully referred to national jurisdictions.<sup>31</sup>

Similar provisions govern review proceedings and contempt or false testimony proceedings. The ICTY and ICTR will complete those for which the request for review is filed or indictment confirmed prior to the commencement date of the respective branch of the Residual Mechanism, and the Residual Mechanism will take on any requests for review filed or indictments confirmed on or after those dates.<sup>32</sup> However, again, the Residual Mechanism will proceed to prosecute persons for contempt or false testimony only following consideration of referral of the case to a national jurisdiction.<sup>33</sup>

There are several other provisions within the Transitional Arrangements. With respect to the protection of victims and witnesses, the ICTY and ICTR will provide protection and related judicial or prosecutorial functions in relation to all victims and witnesses connected to proceedings in respect of which the ICTY or ICTR has competence. The Residual Mechanism will do likewise in relation to all proceedings for which it has competence.<sup>34</sup> A provision in the Transitional Arrangements also allows the President, Judges, Prosecutor and Registrar of the Residual Mechanism to simultaneously hold the same office in the ICTY or ICTR, and for the staff

Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/66/210-S/2011/473, 31 July 2011.

<sup>31</sup> SC, Letter dated 12 May 2011 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, UN Doc. S/2011/317, 18 May 2011, Annex I.C, I.D and II. There are seven trial proceedings at various stages, six of which are anticipated to be completed in the first quarter of 2012. Provided the notices of appeal are filed prior to 1 July 2012 the appeals will be heard by the ICTR Appeals Chamber. However, as mentioned above, if any or all of the notices of appeal are filed after 1 July 2012, the Appeals will go to the Residual Mechanism. One case, that of Nyamata Uwinkindi, is subject of a request for referral to Rwanda and is currently pending before the Appeals Chamber. Following submission of this paper for publication, on 16 December 2011, the Appeals Chamber rendered its decision upholding the referral of the ICTR Referral Bench.

<sup>32</sup> Arts 3(1)-(2), 4(1)-(2) Transitional Arrangements.

<sup>33</sup> Art. 1 Transitional Arrangements; Art. 1(4) Statute of the IRMCT. Before proceeding to try such persons, the Mechanism shall consider referring the case to the authorities of a State in accordance with Article 6 of the present Statute, taking into account the interests of justice and expediency. See Art. 6 Statute of the IRMCT.

<sup>34</sup> Art. 5 Transitional Arrangements.

members of the Mechanism to also be staff members of the ICTY or ICTR.<sup>35</sup>

Ultimately, the Transitional Arrangements are meant to provide a seamless transfer of Tribunal functions to the Residual Mechanism. While the Transitional Arrangements provide a framework for transferring the responsibilities of the Tribunals to this new Mechanism, the success and ease of this transfer of functions will be aided in large part by the similarities between the Statute of the Tribunals and the Statute of the Residual Mechanism.

## B. Continuity through the Imprinting of Key ICTY and ICTR Features on the Residual Mechanism

### I. Statute of the Residual Mechanism

An examination of the Residual Mechanism's Statute reveals numerous and substantial similarities between its provisions and those of the respective Statutes of the ICTY and ICTR. In so structuring the Mechanism's statutory framework, the Security Council has not simply reinvented the wheel, but instead appears to have endeavored to ensure continuity between the work of the Tribunals and the Residual Mechanism.<sup>36</sup> Such provisions include those relating to the Mechanism's jurisdiction; its structure and organization; fair trial rights, including the right to appeal and review; and other provisions which largely mirror analogous provisions in the Statute and Rules of the Tribunals. Any minor differences between analogous provisions appear to reflect the reduced workload of the Residual Mechanism or efforts to ensure procedural efficiency.<sup>37</sup> Furthermore, the Security Council has elevated certain Rules adopted by the Judges of the Tribunals, pursuant to Article 15 of the ICTY Statute and Article 14 of the ICTR Statute, to the status of mandatory statutory provisions of the Residual Mechanism.<sup>38</sup> Additionally, there is a provision to ensure that the Mechanism's Rules of Procedure and Evidence

<sup>35</sup> Art. 7 Transitional Arrangements.

<sup>36</sup> The Report of the Secretary General, *supra* note 1, noted that there had been some indication from members of the working group on the tribunals that the statutes of the residual mechanism(s) should be based on amended ICTY and ICTR Statutes: see para. 7.

<sup>37</sup> See i.e. Arts 1(4), 4, 8, 12, 14(5), 15(4) and 18 Statute of the IRMCT.

<sup>38</sup> See Arts 1(4), 6, 24 Statute of the IRMCT.

will be based on the Rules of Procedure and Evidence of the Tribunals.<sup>39</sup> Thus, part of the means by which the respective legacies of the Tribunals' may be preserved after their closure is through their recreation in the Residual Mechanism.

## 1. Jurisdiction

The Security Council's intention to create a crucial nexus of continuity between the Tribunals' and the Residual Mechanism is evident in Article 1 of the Mechanism's Statute, which like paragraph 4 of Resolution 1966, governs the Mechanism's jurisdiction. Article 1 provides that:

1. The Mechanism shall continue the material, territorial, temporal and personal jurisdiction of the ICTY and ICTR as set out in Articles 1 to 8 of the ICTY Statute and Articles 1 to 7 of the ICTR Statute, as well as the rights and obligations of the ICTY and the ICTR, subject to the provisions of the present Statute.<sup>40</sup>

2. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or ICTR who are among the most senior leaders suspected of being most responsible for the crimes covered in paragraph 1 of this Article, considering the gravity of the crimes charged and the level of responsibility of the accused.

3. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or the ICTR who are not among the most senior leaders covered by paragraph 2 of this Article, provided that the

<sup>39</sup> Art. 13 Statute of the IRMCT; SC-Res. 1966, 22 December 2010, para. 5.

<sup>40</sup> Arts 1-8 ICTY Statute; Arts 1-7 ICTR Statute. Pursuant to Arts 1-8 of its Statute the ICTY has jurisdiction over individuals allegedly responsible for grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity committed in the territory of the former Yugoslavia since 1991; pursuant to Arts 1 to 7 of its Statute the ICTR has jurisdiction over individuals allegedly responsible for genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and Additional Protocol II committed on the territory of Rwanda, "including its land surface and airspace as well as to the territory of neighbouring States" in respect of Rwandan citizens from 1 January 1994 to 31 December 1994.

Mechanism may only, in accordance with the provisions of the present Statute, proceed to try such persons itself after it has exhausted all reasonable efforts to refer the case as provided in Article 6 of the present Statute.

Article 1(1) clearly provides that the two branches of the Residual Mechanism do not possess a wholly redefined jurisdiction from that of the Tribunals – rather each branch is designed to simply continue the jurisdiction of its respective parent Tribunal.<sup>41</sup> This jurisdictional continuity between the Tribunals and the Residual Mechanism was considered to be of critical importance to the legacy of both Tribunals.<sup>42</sup>

Article 1(2)'s restriction of the Mechanism's jurisdiction to the prosecution of only "the most senior leaders" is derived from Rule 11*bis* of the ICTY Tribunal's Rules of Procedure and Evidence. Furthermore, the applicable standard stated therein for assessing whether cases fall into this category, through reference to the "gravity of the crimes charged and the level of responsibility of the accused", is likewise borrowed from Rule 11*bis* of the ICTY Tribunal's Rules of Procedure and Evidence.<sup>43</sup>

In a similar vein, the regime governing the referral of cases to national jurisdictions, as noted in Article 1(3) and detailed under Article 6 of the Mechanism's Statute, essentially mirrors Rule 11*bis* of the Tribunals Rules of Procedure and Evidence, albeit with minor variations. The main difference between both provisions specifically lies in the fact that whereas Article 6 imposes a mandatory obligation upon the Mechanism's Judges to pursue referral by providing that "[t]he Mechanism [...] shall undertake

<sup>41</sup> See B. Garner & H. Black, *Blacks Law Dictionary*, 9th ed. (2009), 868: "continuing jurisdiction" means "A court's power to retain jurisdiction over a matter after entering a judgment, allowing the court to modify its previous rulings or orders".

<sup>42</sup> In this regard, the Secretary-General noted in his Report, *supra* note 1, the agreement among members of the Security Council Informal Working Group on International Tribunals that "in relation to the trial of fugitives [...] the closure of the Tribunals should not result in impunity" (para. 74). SC-Res. 1966, 22 December 2010, further reaffirms the Security Council's "determination to combat impunity for those responsible for serious violations of international humanitarian law and the necessity that all persons indicted by the ICTY and ICTR are brought to justice" (preamble).

<sup>43</sup> See Rule 11*bis*(C) ICTY Rules of Evidence and Procedure. "In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused" (internal footnotes removed); Rule 11*bis* ICTR Rules of Evidence and Procedure does not have a comparable provision.

every effort” to refer all cases not involving the most senior leaders to national jurisdictions, Rule 11*bis* creates a discretionary referral mechanism by providing that the President “may appoint a bench” to determine whether such a case should be referred to the relevant national jurisdiction. Furthermore, whereas Article 6 mandates the monitoring of all cases referred to the Mechanism, Rule 11*bis* relegates the question of monitoring Tribunal-referred cases to the preserve of discretion by providing that the Prosecution “may send observers to monitor the proceedings”<sup>44</sup>.

It is also noteworthy that the Tribunals’ referral regime stems from a rule adopted by the Judges pursuant to Article 15 of the ICTY Statute and Article 14 of the ICTR Statute, which respectively instruct the Tribunals’ Judges to adopt rules of procedure and evidence “for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters”<sup>45</sup>. In transposing this power of referral to the Residual Mechanism, the Security Council has elevated a rule adopted by the Tribunals’ Judges in their discretion to the status of a mandatory statutory provision within the Residual Mechanism’s construct, reflecting an attempt by the Security Council to preserve the methods and procedures of the Tribunals. Further, this decision to impose a mandatory obligation on the Residual Mechanism to refer cases when feasible reflects the Security Council’s vision that

<sup>44</sup> See Art. 6(5) Statute of the IRMCT, Rule 11*bis*(iv) ICTY Rules of Procedure and Evidence; Rule 11*bis*(iv) ICTR Rules of Procedure and Evidence. There are two additional variations. First, pursuant to Rule 11*bis* of the Tribunals’ Rules, the Prosecutor is responsible for monitoring cases referred to national jurisdiction, and does so in cooperation with a regional organization (OSCE), (Rules 11*bis*(iv) ICTY and ICTR Rules of Procedure and Evidence) whereas under Art. 6(5) Statute of the IRMCT, this responsibility falls to the Trial Chamber. Secondly, pursuant to Rule 11*bis* ICTY Rules of Procedure and Evidence, a request to revoke an order of referral is made by the Prosecutor, with the State authorities provided the opportunity to be heard before the Referral Bench renders its decision on the request, (Rules 11*bis* (F) ICTY and ICTR Rules of Procedure and Evidence) whereas under Art. 6(6) Statute of the IRMCT, the Trial Chamber of the Residual Mechanism may revoke an order of referral, either at the request of the Prosecutor or *proprio motu*, “where it is clear that the conditions for referral of the case are no longer met”.

<sup>45</sup> The Statutory authority for this Rule in the Tribunals Rules of Procedure and Evidence is found in SC Res. 1503, 28 August 2003, and SC Res. 1534, 26 March 2004, which sanctioned the Completion Strategies of the Tribunals a vital element of which is the transfer of intermediate and lower rank accused to competent national jurisdictions.

referrals should play a central role in the functioning of the Residual Mechanism to ensure that the Mechanism's work is as limited as possible.

Article 1(4) of the Statute of the Residual Mechanism sets out the power of the Residual Mechanism to prosecute for contempt and the giving of false testimony, providing that:

“4. The Mechanism shall have the power to prosecute, in accordance with the present Statute,  
(a) any person who knowingly and wilfully interferes or has interfered with the administration of justice by the Mechanism or the Tribunals, and to hold such person in contempt; or  
(b) a witness who knowingly and wilfully gives or has given false testimony before the Mechanism or the Tribunals.  
Before proceeding to try such persons, the Mechanism shall consider referring the case to the authorities of a State in accordance with Article 6 of the present Statute, taking into account the interests of justice and expediency”.

The transfer of jurisdiction to try persons for interfering with the administration of justice or giving false testimony before the Tribunals' and not only before the Residual Mechanism is critical for ensuring that the Residual Mechanism protects the integrity of the Tribunals' proceedings, and by consequence, their legacies.

The provisions of Article 1(4) replicate those governing the Tribunals' prosecution of these offences, as set out in their respective Rules of Procedure and Evidence.<sup>46</sup> Where they differ is in the instruction that the Residual Mechanism should consider referring such cases to a national jurisdiction prior to hearing the matter for itself. This is not a possibility that has been considered by the Tribunals. Nor would it be appropriate for them to do so. The basis of the Tribunals' exercise of jurisdiction over these offences, not laid out in their Statutes, is the inherent right of a court to protect the integrity of its own proceedings.<sup>47</sup> That right does not necessarily

<sup>46</sup> Rules 77 and 91 ICTY Rules of Procedure and Evidence, Rules 77 and 91 ICTR Rules of Procedure and Evidence; See e.g., *Prosecutor v. Tadic*, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujjn, IT-94-1-A-R77, 31 January 2000, paras 12-18, 26-28; *Prosecutor v. Seselj*, Judgment, IT-03-67-R77.2-A, 19 May 2010, para. 17.

<sup>47</sup> See, for example, *Prosecutor v. Tadic*, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujjn, IT-94-1-A-R77, 31 January 2000, paras 12-18, 26-28.

extend to an obligation of other jurisdictions to protect the integrity of Tribunal proceedings.<sup>48</sup>

Finally, Article 1(5) stipulates that: “(t)he Mechanism shall not have the power to issue any new indictments against persons other than those covered by this Article”<sup>49</sup>.

Thus under this Article, the Residual Mechanism only has competence to bring new indictments in relation to cases of contempt or false testimony as set out in Article 1(4). This, too, mirrors the jurisdictional situation of the Tribunals. In accordance with its Completion Strategy, which called for the closure of all investigations by 2004, the ICTY has not confirmed any new indictments since 2004 for crimes falling within Articles 1-8 of its Statute. Similarly, the last indictment of the ICTR for crimes falling within Articles 1-7 of its Statute was confirmed in 2005. Both Tribunals have, however, had cause to issue new indictments to prosecute cases of contempt and/or false testimony since that time.<sup>50</sup>

Additional provisions of the Statute of the Residual Mechanism concerning the exercise of jurisdiction also essentially mirror provisions of the Statutes of the Tribunals. For example, Article 5 states that the Residual Mechanism shall have concurrent jurisdiction with national courts but also primacy over those courts, mirroring Article 9 of the ICTY Statute and Article 8 of the ICTR Statute.<sup>51</sup> The difference is that the Residual Mechanism is only authorized to request national courts to defer to it cases of persons falling under Article 1(2) of its Statute, i.e., those “who are among the most senior leaders”, a limitation that is not present in the ICTY and ICTR Statutes.<sup>52</sup> Article 7 of the Residual Mechanism, entitled *Non bis in Idem*, provides that no person shall be tried before a national court for acts for which they have already been tried before the Tribunals, and is

<sup>48</sup> Art. 29 Statute of the ICTY and Art. 28 Statute of the ICTR impose an obligation on States to cooperate with the Tribunals “in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law” only. Art. 28(1) Statute of the IRMCT imposes an obligation on States to cooperate with the Residual Mechanism “in the investigation and prosecution of persons covered by Article 1 of this Statute” thus including contempt and false testimony proceedings.

<sup>49</sup> Art. 1(5) Statute of the IRMCT.

<sup>50</sup> See e.g. *Prosecutor v. Seselj*, Judgment, IT-03-67-R77.2-A, 19 May 2010; *Prosecutor v. Kabashi*, Judgment, IT-04-84-R77.1, 16 September 2011; *Prosecutor v. Tabakovic*, Sentencing Judgment, IT-98-32/1-R77.1, 18 March 2010; *Prosecutor v. GAA*, Judgment and Sentence, ICTR-07-90-R77-I, 4 December 2007.

<sup>51</sup> Art. 5(1) Statute of the IRMCT.

<sup>52</sup> Art. 5(2) Statute of the IRMCT.

analogous to Article 10 of the ICTY Statute and Article 9 of the ICTR Statute, with the variation that its prohibition also applies with respect to persons tried by the Residual Mechanism.

## 2. Structure and Organization

The structure and organization of the Residual Mechanism is likewise indicative of the apparent aim of the Security Council to ensure continuity between the work of the Tribunals and the Mechanism. The Statute of the Residual Mechanism creates one institution with two branches, one for the ICTY and one for the ICTR.<sup>53</sup> The ICTY branch will be seated in The Hague and the ICTR branch in Arusha.<sup>54</sup> In relation to the structure of the Chambers, each branch of the Residual Mechanism has a Trial Chamber, and the two branches share a common Appeals Chamber.<sup>55</sup> This organization of separate trial capacity and a shared Appeals Chamber mirrors the existing relationship between the ICTY and the ICTR, with each having separate Trial Chambers but sharing a common Appeals Chamber.<sup>56</sup> The structure of the Residual Mechanism does reduce the number of Trial Chambers: whereas the Tribunals have three Trial Chambers each, the Residual Mechanism will have one for each branch.<sup>57</sup> However, the organizational arrangements of the Chambers are fundamentally the same as those that currently exist under the Statutes of the Tribunals.

Furthermore, the Statute of the Residual Mechanism provides for a Prosecution and a Registry in addition to the Chambers, thus mirroring the

<sup>53</sup> Art. 3 Statute of the IRMCT.

<sup>54</sup> Art. 3 Statute of the IRMCT: "The branch for the ICTY shall have its seat in The Hague. The branch for the ICTR shall have its seat in Arusha". This mandatory provision in the Statute is qualified by a provision in the SC Res. 1966, 22 December 2010, para. 7, that "the determination of the seats of the branches of the Mechanism is subject to the conclusion of appropriate arrangements between the United Nations and the host countries of the branches of the Mechanism acceptable to the Security Council".

<sup>55</sup> Art. 4 Statute of the IRMCT. At the Tribunals the shared Appeals Chamber sits as the ICTR Appeals Chamber to hear ICTR Appeals and sits as the ICTY Appeals Chamber to hear ICTY Appeals. The Residual Mechanism is conceived as one mechanism which is made up of two distinct branches and thus it is anticipated that the common Appeals Chamber will conceive itself as the ICTR or ICTY Appeals Chamber depending upon which Tribunals jurisdiction it is exercising.

<sup>56</sup> Art. 11 ICTR Statute; Art. 12 ICTY Statute. The ICTY and ICTR share a common Appeals Chamber: Art. 13(4) ICTR Statute; Art. 14(4) ICTY Statute.

<sup>57</sup> Art. 4 Statute of the IRMCT; Art. 12(2) ICTY Statute; Art. 11(2) ICTR Statute.

three organs of the Tribunals.<sup>58</sup> However, it departs from the organization of the Tribunals by providing for a common Prosecutor and Registrar for both branches of the Mechanism.<sup>59</sup> Yet, even this distinction is not entirely foreign to the Tribunals – although the ICTY and ICTR have always had separate Registrars, the Prosecutor was originally common to both institutions. It was not until Security Council Resolution 1503 (2003), in the interests of the Completion Strategies of both institutions, that a separate Prosecutor was created for the ICTR.<sup>60</sup> The Residual Mechanism's single Prosecutor and Registrar provide the bridge between the two branches of the Residual Mechanism. The Statute also provides for a common President of the Mechanism, who will exercise his or her functions at each seat of the Mechanism as necessary, unlike the Tribunals, which each have a President.<sup>61</sup> However, mirroring the Statute of the ICTY, the President of the Residual Mechanism also acts as the Presiding Judge of its Appeals Chamber.<sup>62</sup> Ultimately, this combination of functions in the Residual Mechanism is aimed at ensuring the efficiency of the Residual Mechanism and represents its anticipated reduced workload as compared to the Tribunals.

### 3. Fair Trial Rights, Including Rights to Appeal and Review

All the fair trial rights accorded to accused persons under the Statutes of the Tribunals are provided for in the Statute of the Residual Mechanism. Article 18 of the Mechanism's Statute regarding the commencement and conduct of trial proceedings, mirrors Article 20 of the ICTY Statute and Article 19 of the ICTR Statute. These provisions set out the rights of an accused to a fair and expeditious trial, conducted in accordance with the Rules of Procedure and Evidence and with "full respect for the rights of the accused and due regard for the protection of victims and witnesses". The only difference between the provisions is that trials before the Residual Mechanism, for cases falling under Article 1(4) of its Statute, which addresses contempt and false testimony, are dealt with by a single Judge

<sup>58</sup> Art. 4 Statute of the IRMCT; Art. 11 ICTY Statute; Art. 10 ICTR Statute.

<sup>59</sup> Art. 4(b) and (c) Statute of the IRMCT.

<sup>60</sup> SC Res. 1503, 28 August 2003.

<sup>61</sup> Art. 11(2) Statute of the IRMCT: The President "shall be present at either seat of the branches of the Mechanism as necessary to exercise his or her functions". Cf. Art. 14 ICTY Statute; Art. 13 ICTR Statute.

<sup>62</sup> Art. 12(3) Statute of the IRMCT, Art. 14(2) Statute of the ICTY.

whereas such trials before the Tribunal are dealt with by a Trial Chamber consisting of three Judges.<sup>63</sup>

The fair trial rights guaranteed to accused persons under Article 21 of the ICTY's Statute and Article 20 of the ICTR's Statute are repeated verbatim in Article 19 of the Statute of the Residual Mechanism.<sup>64</sup>

With respect to the right of appeal, Article 23 of the Residual Mechanism's Statute mirrors Article 25 of the ICTY Statute and Article 24 of the ICTR Statute, by identifying the two grounds on which appeals shall be heard by the Appeals Chamber, specifically:

- an error or question of law invalidating the decision;
- or an error of fact which has occasioned a miscarriage of justice.

Article 23 of the Statute of the Residual Mechanism, like Article 25 and Article 24 of the ICTY and ICTR Statutes, also sets forth the power of the Appeals Chamber "to affirm, reverse or revise the decisions" of the Trial Chamber. The only difference is that Article 23 of the Mechanism's Statute also applies this power to decisions taken by a Single Judge before the Residual Mechanism.<sup>65</sup>

Article 24 of the Residual Mechanism Statute, which governs review proceedings, essentially mirrors Article 26 of the ICTY Statute and Article 25 of the ICTR Statute in providing that:

"Where a new fact has been discovered which was not known at the time of the proceedings before the Single Judge, Trial Chamber or the Appeals Chamber of the ICTY, the ICTR or the Mechanism and which could have been a decisive factor in reaching the decision, the convicted person may submit to the Mechanism an application for review of the judgement".

However, Article 24 adds two further provisions that are not found in the Statute of the Tribunals, but are rather derived from the Tribunals'

<sup>63</sup> Art. 12(1) Statute of the IRMCT.

<sup>64</sup> These rights, which are derived from Art. 14 of the International Covenant on Civil and Political Rights, are considered to have the status of customary law. See *Prosecutor v. Aleksovski*, Judgment, IT-95-14/1-A, 24 March 2000, para. 104.

<sup>65</sup> Art. 23(2) Statute of the IRMCT.

Rules.<sup>66</sup> The first places a one year limit from the day of the final judgment on the right of the Prosecution to bring an application for review, and the second provides that:

“The Chamber shall only review the judgement if after a preliminary examination a majority of judges of the Chamber agree that the new fact, if proved, could have been a decisive factor in reaching a decision.”<sup>67</sup>

The power of review has been much maligned at the Tribunals because the threshold that must be satisfied for a Chamber to review a judgment is considered so high that it renders the right of review a nullity.<sup>68</sup> The Security Council’s decision to elevate the Tribunals’ approach to this subject, as reflected in its Rules, to a statutory provision in the Statute of the Residual Mechanism, reflects its intention to ensure that the Residual Mechanism’s review proceedings mirror those of the Tribunals.<sup>69</sup>

#### 4. Co-Operation and Judicial Assistance

Article 28(3) of the Residual Mechanism Statute provides yet another example of the codification of ICTY and ICTR practice. Article 28(3) places a reciprocal obligation on the Residual Mechanism to cooperate with national authorities “in relation to the investigation, prosecution and trial of those responsible for serious violations of international humanitarian law in the countries of the former Yugoslavia and Rwanda”. While the Tribunals’ Statutes contain no such provision, it has long been the practice of the ICTY and the ICTR Offices of the Prosecutor to respond to requests from national jurisdictions for assistance.<sup>70</sup> Indeed, prior to amendments to the ICTY’s

<sup>66</sup> Rules 119(A), 120 ICTY Rules of Procedure and Evidence; Rules 120(A), 121 ICTR Rules of Procedure and Evidence.

<sup>67</sup> Art. 24 Statute of the IRMCT; cf. Rule 120 ICTY Rules of Procedure and Evidence; Rule 121 ICTR Rules of Procedure and Evidence.

<sup>68</sup> See J. Galbraith, ‘New Facts’ in ICTY and ICTR Review Proceedings’, 21 *Leiden Journal of International Law* (2008) 1, 131, 146-147. Only one application for review has succeeded in passing the admissibility hurdle in the history of the Tribunals, see *Prosecutor v. Slijivancanin*, Review Judgment, IT-95-13/1.R.1, 8 December 2010.

<sup>69</sup> Report of the Secretary-General, *supra* note 1, para. 80; Rule 119 ICTY Rules of Procedure and Evidence; Rule 120 ICTR Rules of Procedure and Evidence.

<sup>70</sup> See e.g. Report on the Completion Strategy of the International Criminal Tribunal for the Former Yugoslavia 2011, UN Doc. S/2011/316, paras 76-78; President of the

Rules of Procedure and Evidence [ICTY Rules], when material sought in such assistance requests was subject to protective measures ordered by Chambers, the Prosecutor would petition the Chambers for access on behalf of the relevant national authority.<sup>71</sup>

However, as part of its Completion Strategy, and in light of the remittance of its cases and related files to national jurisdictions pursuant to Rule 11*bis* of the ICTY's Rules, the ICTY Judges initiated amendments to the ICTY Rules, which provided national jurisdictions with an avenue to: (i) directly petition the Tribunal for access to confidential and protected material pursuant to Rule 75(H);<sup>72</sup> (ii) request assistance in obtaining testimony from persons in the custody of the Tribunal pursuant to Rule 75*bis*;<sup>73</sup> and (iii) request the transfer of persons for the purpose of giving evidence in other jurisdictions pursuant to Rule 75*ter*.<sup>74</sup> These Rules have no basis in the ICTY Statute. Nevertheless, they were enacted pursuant to the mandate conferred by the Security Council upon the ICTY, through resolutions 1503 (2003) and 1534 (2004), to assist national jurisdictions in capacity building.<sup>75</sup> By creating a reciprocal obligation on the Residual Mechanism to provide judicial assistance in criminal matters to States, the Residual Mechanism essentially mirrors typical bilateral or multilateral arrangements on judicial assistance between States.<sup>76</sup>

Article 28(3) further provides that the Mechanism should "where appropriate, provide [...] assistance in tracking fugitives whose cases have been referred to national jurisdictions by the ICTY, the ICTR or the Mechanism". This provision does not find a counterpart in the Statute or the Rules of the Tribunals. However, it does recognize that the Tribunals have developed a body of expertise in tracking fugitives that should be made available to national authorities, who have accepted cases referred under Article 6 of the Statute of the Residual Mechanism. It also reflects the

ICTR, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda 2011, UN Doc. S/2011/317, 18 May 2011, paras 52-53, 67-69.

<sup>71</sup> See e.g.: *Prosecutor v. Krstic*, Ex Parte Decision on Prosecution Application for Variation of Protective Measures, IT-98-33-A, 25 May 2006.

<sup>72</sup> Rule 75(H) ICTY Rules of Procedure and Evidence.

<sup>73</sup> Rule 75*bis* ICTY Rules of Procedure and Evidence.

<sup>74</sup> Rule 75*ter* ICTY Rules of Procedure and Evidence.

<sup>75</sup> SC Res. 1503, 28 August 2003, preamble, para. 1; SC Res. 1534, 26 March 2004, para. 9.

<sup>76</sup> D. Stroh, 'State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and Rwanda', 5 *Max Planck Yearbook of United Nations Law* (2001), 249, 270.

Security Council's determination to ensure that there is no impunity for persons indicted by the Tribunals, which is of critical importance to the legacy of the Tribunals.<sup>77</sup>

## 5. Transference of Various Tribunal Functions to the Residual Mechanism

Other provisions of the Residual Mechanism Statute, containing only slight variations from analogous provisions in the ICTY and ICTR Statutes, clearly illustrate that the Residual Mechanism is envisioned, in large part, as inheriting the role of the Tribunals. Article 17 of the Mechanism's Statute, which addresses review of the indictment, is essentially a reproduction of Article 19 of the ICTY Statute and Article 18 of the ICTR Statute. Similarly, Article 20 of the Mechanism's Statute, entitled *Protection of Victims and Witnesses*, mirrors Article 22 of the ICTY Statute and Article 21 of the ICTR Statute, the sole difference being that the Mechanism is instructed to provide, in its Rules of Procedure and Evidence, for the protection of ICTY and ICTR victims and witnesses as well as those of the Residual Mechanism.<sup>78</sup>

Likewise, Article 25 of the Mechanism's Statute, concerning the enforcement of sentences, replicates Articles 27 and 26 of the ICTY and ICTR Statutes, respectively. Article 25 of the Mechanism's Statute is distinctive only in two respects: first, it grants the Mechanism the power to supervise the enforcement of sentences pronounced by the Residual Mechanism in addition to those of the ICTY and ICTR, and secondly, it grants the Residual Mechanism the authority to supervise "the implementation of sentence enforcement agreements [...] and other agreements with international and regional organisations and other appropriate organisations and bodies"<sup>79</sup>. The regime of enforcement, however, remains the same as under the Statutes of the ICTY and the ICTR. Thus, prison sentences will be served in a State designated by the Residual

<sup>77</sup> See, e.g. President of the ICTR, Report on the completion strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2011/317, 18 May 2011, paras 49, 54, 57; President of the ICTR, Report on the completion strategy of the International Criminal Tribunal for Rwanda, S/2010/574, 1 November 2010, paras 49-53.

<sup>78</sup> Art. 20 Statute of the IRMCT.

<sup>79</sup> These additions codify the practice at the Tribunal. The Registrar negotiates enforcement of sentences with Member States and also agreements with monitoring bodies such as the International Committee of the Red Cross.

Mechanism from a list of States that have entered into sentence enforcement agreements with the Mechanism, and will be served in accordance with the national laws of the enforcing State “subject to the supervision of the Mechanism”<sup>80</sup>.

Also noteworthy is Article 26 of the Mechanism’s Statute, governing pardon or commutation of sentence, which substantially reproduces the provisions of Articles 28 and 27 of the Statutes of the ICTY and ICTR, respectively. In this instance, a minor two-fold distinction arises from the fact that: first under Article 26, States notify the Residual Mechanism rather than the ICTY or ICTR when a convicted person becomes eligible for pardon or commutation of sentence; and second, whereas under the Tribunal system, the President determines the matter in consultation with the Judges, under the framework of the Residual Mechanism, the President determines the matter alone.

## 6. Staffing Issues

The Statute of the Residual Mechanism also contains some departures from the Tribunals’ policy framework on staffing issues. These few points of divergence reflect a comparatively more minimalistic approach to staffing, aimed simply at increasing the Residual Mechanism’s overall efficiency.

Thus, of the Judges, only the President will be present full-time at the Residual Mechanism, and there will be a roster of Judges, who will only be called to the seat of the Mechanism by the President when there is work to be done. By contrast, at the Tribunals, these Judges are present full-time.<sup>81</sup> Similarly, the Offices of the Prosecutor and the Registrar will be manned only by a small number of staff full-time, while both Offices will maintain rosters of qualified staff who are on call should the workload of the Residual Mechanism require.<sup>82</sup>

Furthermore, proceedings for contempt and false testimony traditionally conducted by a Trial Chamber of three Judges at the ICTY and ICTR may be conducted by a Single Judge before the Residual

<sup>80</sup> See Art. 27 Statute of the ICTY; Art. 26 Statute of the ICTR.

<sup>81</sup> Arts 8, 12 Statute of the IRMCT. Arts 12, 13*bis* ICTY Statute; Arts 11, 12*bis* ICTR Statute.

<sup>82</sup> Arts 14(5), 15(4) Statute of the IRMCT; Art. 16(3) ICTY Statute; Art. 15(3) ICTR Statute.

Mechanism,<sup>83</sup> and an appeal from a Single Judge will be heard by a bench of three Appeal Judges in lieu of five, as is the case at the Tribunals.<sup>84</sup> This does not represent a reduction of functions as such, but rather, a reduction in the number of Judges required to discharge them, and simply represents the determination of the Security Council to ensure the efficiency of the Residual Mechanism.

## II. Rules of Procedure and Evidence

The Security Council's apparent underlying aim to secure the legacy of the Tribunals, by ensuring that the Residual Mechanism would employ the same *modus operandi* as the Tribunals, is further demonstrated by the Security Council's request in Resolution 1966 for the Secretary General to submit draft Rules of Procedure and Evidence for the Mechanism "based on the Tribunals' Rules of Procedure and Evidence subject to the provisions of this resolution and the Statute of the Mechanism"<sup>85</sup>. Further, Article 13(1) and (3) of the Statute of the Residual Mechanism also provides that the Mechanism's Judges shall adopt Rules of Procedure and Evidence, and that "[t]he Rules of Procedure and Evidence and any amendments thereto shall take effect upon adoption by the judges of the Mechanism unless the Security Council decides otherwise"<sup>86</sup>. Furthermore, Article 13(4) of the

<sup>83</sup> Art. 12(1) Statute of the IRMCT; Art. 12(2) Statute of the ICTY; Art. 11(2) Statute of the ICTY.

<sup>84</sup> Art. 12(3) Statute of the IRMCT. The ICTY and ICTR Appeals Chambers are composed of five members: Art. 12(3) ICTY Statute; Art. 11(3) ICTR Statute.

<sup>85</sup> SC Res. 1966, 22 December 2010, para. 5.

<sup>86</sup> Art. 13 Statute of the IRMCT. This provision is quite curious. On the one hand, it might be a way of the Security Council ensuring the Residual Mechanism adopts procedures akin to that of the Tribunals, and thus preventing a judicial revolution of the Rules of Procedure and Evidence; on the other hand, it may represent a mistrust by the Security Council of the Judges of the Residual Mechanism, and the Council wanting to maintain the right to veto amendments that Judges may make to the Rules that may impact the conduct of their proceedings, particularly any such amendments that may be perceived to lengthen proceedings. Neither of these potential motivating factors can be considered acceptable: it could not on any level be considered proper for the Security Council to interfere in any judicial proceeding before the Residual Mechanism, just as it would have been totally improper for the Council to attempt to interfere in any proceeding before the Tribunals. Hence this provision looms as something of a threat that one expects will never be utilized. That said, the fact that the Security Council considered it appropriate for reasons of political expediency to close the Tribunals suggests that in fact, direct interference in the Residual Mechanism's rules of procedure and evidence may be a possibility.

Statute of the Mechanism states that the Rules must be consistent with the Statute, a provision that is not found in the Statutes of the Tribunals. These provisions together strongly suggests the intent of the Security Council to ensure that the Mechanism's procedures will mirror those of the Tribunals, thereby promoting continuity between the work of the Tribunals and the Residual Mechanism. Thus, through the vehicle of the Residual Mechanism, the work of the Tribunals could be completed and the legacies of the Tribunals preserved.

### III. Conclusion

The preceding examination of the Residual Mechanism's Statute demonstrates that there is little substantive difference between the Tribunals' functions and those of the Residual Mechanism. Indeed, the modeling of the Mechanism around a blueprint virtually identical to that of its predecessor Tribunals reflects a clear intention, on the Security Council's part, to secure a nexus of continuity between the two institutional paradigms by imprinting numerous key Tribunal characteristics onto the Mechanism's construct. The mirroring of the Tribunals' Statutes in the Statute of the Residual Mechanism, the elevation of certain Tribunal Rules and practices to the strata of statutory provisions<sup>87</sup> in the Mechanism's constituent framework, and the Security Council's expressed direction that the Mechanism's Rules of Procedure and Evidence be structured upon those of both Tribunals, are all indicative of the Security Council's intention to secure continuity by deliberate design.

#### C. The Residual Mechanism and ICTY Precedents

Through the Residual Mechanism's Statute, the Security Council has created the conditions whereby persons subject to the Mechanism's jurisdiction could anticipate their proceedings being treated as though they were before the Tribunals. This factor of treating like cases alike is important to the preservation of the Tribunals' legacies. However, despite the Security Council's apparent objective of continuity, no guidance has been furnished with respect to the weight, if any, assignable by the Residual Mechanism to the procedural and substantive jurisprudence of the Tribunals. Continuity between the procedural and substantive jurisprudence

<sup>87</sup> Which has elevated Judges of the Tribunals to legislators of provisions of the Statute of the Residual Mechanism.

of the Tribunals and that of the Residual Mechanism is of course critical to the preservation of the Tribunals' substantive and procedural legacy. Of vital importance in this regard is the potential for departures made by the Residual Mechanism from the Tribunals' jurisprudence to negatively impact the rights of accused persons who either have already been tried before the Tribunals, or whose proceedings will be conducted by the Residual Mechanism.

### I. The Status of Precedent under International Law

In his report, the Secretary-General stated that provision would have to be made to ensure that the previous decisions of the Tribunals could not be called into question.<sup>88</sup> In considering how to address this issue, the Security Council may have considered that it faced a conundrum. How could it bind the Residual Mechanism to the previous decisions of the Tribunals when judicial decisions, even within the same court, are not considered binding under international law?

Judicial decisions are incapable of binding effect as precedents on any court, including the court of issuance, because they do not constitute a source of law in international law.<sup>89</sup> The sources of law in international law are those identified in Article 38(1) of the Statute of the International Court of Justice [ICJ Statute], which is considered to be customary law.<sup>90</sup>

<sup>88</sup> See the Report of the Secretary-General, *supra* note 1, para. 99. Upon the closure of the Tribunals, it will be crucial to remove any risk of challenge to the continuing validity of the Tribunals' official documents, including the indictments, judgments, decisions and orders. Likewise, if the Security Council decides to establish the residual mechanism(s) to carry out functions inherited from the Tribunals, there will be a need to remove any risk of challenges to the jurisdiction of the mechanism(s). For example, it will have to be absolutely clear that the mechanism(s) has (have) the jurisdiction to order the arrest of and try fugitives initially indicted by the Prosecutors of the Tribunals, to amend indictments in connection with cases initiated by the Tribunals and to implement or amend decisions that had been taken by the Tribunals (such as decisions varying protective measures).

<sup>89</sup> While this is the clear position in international law, as will be seen, the ICTY and the ICTR Tribunals have created internal doctrines of precedent.

<sup>90</sup> M. Shaw, *International Law*, 5th ed. (2003), 66-67.

Article 38(1) provides that:

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

The sources of law identified by Article 38(1) include treaties, custom, and general principles of law. The conventional wisdom is that in rendering judicial decisions, judges state what the law is as made by States and identified in Article 38(1). They do not make the law.<sup>91</sup> While it is true that international criminal courts in particular have substantially clarified and defined international customary law and relevant treaty provisions, the theory is that they have not thereby made the law. Rather, the law has some basis in the conduct of States either through treaty provision or customary international law which is derived from *opinio juris* and state practice.<sup>92</sup> As Judges are not legislators, judicial decisions, even of the same court, do not constitute a source of law.<sup>93</sup> Instead, they are, as stated in Article 38(1)(d) of

<sup>91</sup> See A. Cassese, *International Criminal Law*, 2nd ed. (2008), 13-27; A. Cassese, *International Criminal Law: Cases and Commentary* (2011), 5-27.

<sup>92</sup> This is a conservative view and many now accept that Judges of international courts are in fact lawmakers, see T. Buergenthal, ‘Lawmaking by the ICJ and Other International Courts’, 103 *American Society of International Law* (2009) 103, 403-406.

<sup>93</sup> See K. Oellers-Frahm, ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions’, 5 *Max Planck Yearbook of United Nations Law* (2001), 67, 72; G. Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’, 2 *Journal of International Dispute Settlement*

the ICJ Statute, a “subsidiary means for the determination of international rules of law”. In other words, they are evidence of the law and not the law as such.<sup>94</sup>

In light of the above, the Security Council may have considered that conferring the status of binding authority upon the Tribunals’ judicial decisions, *vis-à-vis* the Residual Mechanism, would have been contrary to the provisions of Article 38(1) of the ICJ Statute, which has status as customary international law, and would have given the impression that it had elevated the Judges of the Tribunals to legislators.<sup>95</sup>

(2011) 1, 5, 8-9; R. Cryer, ‘Of Custom, Treaties, Scholars and the Gavel: The Influence of International Criminal Tribunals on the ICRC Customary Law Study’, 11 *Journal of Conflict and Security Law* (2006) 2, 239, 245-247.

<sup>94</sup> See *Prosecutor v. Kupreskic et al.*, IT-95-16-T, Judgment, 14 January 2000, para. 540: “Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremburg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinion iuris sive necessitates* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts”.

<sup>95</sup> Further, it would have faced the practical difficulty that the ICTR and ICTY Tribunals do not treat each others decisions as binding authority but as persuasive only, although the common Appeals Chamber does ensure a level of consistency between the two courts that for all practical purposes Appeals Chambers decisions are binding upon them. See *Prosecutor v Kanyabashi*, Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997, para. 8: “The [ICTR] Trial Chamber respects the persuasive authority of the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia.” However, see also *Prosecutor v Nahimana et al.*, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal, Rule 98bis of the Rules of Procedure and Evidence, ICTR-99-52-T, 25 September 2002, para. 16, where the ICTR Trial Chamber held that it was bound

Another factor that militates against binding the Residual Mechanism to the Tribunals' previous decisions is the basic understanding that there is no hierarchy between international judicial bodies in international law.<sup>96</sup> International courts and tribunals are regarded as relational equals, and as such they are under no obligation to take account of either their own previous decisions or those of other judicial bodies, even if they relate to the same subject matter. Thus, it would have been contrary to the current understanding of the relationship between international courts and tribunals to bind the Residual Mechanism to the previous decisions of the Tribunals. It would also have created the situation of the Residual Mechanism being bound to the decisions of a body that would no longer be in existence. Furthermore, it may have appeared to be interference in judicial discretion for the Security Council to include a direction to the Judges of the Residual Mechanism concerning the consideration to be given to previous decisions of the Tribunals.<sup>97</sup>

## II. The ICTY's Position on Precedent

While the lack of precedent in international law, and the horizontal relationship between international courts, are basic principles in international law that may have given the Security Council reasonable cause for reflective pause, they should by no means have been considered as inexorably obstructive. This is because these are principles that have primarily evolved from the jurisdiction of courts dealing with inter-State disputes, where the operability of the courts' jurisdiction is contingent upon States' consent. This in turn is a very different environment from that out of which the Tribunals and the Residual Mechanism have sprung. The Tribunals and the Residual Mechanism are Chapter VII enforcement

by an interpretation of the ICTY Appeals Chamber "in its interpretation and application of the corresponding ICTR rule".

<sup>96</sup> *Prosecutor v. Kupreskic et al.*, Judgment, IT-95-16-T, 14 January 2000, para. 540: "the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. Indeed, this doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community".

<sup>97</sup> Art. 13 Statute of the IRMCT, which provides that "the Rules of Procedure and Evidence and any amendments thereto shall take effect upon the adoption by the Judges of the Mechanism unless the Security Council decides otherwise" suggests that the Security Council is not shy about interfering with the work of the Residual Mechanism.

measures prosecuting individuals for breaches of international humanitarian law. As Chapter VII measures, their proceedings bind all States and have normative force.<sup>98</sup> As criminal courts, other values come into play, including fairness, certainty, and predictability. Indeed, the profound importance of these values prompted the ICTY Appeals Chamber to decide, contrary to the tide of the basic international law principles noted above, to institute an internal doctrine of precedent at the Tribunal.<sup>99</sup>

Thus, in the *Aleksovski* Judgment, the ICTY Appeals Chamber held:

“that a proper construction of the Statute, taking account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interest of justice.

Instances of situations where cogent reasons in the interest of justice require a departure from a previous decision include cases where the previous decision has been decided on a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been “wrongly decided, usually because the judge or judges were ill-informed about the applicable law.”<sup>100</sup>

The Appeals Chamber further considered that a proper construction of the ICTY Statute required that the *ratio decidendi* of Appeals Chamber decisions would be binding on Trial Chambers. This, the Appeals Chamber reasoned, would comply “with the intention of the Security Council” that the Tribunal apply “a single, unified and rational corpus of law”<sup>101</sup>. It further reasoned that: (i) the Statute of the Tribunal created a hierarchy between the Appeals Chamber and the Trial Chambers; (ii) the mandate of

<sup>98</sup> See E. Cannizzaro, ‘Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ’, *European Journal of Legal Studies* (2007) 1, 1.

<sup>99</sup> See G. Boas *et al.* (eds.), *International Criminal Law Practitioner: International Criminal Procedure*, Volume III (2011), para. 460 where the argument is made that the binding nature of previous appeals decisions on trial chambers may cause problems for international criminal justice.

<sup>100</sup> *Prosecutor v. Aleksovski*, Judgment, IT-95-14/1, 24 March 2000, paras 107-108 [Aleksovski Judgment].

<sup>101</sup> *Id.*, para. 113.

the Tribunal could not be achieved “if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the law” and (iii) the right of appeal, which is a rule of customary international law, “gives rise to the right of the accused to have like cases treated alike”<sup>102</sup>.

The Appeals Chamber thus concluded that:

“The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunals, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced”<sup>103</sup>.

Finally, the Appeals Chamber determined that Trial Chambers, “which are bodies with coordinate jurisdiction” should not be bound by the decisions of each other, although they would be free to regard each other’s decisions as persuasive.<sup>104</sup>

The *Aleksovski* decision of the ICTY Appeals Chamber has resulted in a situation at the Tribunals, especially after 15 years of judicial practice, where the applicable law and procedures are entrenched and well known.<sup>105</sup>

<sup>102</sup> *Id.*, para. 113; See also the decision of the ICTR Appeals Chamber in *Prosecutor v. Semanza*, Decision, ICTR-97-20-A, 31 May 2000 [*Semanza* Decision]. “The Appeals Chamber adopts the findings of the ICTY Appeals Chamber in the *Aleksovski* case and recalls that in the interests of legal certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interest of justice. Applying this principle, the Appeals Chamber has altered the interpretation it gave Rule 40bis in its *Barayagwiza* Decision for the reasons hereinafter given”.

<sup>103</sup> *Aleksovski* Judgment, para. 113.

<sup>104</sup> *Id.*, para. 114. Failure of the part of a Trial Chamber to follow the *ratio decidendi* of Appeals Chamber decisions constitutes an error law invalidating the Trial Chamber decision: See e.g., *Prosecutor v. Blagojevic et al.*, Decision on Provisional Release of Vidoje Blagojevic and Dragan Obrenovic, IT-02-60-AR65 & IT-02-60-AR65.2, 3 October 2002. The Trial Chamber is bound by the legal findings and not the factual findings of the Appeals Chamber, for example, see *Prosecutor v. Bradnin & Talic*, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 6.

<sup>105</sup> In the *Semanza* Decision, Judge Shahabuddeen appended a separate opinion in which he questioned the legal status of the *Aleksovski* Judgment, as the Statute of the

The ICTY's jurisprudence is so entrenched that it constitutes a substantial basis for ICTY decisions and Judgments. The actual sources of law on which those decisions depend is not necessarily identified, but reliance is placed on the fact that the earliest previous decisions sufficiently identified the relevant source of law in a treaty, custom, or general principles of law, the implication being that such previous decisions correctly identified the applicable law. Further, the instances of the Appeals Chambers departing from previous decisions for "cogent reasons in the interest of justice" are extremely rare.<sup>106</sup>

Thus, proceedings at the Tribunals are infused with predictability and certainty. Predictability and certainty of the law are key components of the rule of law and the right of an accused to a fair trial – the principle that the law should be knowable and foreseeable to its subjects, and that an accused can expect his or her case to be treated the same as similar cases that have come before. Indeed, a guiding rationale behind the Appeals Chamber decision in *Aleksovski* was its consideration that

“[a]n aspect of the fair trial requirement is the right of an accused to have like cases treated alike so that in general, the same cases will be treated in the same way and decided [...] ‘possibly by the same reasoning’”<sup>107</sup>.

If proceedings before the Residual Mechanism are meant to mirror those before the Tribunals, these proceedings should maintain the same level of predictability and certainty expected before the Tribunals.

In this respect, the Security Council could have followed the approach of the ICTY Appeals Chamber in *Aleksovski* and instituted a doctrine of precedent for the Residual Mechanism with respect to applicable previous decisions of the Tribunals, whereby departures should only occur for “cogent reasons in the interests of justice”. Under Chapter VII of the UN Charter, the Security Council clearly had the power to have done so. Indeed,

Tribunals did not expressly mention a duty on the Appeals Chamber to follow its previous decisions.

<sup>106</sup> There may only be two instances at the ICTY where this has occurred. *Prosecutor v. Zigic*, Decision on Zoran Zigic's "Motion for Reconsideration of Appeals Chamber Judgement, Case No. IT-98-30/1-A, Delivered on 28 February 2006", IT-98-30/1-A, 26 June 2006; *Prosecutor v. Kordic and Cerkez*, Judgment, IT-95-14/2-A, 17 December 2004, paras 1040-1043.

<sup>107</sup> *Aleksovski* Judgment, para. 105.

to avoid challenges to the fairness of proceedings before the Residual Mechanism, it would have been advisable for the Security Council to have at least made it abundantly clear that the fair trial rights of persons appearing before the Residual Mechanism will mirror, not only in form but in substance, the equivalent rights before the Tribunals.

In some respects, it is even more surprising that the Security Council took no action to secure the procedural and substantive jurisprudence of the Tribunals given that the *Aleksovski* approach, while unusual in international law to the extent that the Tribunal proclaimed to follow a doctrine of precedent, is in practice consistent with the approach of other international courts and Tribunals. For example, the International Court of Justice [ICJ], while not recognizing that there is any binding value to its own precedent, does take its previous decisions into consideration.<sup>108</sup> Thus, in the *Bosnian Genocide* case, the ICJ stated that: “to the extent that the decisions contain findings of law, the Court will treat them as all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from settled jurisprudence unless it finds very particular reasons to do so”<sup>109</sup>.

Other international and hybrid courts, such as the International Criminal Court,<sup>110</sup> the Special Court for Sierra Leone and the Extraordinary Chambers of the Courts of Cambodia [ECCC], have adopted the same approach to such an extent that, for all practical purposes, a doctrine of precedent is being applied.<sup>111</sup> As is the practice at the Tribunals, previous

<sup>108</sup> G. Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’, *Journal of International Dispute Settlement* (2001) 2, 1, 12. See also M. Shahabuddeen, *Precedent in the World Court* (1996).

<sup>109</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, ICJ Reports 2008, 412, para. 53.

<sup>110</sup> Article 21(2) of the Rome Statute establishing the ICC provides that “the Court may apply principles and rules of law as interpreted in previous decisions”.

<sup>111</sup> Further, other international courts and tribunals do rely on the previous decisions of the Tribunals as correctly stating the law and the judgments of other Tribunals are replete with references to the ICTY’s decision. Indeed, the Statute of the Special Court for Sierra Leone specifically provides in Article 20(3) that the judges shall be guided by the decisions of the ICTY and the ICTR Appeals Chamber. However, in this context the decisions of the Tribunals are treated as persuasive authority only, in the same way that the Tribunals treat the decisions of other jurisdictions. The same applies to the relationship between the ICTY and the ICTR Tribunals. The decisions of each are treated as persuasive authority to each other. The SCSL Trial Chamber has stated that the Special Court frequently cites decisions of the ICTY and ICTR for

decisions are also not easily departed from.<sup>112</sup> Thus, a Security Council provision binding the Residual Mechanism to applicable previous decisions of the Tribunals would hardly have been radical, particularly in the realm of international criminal law.<sup>113</sup>

Alternatively, it could be argued that the Security Council did not need to make a provision within the Mechanism's Statute binding the Residual Mechanism to the previous jurisprudence of the Tribunals because a proper interpretation of Resolution 1966 required the Mechanism to consider itself so bound. If the Residual Mechanism takes the same approach to the interpretation of its Statute as the ICTY Appeals Chamber in *Aleksovski*,<sup>114</sup> and interprets its Statute in accordance with the rules for interpreting treaties set out in Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties, which is declaratory of customary international law, it should in any event come to the conclusion that it should be bound by the Tribunals' previous decisions.<sup>115</sup>

It may be found that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that the Mechanism is to facilitate the completion of the work of the Tribunals and to exercise

“guidance [on] the interpretation of general principles of law in the context of international criminal adjudication” (para. 21) and “[the] Court applies persuasively decisions taken at the ICTY and ICTR” (para. 24) see *Prosecutor v. Brimba et al.*, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, SCSL-04-16-PT, 1 April 2004, paras 21-24. The ECCC OCIJ stated that it was “compelled to follow” the jurisprudence of the ICTY and ICC on the doctrine of abuse of process – 001/18-07-2007, Order of Provisional Detention, 31 July 2007, para. 21.

<sup>112</sup> For example, the ICC Trial Chamber I stated that there is a “strong presumption [...] that a Chamber is bound by its own decisions” unless they are “manifestly unsound and their consequences manifestly unsatisfactory” – *Situation in the Democratic Republic of the Congo in case of the Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, ICC-01/04-01/06, 30 March 2011, para. 18, see also *Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 30 June 2010, para. 54; *Situation in the Republic of Kenya*, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09, 3 November 2010, para. 9.

<sup>113</sup> See *supra* note 86 re interference through the Rules of Procedure and Evidence. Such a move, however, may have invited the criticism that it was an intrusion into the judicial function of the Judges of the Residual Mechanism.

<sup>114</sup> *Aleksovski* Judgment, para. 98.

<sup>115</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N.T.S., 1155, 331.

residual functions of the Tribunals into the future.<sup>116</sup> Thus, although it would be unusual for a separate international court to declare itself bound by the previous decisions of another, the Residual Mechanism is a special type of international court.

It is the legal successor to the Tribunals and meant to be residual in nature, finishing up the work of the Tribunals and carrying on some residual functions. It is designed to be a scaled-down version of the Tribunals. Its Statute and Rules of Procedure and Evidence are based on the Tribunals' and therefore it is clear that the intention of the Security Council has been to ensure that the rights of accused and convicted persons are fully respected by the Residual Mechanism in parity with the Tribunals. Thus, in essence, similarly situation persons should be treated similarly.

While the intent and purpose of the Statute can be relied upon to make this argument, the Residual Mechanism may well reject the notion that it is bound by the previous decisions of the Tribunals. In that regard, it would be more likely for the Judges of the Residual Mechanism to find the previous decisions of the Tribunals persuasive, not binding. This approach would be entirely consistent with international law and with Article 38 of the ICJ Statute, which identifies judicial decisions "as subsidiary means for the determination of rules of law". It would also avoid the legal problem identified by Judge Shahabuddeen as to whether a decision of the Appeals Chamber can of its own authority, absent a provision in the Statute, have the effect of binding the Appeals Chamber to its previous decisions. As he reasoned:

“[a] decision of the Appeals Chamber interpreting the Statute to mean that it is obliged in law to follow its previous decisions subject to a limited power of departure does not, because it cannot, deprive that Chamber of competence to reverse the interpretation given in that decision itself. If the Appeals Chamber can do that in a latter decision, it is difficult to see what the earlier decision achieves. There is no basis for saying that, unless the departure falls within the exceptions visualised by the earlier decision, the interpretation given in that earlier decision cannot be reversed. The limitations imposed by the

<sup>116</sup> See *Aleksovski Judgment*, para. 107.

earlier decision cannot prevent the Appeals Chamber from later setting aside the very holding which fixed the limitation”<sup>117</sup>.

Thus, in reality, considering the technical difficulty that the Mechanism faces in declaring itself bound by Tribunal decisions in the absence of a requirement in its Statute authorizing it to do so, the determination that such decisions at least possess persuasive authority, may constitute a compromise between the extremes of binding precedent and a wholesale disregard of the Tribunals’ case law. This compromise may provide a somewhat adequate basis for the expectation that cases before the Residual Mechanism will be treated in the same manner as those before the Tribunals. However, precedent, by dint of the inherent and substantial degree of consistency which its authoritativeness engenders, would undoubtedly provide a far more secure hook upon which to hang such an expectation. Thus, despite the legal difficulty that confronts the Mechanism in holding that prior decisions of the Tribunals constitute binding authorities upon it, the more formidable specter of greater uncertainty looms from a failure to do so.<sup>118</sup>

Internal consistency and concomitant certainty are the results of the *Aleksovski* approach, as departure from previous decisions arises only where cogent reasons in the interest of justice outweigh the values of predictability and certainty, which is extremely rare.<sup>119</sup> If the Residual Mechanism treats Tribunal decisions as merely persuasive, persons whose proceedings are to be brought before the Mechanism will be unsure as to whether their case would be treated in the same manner as similar cases before the Tribunals. Furthermore, it may result in the Residual Mechanism extensively reviewing Tribunal decisions in order to determine whether or not those decisions are of persuasive authority for the Residual Mechanism. As the ICTY Trial Chamber stated in the *Kupreskic* case, “international criminal courts [...] must always carefully appraise decisions of other courts before

<sup>117</sup> *Semanza* Decision, Separate Opinion of Judge Shahabuddeen, para. 12.

<sup>118</sup> *Id.*, para. 17: Judge Shahabuddeen concluded that the better view was that not to claim that “the Statute itself lays down a requirement from the Appeals Chamber to follow its previous decisions subject to a limited power of departure, but as asserting that the Statute empowers the Appeals Chamber to adopt a practice to that end and that such a practice has now been adopted”.

<sup>119</sup> See *Prosecutor v. Milosevic*, Decision on Admissibility of Prosecution Investigator’s Evidence, IT-02-54-AR73.2, Partial Dissenting Opinion of Judge Shahabuddeen, 30 September 2002, para. 38; See *supra* note 106.

relying on their persuasive authority as to existing law”<sup>120</sup>. As examined further in the section below, these scenarios could negatively impact the legacies of the Tribunals.

### III. Practical Examples of the Potential Ramifications of the Mechanism’s Failure to Adopt an Internal Doctrine of Precedent

Holding that judicial decisions of other international courts can have persuasive but not binding value does leave ample opportunity to find previous decisions of no persuasive value at all.<sup>121</sup> A well-known example is the disagreement over the standard of control test for the attribution of acts to armed groups. In the *Tadic* Appeal Judgment, the Appeals Chamber of the ICTY held that the “effective control” test set forth by the ICJ in *Nicaragua* was not persuasive.<sup>122</sup> In *Nicaragua*, the ICJ was faced with the

<sup>120</sup> See *Prosecutor v. Zoran Kupreskic et al.*, IT-95-16-T, Judgment, 14 January 2000 [*Kupreskic* case], para. 542; See also *Prosecutor v. Brima et al.*, SCSL-04-16-Pt, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, para. 25: “Accordingly, as stated in some of its major decisions do far, the Special Court will apply the decisions of the ICTY and ICTR for their persuasive value, with necessary modifications and adaptations, taking into account the particular circumstances of the Special Court. The Trial Chamber will, however, where it finds it necessary or particularly instructive, conduct its own independent analysis of the state of customary international law or a general principle of law on matters related to inter alia evidence or procedure. Additionally, in cases where the Trial Chamber finds that its analysis of a certain point or principle of law may differ from that of either the ICTY or ICTR, it shall base its decisions on its own reasoned analysis”.

<sup>121</sup> See *Prosecutor v. Zejnir Delalic et al.*, Judgment, IT-96-21-A, 20 February 2001, para. 24: “The Appeals Chamber agrees that ‘so far as international law is concerned, the operation of the desiderata of consistency, stability and predictability does not stop at the frontiers of the Tribunal. [...] The Appeals Chamber cannot behave as if the general state of the law in the international community whose interest it serves is none of its concern.’ However, this Tribunal is an autonomous judicial body, and although the ICJ is the ‘principal judicial organ’ within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion”. See also, *Prosecutor v. Kvočka et al.*, Decision on Interlocutory Appeal by the Accused Zoran Zigic Against the Decision of the Trial Chamber I Dated 5 December 2000, IT-98-30/1-AR73.5, 25 May 2001, paras 16-22.

<sup>122</sup> *Prosecutor v. Tadic*, Judgment, IT-94-1-A, 15 July 1999, paras 99-14 [*Tadic*]

question of whether the United States, through its training and supplying of weapons to Nicaraguan rebels, could be liable for the crimes committed by those rebels. The ICJ held that in order for the United States to be liable, it had to be shown that the United States exercised “effective control” over the rebels. In *Tadic*, the ICTY Appeals Chamber found that the *Nicaragua* “effective control test” was not consistent with the logic of the law of state responsibility and conflicted with judicial and state practice. The *Tadic* Appeals Chamber departed from the “effective control” test in favor of an “overall control” test which it claimed to be representative of international law.<sup>123</sup> In the *Bosnian Genocide Case*,<sup>124</sup> that followed, the ICJ considered the *Tadic* Appeals Chamber decision and expressly departed from its “overall control” test for the “effective control” test stating that:

“The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the *Tadic* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgement the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. The Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgements dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction, and, moreover,

<sup>123</sup> *Id.*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, (Merits), Judgment, ICJ Reports 1986, 14. For criticism of the ICTY’s purported review of the ICJ, see, for example, K. Oellers-Frahm, ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions’, 5 *Max Planck Yearbook of United Nations Law* (2001), 9-80.

<sup>124</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, 43, para. 396.

the resolution of which is not always necessary for deciding the criminal cases before it”<sup>125</sup>.

While disagreement between courts exercising different jurisdictions can be explained on that basis, departures by other courts exercising international criminal jurisdiction from rulings made by the Tribunals’ demonstrates that international criminal law is still in the early stages of its development and is far from a settled body of law. Further, the offences over which the ICTY, for example, exercises jurisdiction are limited to those established as customary law.<sup>126</sup> The unwritten nature of customary law allows broad judicial discretion in determining whether there is sufficient evidence of state practice and *opinio juris* to establish the customary nature of an offence.

An example is the divergence of opinion among international tribunals concerning the mode of liability of joint criminal enterprise [JCE], and most notably the third category of joint criminal enterprise. At the Tribunals, JCE is heralded as having the status of customary international law<sup>127</sup> and has been identified as having three categories: the first category is an intention to further a common criminal purpose; the second category is the intent to further a criminal system, such as a concentration camp; and the third category is the intent to carry out a common criminal purpose during which another crime is carried out by one of the participants which was a “natural and foreseeable consequence” of the agreed upon common purpose [JCE III]. Criminal responsibility for all three modes of JCE can attach for any of the crimes identified under the Tribunals’ Statute, including special intent crimes.<sup>128</sup>

The ECCC reviewed the *Tadic* decision, which established the three categories of JCE, and considered the authorities relied upon by the ICTY

<sup>125</sup> *Id.*, para. 403.

<sup>126</sup> Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993); UN Doc S/25704, 3 May 1993, para. 34: “In the view of the Secretary-General, the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law”.

<sup>127</sup> *Tadic*, *supra* note 122, paras 194-213, 220.

<sup>128</sup> *Id.*, paras 190-194; See also A. Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice*, (2007) 1, 109-133; G. Guliyeva, ‘The Concept of Joint Criminal Enterprise and ICC Jurisdiction’ 5 *Eyes on the ICC* (2008- 2009) 1, 49, 60. See also note 134.

Appeals Chamber to support its conclusion as to the customary status of the three modes of responsibility of JCE. The ECCC concluded that while the ICTY Appeals Chamber correctly identified the first two categories as existing in customary international law, it was not satisfied that it established that the third category had that status “at the time relevant to Case 002”, i.e. 1975-1979.<sup>129</sup> Thus, this left open the question as to whether it indeed had that status as of 1991, at which time the Tribunal’s temporal jurisdiction began.<sup>130</sup> However, the reasoning of the ECCC suggests that *Tadic* may not be a reliable precedent at all with respect to the customary status of JCE III.<sup>131</sup>

Further, the Special Tribunal for Lebanon found that contrary to the conclusion of the Tribunals, an accused cannot be convicted for JCE III for a special intent crime such as terrorism.<sup>132</sup> The Court held that:

“Under international law, when a crime requires special intent (*dolus specialis*), its constitutive elements can only be met, and the accused consequently be found guilty, if it is shown beyond reasonable doubt that he specifically intended to reach the result in question, that is, he entertained the required special intent. A problem arises from the fact that for a conviction under JCE III, the accused need not share the intent of the primary offender. This leads to a serious legal anomaly: if JCE III liability were to apply, a person could be convicted as a (co)perpetrator for a *dolus specialis* crime without possessing the requisite *dolus specialis*”<sup>133</sup>.

<sup>129</sup> *Prosecutor v. Nuon Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, para. 77.

<sup>130</sup> Art. 1 ICTY Statute; *Tadic*, *supra* note 122, paras 195-220, The Appeals Chamber in *Tadic* in determining that third category joint criminal law was customary in nature relied upon cases that dated back to the end of the Second World War.

<sup>131</sup> See *Prosecutor v. Nuon Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, para. 75.

<sup>132</sup> *Prosecutor v. Ayyash et al.*, STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, paras 248-249.

<sup>133</sup> *Id.*, para. 248.

On this basis, it expressly departed from the contrary view of the ICTY Appeals Chamber.<sup>134</sup>

Finally, on its face it appears as if the Rome Statute of the International Criminal Court [ICC Statute] may have distanced itself from JCE liability<sup>135</sup> in favor of a form of liability of co-perpetration.<sup>136</sup> This was the interpretation given to Article 25(3)(a) of the ICC Statute by the Pre-Trial Chamber in the *Lubanga* case. Article 25(3)(a) provides for criminal responsibility where a person:

“(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible”<sup>137</sup>.

In addition, the ICC Statute identifies a form of common purpose liability under Article 25(3) (d) which provides:

“In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity involve the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime.”

<sup>134</sup> *Id.*, para. 249; see ICTY: *Prosecutor v. Brdanin*, Decision on Interlocutory Appeal, IT-99-36-A, 19 March 2004, paras 5-10; *Prosecutor v. Stakic*, Judgment, IT-97-24-A, 22 March 2006, para. 38; *Prosecutor v. Milosevic*, Decision on Motion for Judgment of Acquittal, IT-02-54-T, 16 June 2004, para. 291; *Prosecutor v. Popovic, et al.*, Judgment, IT-05-88-T, 10 June 2010, Vol. I, paras 1195, 1332, 1427, 1733-1735.

<sup>135</sup> *Prosecutor v. Lubanga Dyilo*, Decision on the Confirmation of the Charges, ICC-01-04-01/06, Pre-Trial Chamber I, 29 January 2007, paras 334-337, the Pre-Trial Chamber rejected joint criminal enterprise.

<sup>136</sup> *Id.*, paras 322, 328-333. See also *Prosecutor v. Katanga & Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008; See also T. Weigend, ‘Perpetration through an Organisation’, 9 *Journal of International Criminal Justice* (2011) 1, 91, 105.

<sup>137</sup> Indirect perpetration and co-perpetration were rejected at the ICTY in favor of joint criminal enterprise, see *Prosecutor v. Stakic*, Judgment, IT-97-24-A22 March 2006, para. 62; *Prosecutor v. Simic*, Dissenting Opinion of Judge Schomburg, IT-95-9-A, 28 November 2006, paras 18-21.

Whether or not Article 25(3)(d) will be interpreted as a form of JCE remains to be seen, but even if it is so interpreted it does not seem capable of accommodating JCE III where the standard is not one of intention but foreseeability. As the ICC Statute is the product of negotiations between States, it could be argued that the failure to include JCE III in the ICC Statute is indicative of the *opinio juris* of States concerning its status as customary law.<sup>138</sup>

As the first obligation of any international criminal court is to apply the provisions of its statute, differences between statutes governing different international courts can explain, to some extent, their differences of opinion on the state of the law. Further, reasonable minds can differ,<sup>139</sup> and without a doctrine of precedent in international law, or a hierarchy between criminal courts, it can be expected that there will be differences of opinion as to the precise contours of international criminal law, and in particular customary international law, as currently exist among international criminal courts with respect to JCE III. But would this be an equally legitimate explanation if the departures are by the Residual Mechanism from the entrenched jurisprudence of the Tribunals? While the Residual Mechanism has its own Statute and is a separate legal entity from the Tribunals, its purpose is to continue the work of the Tribunals. Thus its Statute should be interpreted consistently with the Tribunals interpretation of its similar statutory provisions, and arguably, decisions of the Tribunals should have normative force on the decisions of the Residual Mechanism.

<sup>138</sup> The possibility that third category joint criminal enterprise may be revisited by the Residual Mechanism is made all the more likely considering a preliminary motion filed by Radovan Karadzic, an accused whose appeal, if any, will be before the Residual Mechanism, requesting that all special intent crimes based on third category joint criminal enterprise be dismissed. The Trial Chamber rejected the motion as not properly raised as a jurisdictional challenge. If the Residual Mechanism were to accept the argument during an appeal on the merits (assuming a conviction on that basis) it would impact substantially on the settled jurisprudence of the Tribunal and raises issues of unfairness in relation to those accused before the Tribunal convicted on that basis; See *Prosecutor v. Radovan Karadzic*, Preliminary Motion to Dismiss JCE III – Special Intent Crimes, 27 IT-95-05/18-PT, 27 March 2009; *Prosecutor v. Radovan Karadzic*, Decision on Six Preliminary Motions Challenging Jurisdiction, IT-95-05/18-PT, 28 April 2009.

<sup>139</sup> *Prosecutor v. Blagojevic, et al.*, Decision on Blagojevic's Application Pursuant to Rule 15(B) IT-02-60, 19 March 2003, para. 14: "[t]he Trial Chamber's behaviour resulted from its disagreement with the Appeals Chamber on a point of law about which reasonable jurists could certainly differ".

#### IV. Conclusion

Should the Residual Mechanism adopt the approach that it is not bound by the previous jurisprudence of the Tribunals, either by its Statute or otherwise under international law, then the Tribunals' legacy stands to be undermined through the absence of certainty and foreseeability with respect to the applicable law and procedures which would have been present had the proceedings remained with the Tribunals. The completion of the Tribunals' work by the Residual Mechanism could take on a fundamentally different character, as an accused or appellant whose proceedings fall before the Residual Mechanism may face unfamiliar adjudicatory standards attributable to the fact that the Mechanism's judicial operations would be unsupported by a history of entrenched jurisprudence, and the concomitant certainty of law which proceedings before the Tribunals would have guaranteed.

Whether the Residual Mechanism will choose to find the Tribunals' previous decisions binding, persuasive or of no weight at all remains to be seen. The Residual Mechanism may well choose to express a commitment to continuity with the decisions of the Tribunals early on in its operations. However, it should be borne in mind that in creating the Residual Mechanism, the Security Council did not automatically secure the legacy of the Tribunals, due to its failure to make some provision for an internal doctrine of precedent. Instead, it created a situation where various scenarios may be played out, possibly the worst of which includes departures from Tribunal decisions, resulting in unfairness to those whose proceedings have been transferred to the Residual Mechanism. Simply put, such unfairness would be attributable to similarly placed persons being dissimilarly treated. Additionally, such departures may impact on the integrity of the Tribunals' proceedings if they are of such a nature as to call into question the cogency of the Tribunals' entrenched jurisprudence.<sup>140</sup>

<sup>140</sup> See generally, R. Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance', 94 *American Society International Law Proceedings* (2000), 160; K. Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions', 5 *Max Planck Yearbook of United Nations Law* (2001) 67; S. Freeland, 'The Internationalization of Justice - A Case for the Universal Application of International Criminal Law Norms', *New Zealand Yearbook of International Law* (2007) 4, 45; C. Stahn, 'Between Harmonization and Fragmentation: New Groundwork on Ad Hoc International Criminal Courts and Tribunals', 19 *Leiden Journal of International Law* (2006) 2, 567; F. Pocar, 'The Proliferation of International Criminal Courts and

## D. The Inevitable Challenge to Security Council's Decision to Establish the Residual Mechanism

### I. Jurisdictional Issues

Even if the Residual Mechanism adopts the jurisprudence of the Tribunals as its own, the Mechanism will not thereby avoid the inevitable challenges that will be made against its exercise of jurisdiction due to its status as a separate legal body. In his Report, the Secretary-General raised the possibility of challenges to the Residual Mechanism's exercise of the jurisdiction of the Tribunals.<sup>141</sup> In order to address this concern, the Security Council attempted to minimize the possibility of such challenges by providing for a continuation of the Tribunals' jurisdiction, rather than allocating a separate and distinct jurisdiction to the Residual Mechanism.

The Security Council's decision to have the jurisdictional provision of the Mechanism's Statute expressly refer back to the jurisdictional provisions in the Tribunals' Statutes clearly indicates that the Mechanism was intended to inherit the Tribunals' jurisdictional scope. However, this on its own is unlikely to avert challenges to the Mechanism's jurisdiction. In particular, the Residual Mechanism can anticipate answering a challenge to its jurisdiction on the grounds that its establishment by the Security Council is *ultra vires* the powers of the Security Council.

In the *Tadic* case, the Appeals Chamber of the ICTY addressed a challenge to the exercise of the jurisdiction conferred upon it by the Security Council, premised on the alleged illegality of the Tribunal's establishment by the Security Council.<sup>142</sup> In that case, the Appeals Chamber determined that the Security Council has a wide measure of discretion in determining whether a situation constitutes one of the trigger events under Article 39 of the United Nations Charter [UN Charter], namely, "a threat to the peace", "breach of the peace" or "act of aggression", as well as a wide measure of

Tribunals: A Necessity in the Current International Community', 2 *Journal of International Criminal Justice* (2004) 2, 304-308; G. Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law', 25 *Michigan Journal of International Law* (2003-2004), 849.

<sup>141</sup> Report of the Secretary-General, *supra* note 1, para. 99.

<sup>142</sup> *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (*Tadic* Jurisdiction Case), IT-94-1,; The ICTR dealt with a similar challenge in the case of *Prosecutor v. Kanyabashi*, Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997.

discretion in determining whether to adopt measures and what measures to adopt pursuant to Articles 41 and 42 of the UN Charter. Despite this broad power, the Appeals Chamber determined that the Security Council's powers are not unlimited and must be exercised consistently with the purposes and principles of the UN Charter.<sup>143</sup>

The Appeals Chamber in *Tadic* did not find it necessary to examine in detail the limits of the Security Council's discretion in determining a threat to the peace pursuant to Article 39, because it was satisfied that such a threat existed due to the armed conflict in the former Yugoslavia.<sup>144</sup> It was further satisfied that the measure adopted by the Security Council, specifically, the establishment of the ICTY, was within the wide discretionary powers of the Security Council under Article 41 of the UN Charter as a measure contributing to the restoration of peace in the former Yugoslavia.<sup>145</sup> The Appeals Chamber further held that contrary to the arguments of the Appellant, the Tribunal had been established by law as required by Article 14(1) of the International Covenant on Civil and Political Rights [ICCPR], explaining that in an international setting, the guarantee that a tribunal must be founded in accordance with the rule of law means that, "it must be established in accordance with proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with international human rights instruments"<sup>146</sup>. Upon an examination of the ICTY Statute and Rules of Procedure and Evidence, the Appeals Chamber concluded that the Tribunal had been established in accordance with the rule of law, as it provided for all the fair trial guarantees of Article 14 of the ICCPR, as well as other fair trial guarantees, including the high moral character and impartiality of Judges.<sup>147</sup>

The conclusion of the ICTY Appeals Chamber in *Tadic*, that the establishment of the Tribunal was *intra vires* the powers of the Security Council was predictable. However, the reasoning of the Appeals Chamber was not. There has been and remains considerable controversy surrounding the reviewability of the legality of Security Council decisions taken pursuant to Chapter VII of the UN Charter.<sup>148</sup> There is also considerable

<sup>143</sup> *Tadic* Jurisdiction Case, paras 28-29.

<sup>144</sup> *Id.*, paras 29-30.

<sup>145</sup> *Id.*, paras 35-39.

<sup>146</sup> *Id.*, para. 45.

<sup>147</sup> *Id.*, para. 46.

<sup>148</sup> K. Hossain, 'Legality of the Security Council Action: Does the International Court of Justice Move to Take up the Challenge of Judicial Review?', 3 *USAK Yearbook of*

disagreement as to whether the powers of the Security Council pursuant to Article 39 of the UN Charter are subject to any limitations at all, or whether a determination thereto is of a non-justiciable nature.<sup>149</sup> There is also considerable disagreement concerning whether the discretion of the Security Council in choosing the type of enforcement measure for maintaining international peace and security pursuant to Articles 40, 41 and 42 of the UN Charter is subject to any limitation.<sup>150</sup>

The ICTY Appeals Chamber in *Tadic* swept aside these issues and determined that the Security Council was not *legibus solutus* (unbound by law).<sup>151</sup> Pursuant to Article 39, a proper exercise of the Security Council's powers under that Article necessitated a finding that one of the trigger events had been established under that Article, i.e. a "threat to the peace", "breach of the peace" or "act of aggression" and its exercise of power thereto had to be consistent with the purposes and principles of the UN Charter.<sup>152</sup>

However, the decision of the Appeals Chamber in *Tadic* has not abated the disagreement with respect to the reviewability of the Security Council's exercise of its powers under Chapter VII of the United Nations. Notably, the ICJ, the principal judicial organ of the United Nations, has despite opportunity, not asserted any right to review of Security Council decisions.<sup>153</sup> In circumstances where the answering of a legal questions

*International Politics and Law* (2010), 91-122; F. Patel King, 'Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers under Chapter VII of the Charter', 10 *Emory International Law Review* (1996) 2, 509, 522-542; A. Orakhelashvili, 'The Power of the UN Security Council to Determine the Existence of a 'Threat to the Peace'', 1 *Irish Yearbook of International Law* (2006), 61, 95-98; J. W. Davis, 'Two Wrongs Do Make a Right: The International Criminal Tribunal for the Former Yugoslavia was Established Illegally – but it was the Right thing to do... So Who Cares?', 28 *North Carolina Journal of International Law and Commercial Regulation* (2002) 2, 395-419.

<sup>149</sup> Hossain, *supra* note 148, 91-122; Davis, *supra* note 148, 395-419.

<sup>150</sup> Patel King, *supra* note 148, 552 and 561-574; Orakhelashvili, *supra* note 148, 61-99; S. Talmon, 'The Security Council as World Legislature', 99 *American Journal of International Law* (2005) 1, 175, 182-186; A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 16 *European Journal of International Law* (2005) 1, 59-88; Jeffrey W. Davis, *supra* note 148, 395.

<sup>151</sup> *Tadic* Jurisdiction Decision, para. 28.

<sup>152</sup> *Id.*, para. 29.

<sup>153</sup> Art. 92 Charter of the United Nations; See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v.*

posed by the General Assembly has necessitated that the ICJ consider General Assembly resolutions, the ICJ has in the process disavowed that it has any power to review decisions of other organs of the United Nations.<sup>154</sup> Further, in a case in which the ICJ was directly requested to consider the validity of a Security Council resolution during the provisional measure stage of a proceeding the ICJ made apparent its unwillingness to do so and the matter was dropped by the applicant during the merits stage.<sup>155</sup> The reluctance of the ICJ is understandable – at the time of the United Nations’ establishment the ICJ was not intended to have this role.<sup>156</sup> – but arguably

*Serbia and Montenegro*), Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, 325; Separate Opinion of Judge Ajibola, 390-391.

<sup>154</sup> See *Certain Expenses of the United Nations (Art. 17, para. 2 of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1961, 151, 168. In that case the opinion of the ICJ was sought by the General Assembly as to whether the expenses incurred by the UN operation in the Congo and the Middle East fell within the meaning of Art. 17(2) of the Charter of the UN – “that expenses of the Organisation shall be borne by the Members as apportioned by the General Assembly”. In answering the question the Court had to review the resolutions authorizing the expenditure. It held that the “operations were undertaken to fulfill the prime purpose of the United Nations, that is, to promote and maintain peaceful settlement” and as such the expenditures were expenses of the United Nations within the meaning of Art. 17(2) of the Charter. In reaching this decision, the Court expressly rejected that it might have a power of judicial review. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 45, where the Court declared that it did not have the power of judicial review or appeal in respect of decisions taken by the United Nations organs concerned. However, despite its categorical rejection of a power of judicial review, the Court concluded that the resolutions of the Security Council relevant to the case had been adopted in conformity with the purposes and principles of the Charter and in accordance with Arts 24 and 25 of the Charter and thus demonstrated that it considered it was competent to decide whether a decision of the Security Council is in conformity with the Charter when that question arises during the exercise of its judicial function. See also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 2.

<sup>155</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, 3, 6 and Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, 325, 328. Bosnia-Herzegovina wanted the ICJ to consider the legal status and effects of the mandatory arms embargo that was imposed by the Security Council Resolution 713 of 25 September 1991 against the former Socialist Republic of Yugoslavia.

<sup>156</sup> See Hossain, *supra* note 148, 107-110.

the increased activity of the Security Council following the end of the Cold War may warrant the ICJ assuming this role, particularly as there seems to be general agreement that the Security Council should not be allowed to act in a legal vacuum.<sup>157</sup>

In these circumstances, it will be up to the Residual Mechanism to determine how it might respond to the inevitable challenge that will be made by Counsel to its establishment by the Security Council. If it does take the approach of the ICTY Appeals Chamber in *Tadic*, it may be a little more difficult to conclude that the Security Council validly exercised its powers pursuant to Chapter VII in establishing the Residual Mechanism.<sup>158</sup> Unlike the Tribunals, the Residual Mechanism is not being established during a period of armed conflict as a measure to restore international peace and security in the former Yugoslavia. Nor has it been established as a necessary follow on measure to the Tribunals. Left to their own devices, the Tribunals would have organically scaled down until the functions they were left to exercise were residual. However, the Tribunals are expensive institutions and the international community is suffering from Tribunal fatigue. As such, the decision of the Security Council to establish the Residual Mechanisms was fundamentally a political one.<sup>159</sup>

<sup>157</sup> *Id.*, 91; Talmon, *supra* note 150, 178-179; see also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992 3, Separate Opinion of Judge Shahabuddeen, 32; Dissenting Opinion of Judge Weeramanry, 61.

<sup>158</sup> In *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Judge Bedjaoui expressed discomfort with the fact that the *Lockerbie* bombing should be seen as an urgent threat to the peace three years after its occurrence, but was not sure whether the ICJ could concern itself with this question. Judge Weeramanry concluded that a determination under Art. 39 of the Charter is one entirely within the discretion of the Security Council: See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 114 Dissenting Opinion of Judge Bedjaoui, 153, Dissenting Opinion of Judge Weeramanry, 176.

<sup>159</sup> See, for example, Statement of the Representative of the Russian Federation to the United Nations Security Council, 6 December 2010, UN Doc. S/PV.6434, 22: “we are even more concerned about the continued prolongation of the Tribunals’ existence.”; Statement of the Representative of the United Kingdom to the United Nations Security Council, 3 December 2009, UN Doc. S/PV.6228, 17: “We acknowledge the measures taken by the two Tribunals to expedite proceedings, but we remain concerned that the latest reports indicate further slippage in the timelines for final completion.”;

That said, it can reasonably be predicted that any eventual challenge made to the Security Council's establishment of the Residual Mechanism, should the Residual Mechanism determine it has the competence to consider it, will be dismissed and the finding made that the Residual Mechanism is lawfully established. The legitimacy of that decision may not turn upon the issue of the power of the Security Council to establish the Residual Mechanism, but the fairness of its decision to do so. The *sine qua non* is whether proceedings before the Residual Mechanism result in persons being deprived of rights that would have been recognized by the Tribunals. If that circumstance occurs, no amount of judicial reasoning will be able to legitimize the decision of the Security Council to close the Tribunals and establish the Residual Mechanism. The legacies of the Tribunals will be irreparably damaged.

## II. The Importance of Judicial and Procedural Parity between the Tribunals and the Residual Mechanism: A Question of Fairness

There is little doubt that it would have been better for the Security Council to have allowed the Tribunals to naturally wind down as they completed their work, and then continue to operate as much smaller entities dealing with residual functions into the future. While the Security Council endeavored to find a compromise in establishing the Residual Mechanism as a mirror institution to the Tribunals, this decision in and of itself may be

Statement of the Representative of the Russian Federation to the United Nations Security Council, *id.*, 16: "We therefore believe that it is time for the Security Council to adopt specific decisions on implementing measures set out in the completion strategies conveyed to the Tribunals six years ago in resolution 1503 (2003) and reaffirmed in resolution 1534 (2004). [...] Trials – no matter how complex – must not drag on interminably". See also the debates in the United Nations Security Council regarding the completion strategies of the ICTY and ICTR: 6 June 2011, UN Doc. S/PV.6545; 6 December 2010, UN Doc. S/PV.6434; 18 June 2010, UN Doc. S/PV.6342; 2 December 2009, UN Doc. S/PV.6228; 4 June 2009, UN Doc. S/PV.6134; 12 December 2008, UN Doc. S/PV.6041; 4 June 2008, UN Doc. S/PV.5904; 10 December 2007, UN Doc. S/PV.5796; 18 June 2007, UN Doc. S/PV.5697; 15 December 2006, UN Doc. S/PV.5594; 7 June 2006, UN Doc. S/PV.5453; 15 December 2005, UN Doc. S/PV.5328; 13 June 2005, UN Doc. S/PV.5199; 23 November 2004, UN Doc. S/PV.5086; 29 June 2004, UN Doc. S/PV.4999. See further R. Zacklin, 'The Failings of the Ad Hoc Tribunals', 2 *Journal of International Criminal Justice* (2004) 2, 541.

harmful to the Tribunals' legacies if the rights of persons whose proceedings will fall to be determined before the Residual Mechanism are deficient in any way from those rights they would have had before the Tribunals. The fundamental issue is whether any inherent unfairness could be occasioned to persons whose proceedings will be transferred to the Residual Mechanism. An argument on this basis would be a much more serious objection to the establishment of the Residual Mechanism than one based on alleged *ultra vires* action on the part of the Security Council in creating the Mechanism.

At the outset it can be anticipated that there will be no shortage of objections made by Counsel to the transfer of Tribunal functions to the Residual Mechanism. That said, on its face, it would appear that there should be little ground upon which an accused could object to being tried by the Mechanism as opposed to the Tribunals. Under the Mechanism's Statute, the accused has all the fair trial guarantees that he would have had had he been tried before the Tribunal. Provided those fair trial rights are interpreted consistently with their interpretations before the Tribunals, a trial before the Residual Mechanism should mirror a trial before the Tribunals. For example, the Residual Mechanism would have to ensure that the right of the defense to adequate time and facilities for the preparation of their case was interpreted consistently with the practice at the Tribunals and also ensure the provision of legal aid to indigent accused applying the same policies as the Tribunals. It is only through such measures that an accused can be satisfied that his rights are being respected with the equivalency that they would have been had he been tried by the Tribunals.

The same applies to appellate proceedings. The framework is there for the conduct of those proceedings before the Residual Mechanism to mirror how such proceedings would have been conducted by the Tribunals. Undoubtedly, Counsel will formulate any number of objections to the appeals from decisions of the Tribunals taking place before the Residual Mechanism but provided the Residual Mechanism adheres to the procedural and substantive jurisprudence of the Tribunals the expectation is that there will be little basis for objection to be made. The appellant will have the same rights they would have had if appealing before the Tribunals and the appellate procedure will mirror that of the Tribunals.

With respect to the right to review a judgment, the objection could be made that the transfer of the power of review to the Residual Mechanism effectively nullifies that right. At the Tribunals a review is a re-examination of a final judgment by, as much as possible, the same judges who gave it, in

the light of a new fact brought forward by the convicted person or the prosecution.<sup>160</sup> This is provided for in Rule 119 of the ICTY Rules of Procedure and Evidence and Rule 120 of the ICTR Rules of Procedure and Evidence. Significantly, it is only when any of the Judges that constituted the Chamber are no longer Judges of the Tribunal that another Judge can be appointed to sit in their place.<sup>161</sup>

In his report, the Secretary-General warned against the transfer of this provision to national jurisdictions positing that:

“If the review of judgments were transferred to national jurisdictions they would [...] be likely to apply different approaches and standards in relation both to the Tribunals and to each other. It might be difficult or impractical for a national jurisdiction to review a judgement in which it played no role and to do so on the basis of the Tribunal’s Statute and Rules of Procedure and Evidence. There would inevitably be inconsistencies of approach among the various national jurisdictions on the basis that they had a right to review of judgment under the Tribunals Statutes, and that that protection has been diminished, or is being applied inconsistently among similarly placed convicted persons in different jurisdictions. The review would be conducted not only by a court constituted differently from the one that issued the judgement, but by an entirely separate jurisdiction.”<sup>162</sup>

On its face it appears that at least some of these objections also apply to the transfer of the right of review to the Residual Mechanism. While the Residual Mechanism’s structure as a singular court anticipates that there will be a level of consistency that may not be achieved among different national jurisdictions, the Residual Mechanism is, while continuing the jurisdiction of the Tribunals, simultaneously an entirely separate

<sup>160</sup> Rule 119 ICTY Rules of Procedure and Evidence; Rule 120 ICTR Rules of Procedure and Evidence. See A. Carcano, ‘Requests for Review in the Practice of the International Criminal Tribunals for the former Yugoslavia and for Rwanda’, 17 *Leiden Journal of International Law* (2004) 1, 103-119.

<sup>161</sup> Rule 119(A) ICTY Rules of Procedure and Evidence; Rule 120(A) ICTR Rules of Procedure and Evidence.

<sup>162</sup> Report of the Secretary-General, *supra* note 1, para.80.

jurisdiction. Moreover, by giving the power of review to a new judicial mechanism, the Residual Mechanism, the Security Council may well have deprived accused persons of the right of review guaranteed to them under the Statute as there is no guarantee that the Tribunals' Judges will be Judges of the Residual Mechanism. As such, it could well be that Judges who have neither had prior involvement in the relevant case, or any cases whatsoever before the Tribunal, will be appointed to consider the application for review.

Yet, there is equally no guarantee that an applicant for review would benefit from a bench made up of the same Judges who rendered the original judgment if that review is conducted by the Tribunals. While this is the preferred procedure for a review, the turnover of Judges at the Tribunals means that it is unlikely, after any considerable passage of time, that the same Judges will be available to conduct a review. This is particularly so due to the reliance of the Tribunals on *ad litem* judges who are typically assigned to the Tribunal for a single case only and leave upon the rendering of the judgment in the particular case. Thus, it would appear that one of the most serious objections to the transfer of this power to the Residual Mechanism, namely that the review might be conducted by Judges unfamiliar with the proceedings, could equally apply to proceedings before the Tribunal.

However, as the Mechanism's Rules of Procedure and Evidence are based on those of the Tribunals, it can perhaps be anticipated that a rule similar to the Tribunals will direct the President to assign as much as possible Judges on the roster who were Judges of the Tribunals with involvement in the previous case, or if none are available, Judges who were previously Tribunal Judges, and therefore familiar with its proceedings. Such an approach will go a long way towards defending against claims of a reduction of the right to review before the Residual Mechanism.

The mandatory obligation of Article 6 of the Residual Mechanism's Statute to consider referral of cases of accused indicted before the Tribunals for substantive crimes to national jurisdictions will no doubt give rise to challenges from accused persons that their cases are only being referred to national jurisdictions because of pressure by the Security Council. However, the merit of this argument is questionable. The ICTY has long made clear that it has no remaining cases suitable for referral, having already referred 13 cases.<sup>163</sup> Thus Article 6 of the Mechanism's Statute should have no

<sup>163</sup> P. Robinson, Assessment and report of Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security

impact on the ICTY. Also, long before the establishment of the Residual Mechanism, the ICTR Prosecutor made public his intention to seek transfers to national jurisdictions of all but three of the ICTR's remaining cases.<sup>164</sup> Thus, it is not to be anticipated that persons indicted by the ICTR will be treated any differently under the Residual Mechanism than they would have been if the ICTR had retained jurisdiction of their cases. Those earmarked as suitable for transfer have already been identified and only if that situation changes may there exist a valid reason to object.

Objection could, however, still be made with respect to any decision by the Mechanism's Trial Chamber to order a transfer to a national jurisdiction. Again, it could be argued that pressure from the Security Council may result in the Trial Chamber of the Residual Mechanism sanctioning an application to transfer to a national jurisdiction that would not have been sanctioned by a Trial Chamber of the Tribunals. This objection may particularly be made with respect to transfer of cases to jurisdictions which the ICTR has previously determined could not guarantee a fair trial to the accused, notably transfers to Rwanda, which has expressed an ongoing desire to try cases of persons indicted by the ICTR.<sup>165</sup> Arguably, in making any decision contrary to that of the Tribunals, the Residual Mechanism would have to demonstrate the circumstances which now warrant a different conclusion.<sup>166</sup> To avoid objections of this kind, it would

Council pursuant to paragraph 6 of Council resolution 1534 (2004), covering the period from 15 May to 15 November 2009, UN Doc. S/2009/589, 13 November 2009, para. 47.

<sup>164</sup> Statement by Justice H. B. Jallow, Prosecutor of the ICTR, to the United Nations Security Council, 6 December 2010, UN Doc. S/PV.6434, 10.

<sup>165</sup> Failed transfers to Rwanda include, *Prosecutor v. Gatete*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ICTR-2000-61-R11bis, 17 November 2008; *Prosecutor v. Kanyarukiga*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ICTR-2002-78-R11bis, 6 June 2008; *Prosecutor v. Hategekimana*, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda: Rule 11 bis of the Rules of Procedure and Evidence, ICTR-00-55B-R11bis, 19 June 2008; *Prosecutor v. Munyakazi*, Decision on Prosecutor's Request for Referral of Case to the Republic of Rwanda: Rule 11bis of the Rules of Procedure and Evidence, ICTR-97-36-R11bis, 28 May 2008.

<sup>166</sup> There is currently pending before the ICTR Appeals Chamber an appeal against a referral of a case from the ICTR to Rwanda: *Jean Uwinkindi v. Prosecutor*, ICTR-01-75-AR11bis. The Trial Chamber determined that the conditions in Rwanda now warranted transfer: *Prosecutor v. Jean Uwinkindi*, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda: Rule 11bis of the Rules of Procedure and Evidence, ICTR-2001-75-R11bis, 28 June 2011, paras 222-225.

be preferable for the ICTR to consider the referral of cases prior to its closure, as the Secretary General recommended in his report.<sup>167</sup> Currently, a case of referral to Rwanda is pending appeal before the Appeals Chamber and the rendering of the appeal in that matter might clarify the appropriateness of referrals to Rwanda.<sup>168</sup> In any event, it would be preferable if the issue of Rwanda's capacity to try cases fairly is resolved by the ICTR Tribunal and not by the Residual Mechanism.

Another issue is whether it should be of any concern if a person indicted by the Tribunal is transferred from the Tribunal to the Residual Mechanism and then referred from the Mechanism to a national jurisdiction. Provided this double transfer does not result in undue delay, it appears that little objection could be made as the end result is the same – the person would end up being tried in a national jurisdiction and this result would have occurred whether the person was referred directly by the Tribunal or by the Residual Mechanism.

The mandatory provision in the Residual Mechanism's Statute indicating that the Residual Mechanism shall consider the referral of cases involving contempt and false testimony "in the interests of justice and expediency" does result in a situation where a person subject to the jurisdiction of the Residual Mechanism can anticipate being treated differently than under the jurisdiction of the Tribunals.<sup>169</sup> For example, different national jurisdictions may well have different laws and different penalties for contempt or false testimony offences which could result in like cases being treated differently. Should accused be subject to less fair trial rights than before the Tribunals or if the penalties imposed by any national jurisdiction be greater than the maximum available penalties under the Tribunals' Rules of Procedure and Evidence, this may well constitute ground for objection.<sup>170</sup>

<sup>167</sup> Report of the Secretary General, *supra* note 1, para. 85.

<sup>168</sup> *Jean Uwinkindi v. Prosecutor*, ICTR-01-75-AR11*bis*. Following the submission of this paper for publication, on 16 December 2011, the Appeals Chamber rendered its decision case upholding the decision of the ICTR Referral Chamber to refer the case for trial in Rwanda pursuant to Rule 11*bis* of the ICTR Rules of Procedure and Evidence.

<sup>169</sup> Art. 1(4) Statute of the IRMCT.

<sup>170</sup> ICTY Rules of Procedure and Evidence Rule 77 (G): The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years or a fine not exceeding 100,000 euros or both.; ICTR Rules of Procedure and Evidence Rule 77(G): The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of

While the Security Council has included the possibility of referral to a national jurisdiction of cases of contempt and false testimony in the Statute of the Residual Mechanism there may be difficulty in finding States willing to take such cases due to their unfamiliarity with proceedings at the Tribunal. In his Report the Secretary-General noted that despite the cost benefit<sup>171</sup>:

“[...] it may be difficult or impractical for a national jurisdiction, which had no involvement in the trial proceedings, to determine an issue which relates directly to those proceedings, and to the Tribunal’s statute and Rules of Procedure and Evidence. The residual mechanism(s), on the other hand – particularly if managing the Tribunal’s archives and with judges who were formerly judges of the Tribunal concerned – would be in a much stronger position to decide upon the contempt”<sup>172</sup>.

Thus, while there is room for departure from the Tribunals concerning referrals of these types of proceedings to national jurisdictions, this may be unlikely due to a reluctance on the part of Member States to accept such cases, for the reasons identified in the Secretary-General’s Report. However, it should be noted that the ease with which the Secretary-General contrasts the ability of the Residual Mechanism as opposed to national jurisdictions to deal with these types of proceedings does assume a level of continuity of the Residual Mechanism with the Tribunal, which, as explained above, is not guaranteed. As described previously, there is no requirement which states that the Judges of the Residual Mechanism must be the same Judges as those at the Tribunals and there is no requirement that the Residual Mechanism accept as binding previous decisions of the Tribunals.

With respect to the enforcement of sentences and consideration of applications for pardon and commutation of sentence, it is uncertain whether

imprisonment not exceeding five years, or a fine not exceeding USD10,000, or both; Statute of the IRMCT Article 22(1): The penalty imposed on persons covered by paragraph 4 of Article 1 of this Statute shall be a term of imprisonment not exceeding seven years, or a fine of an amount to be determined in the Rules of Procedure and Evidence, or both.

<sup>171</sup> Report of the Secretary-General, *supra* note 1, para. 75

<sup>172</sup> Report of the Secretary General, *supra* note 1, para.79.

convicted accused can anticipate being treated in the same manner as they would have been by the Tribunals. The Secretary-General's Report noted that the

“Presidents of the Tribunals apply standard criteria when deciding on pardon or commutation. If such functions were transferred to national jurisdictions, there would inevitably be differing approaches and inconsistency of treatment among those convicted [...] this could lead to challenges on the basis that the rights of those convicted are not being effectively and equally protected”<sup>173</sup>.

Throughout different administrations, Presidents of the ICTY applied standard criteria in assessing requests for pardon or commutation of sentence under Article 28 of the Statute, and Rules 124 and 125 of the Rules of Procedure and Evidence. But the fact that the ICTY and ICTR enforce sentences in any number of countries that have entered into agreements for that purpose invariably does result in inconsistencies between defendants as to the conditions of imprisonment and the right to petition for pardon or commutation of sentence. In this circumstance, the approach of the ICTY Tribunal has been to try and ensure that all convicted persons are treated alike in applications for early release<sup>1</sup> through a practice where convicted accused will only be considered eligible for pardon or commutation of sentence once they have served two-thirds of their sentence.<sup>174</sup> Thus, if a

<sup>173</sup> Report of the Secretary-General, *supra* note 1, para. 81.

<sup>174</sup> *Prosecutor v. Ivica Rajic*, Decision of President on Early Release of Ivica Rajic, IT-95-12-ES, 22 August 2011, para. 12; *Prosecutor v. Milomir Stakic*, Decision of President on Early Release of Milomir Stakic, IT-97-24-ES, 15 July 2011, para. 22; *Prosecutor v. Momcilo Krajisnik*, Decision of President on Early Release of Momcilo Krajisnik, IT-00-39-ES, 11 July 2011, para. 21; *Prosecutor v. Veselin Sljivancanin*, Decision of President on Early Release of Veselin Sljivancanin, IT-95-13/1-ES.1, 5 July 2011, para. 20; *Prosecutor v. Johan Tarculovski*, Decision of President on Early Release of Johan Tarculovski, IT-04-82-ES, 23 June 2011, para. 13; *Prosecutor v. Blagoje Simic*, Decision of President on Early Release of Blagoje Simic, IT-95-9-ES, 15 February 2011, para. 20; *Prosecutor v. Darko Mrda*, Decision of President on Early Release of Darko Mrda, IT-02-59-ES, 1 February 2011, para. 15; *Prosecutor v. Ivica Rajic*, Decision of President on Early Release of Ivica Rajic, IT-95-12-ES, 31 January 2011, para. 14; *Prosecutor v. Zoran Zigic*, Decision of President on Early Release of Zoran Zigic, IT-98-30/1-ES, 8 November 2010, para. 12; *Prosecutor v. Haradin Bala*, Decision on Application of Haradin Bala for Sentence Remission, IT-03-66-ES, 15 October 2010, para. 14; *Prosecutor v. Momcilo Krajisnik*, Decision of

convicted person is eligible at the halfway mark for early release as in some national jurisdictions, it is likely that pardon or commutation will be refused.<sup>175</sup> If ineligible until the three-quarters mark as in other national jurisdictions, a means will be found by the President to consider pardon after the convicted person has served two-thirds of the sentence.<sup>176</sup> In one case, this has meant breaking an enforcement of sentence agreement.<sup>177</sup>

In light of the efforts made by the ICTY to ensure consistency of length of service of sentences imposed, the Residual Mechanism should also adopt a consistent approach in this regard towards all persons convicted by the Tribunals or the Residual Mechanism. However, it is not bound to take the same approach as the Tribunals. As already discussed, there is no requirement in the Residual Mechanism's Statute, or in international law, that it abide by the approach taken by the Tribunals. Consequently, there is no guarantee that the Mechanism will continue the ICTY's practice of regarding all persons convicted by the Tribunal as eligible in principle for

President on Early Release of Momcilo Krajisnik, IT-00-39-ES, 26 July 2010, para. 14; *Prosecutor v. Milan Gvero*, Decision of President on Early Release of Milan Gvero, IT-05-88-ES, 28 June 2010, para. 8; *Prosecutor v. Dusko Sikirica*, Decision of President on Early Release of Dusko Sikirica, IT-95-8-ES, 21 June 2010, para. 13; *Prosecutor v. Dragan Zelenovic*, Decision of the President on Application for Pardon or Commutation of Sentence of Dragan Zelenovic, IT-96-23/2-ES, 10 June 2010, para. 13; *Prosecutor v. Dario Kordic*, Decision of President on Application for Pardon or Commutation of Sentence of Dario Kordic, IT-95-14/2-ES, 13 May 2010, para. 13; *Prosecutor v. Mlado Radic*, Decision of President on Application for Pardon or Commutation of Sentence of Mlado Radic, IT-98-30/1-ES, 23 April 2010, paras 12-13; *Prosecutor v. Mitar Vasiljevic*, Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Mitar Vasiljevic, IT- 98-32-ES, 12 March 2010, para. 14; *Prosecutor v. Dragan Jokic*, Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Dragan Jokic of 8 December 2009, IT-02-60-ES & IT-05-88-R.77.1-ES, 13 January 2010, para. 14; *Prosecutor v. Biljana Plavsic*, Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavsic, IT-00-39 & 40/1-ES, 14 September 2009, para. 10.

<sup>175</sup> *Prosecutor v. Zelenovic*, Decision of President on Application for Pardon or Commutation of Sentence of Dragan Zelenovic, IT-96-23/2-ES, 10 June 2010, para. 13.

<sup>176</sup> *Prosecutor v. Kupreskic, et al.*, Public Redacted Decision of the President on the Application for Pardon or Commutation of Sentence of Vladimir Santic, IT-95-16-ES, 16 February 2009, para. 7.

<sup>177</sup> *Prosecutor v. Krnojelac*, Public Redacted Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac, IT-97-25-ES, 9 July 2009, paras 23-24.

early release after serving two-thirds of their sentence. As a result of the Residual Mechanism's discretion to adopt its own approach, there is the possibility that unfairness will occur if the Residual Mechanism does not apply a consistent approach to similarly situated persons.

With respect to the monitoring of sentences, the Secretary-General's report noted that the Tribunals "have already concluded agreements with other international bodies for them to carry out some aspects of their functions" and that it "would seem advisable for the residual mechanism(s) to continue those arrangements"<sup>178</sup>.

The Tribunals have entered into agreements with bodies such as the International Committee of the Red Cross, and the European Committee for the Prevention of Torture and Inhumane and Degrading Treatment or Punishment to monitor the enforcement of its sentences and it benefits from the assistance of those bodies in the monitoring of its sentences. While the Secretary-General did not indicate why specifically it "would seem advisable for the residual mechanism(s) to continue those arrangements", these arrangements have provided a means whereby the Tribunals can be satisfied that the rights of their convicted accused are being respected by the enforcement State, and have provided an avenue via which the Tribunals convicted accused can bring matters of concern to the attention of the Tribunals. Thus, it is advisable for the Residual Mechanism to continue these arrangements.

### III. Conclusion

On balance, it appears that the most difficult challenge to be faced by the Residual Mechanism will not be to the legality of its establishment by the Security Council, but to the impact of its establishment on the rights of persons whose proceedings would have come before the Tribunals. While it can be anticipated that Counsel will bring any number of challenges to the Residual Mechanism's exercise of jurisdiction on that basis, provided the Judges of the Residual Mechanism ensure continuity between the work of the Tribunals and that of the Residual Mechanism by adopting the Tribunals' procedural and substantive jurisprudence, as well as their practices, potential unfairness to persons whose proceedings are before the Mechanism should be avoided. Further, the legacies of the Tribunals will thereby be preserved and the integrity of their decision making secured.

<sup>178</sup> Report of the Secretary General, *supra* note 1, para. 82.

## E. Final Analysis

From a realist perspective, the Residual Mechanism is no more than the Tribunals' under a different name. The Residual Mechanism's Statute mirrors the Statute of the Tribunals, the only real variance being that it also elevates Judge made rules or practices of the Tribunals to its Statute and includes minor variations aimed at securing the efficiency of the Mechanism. These latter measures are reflective of the fact that once all substantive proceedings have concluded, the role of the Residual Mechanism will be to deal with reduced functions that are really residual in nature, for example, the continued protection of victims and witnesses and applications for pardon and commutation of sentences. This residual functioning of the Mechanism will continue well into the future and has the potential to therefore assist in the preservation of the Tribunals' legacies. Further, provision has been made to ensure that the Mechanism's Rules of Procedure and Evidence will be based on those of the Tribunals so that the Mechanism can adopt the same *modus operandi* of the Tribunals. Thus, while it may have been better for the Security Council to have allowed the Tribunals to scale down naturally, the Residual Mechanism can achieve the same objectives as would have been achieved by the Tribunals.

However, the Security Council neglected to make provision to ensure the continuity of the Tribunals procedural and substantive jurisdiction by the Residual Mechanism. It has merely provided the framework for Mechanism to function as the Tribunals and left it open to the Judges of the Residual Mechanism to determine the value to be attributed to the previous decisions of the Tribunals. This lacunae opens up the possibility of the Residual Mechanism undermining rather than preserving the legacies of the Tribunals by jurisprudential departures by the Residual Mechanism which could cause unfairness to accused whose proceedings were started at the Tribunals and transferred to the Residual Mechanism, or accused whose proceedings were finally determined by the Tribunals.

The integrity of any judicial institution is inextricably bound up with the fairness of its proceedings. Inherent to the notion of fairness in legal proceedings is the equal application of judicial standards to persons subject to the same jurisdiction. Such parity of treatment is attainable within the context of the Residual Mechanism's operations, through its assimilation of the Tribunals' jurisprudence as binding precedent, subject to departure only in instances where "cogent reasons in the interests of justice" so demand. This sustained jurisprudential continuum between the Residual Mechanism and the Tribunals thus constitutes an imperative bulwark against the possible infiltration of the taint of unfairness into the Mechanism's

proceedings, through the disparate treatment of those whose cases were fully adjudicated before the Tribunals, relative to those whose cases are projected for completion before the Residual Mechanism. At the end of the day, the Residual Mechanism's Judges bear the responsibility of ensuring that proceedings before it meet the highest standards of international due process and fairness. In this regard, the Security Council has more than amply provided the Mechanism with sufficient tools to ensure that its proceedings are conducted *in pari passu* with those before the Tribunals. Thus, the Security Council has furnished the Residual Mechanism with the means of safeguarding the integrity of its proceedings as a judicial institution, and, by extension, the legacy of both Tribunals.