

## ZOOM IN

### *The question:*

#### **The advent of the Residual Mechanism for Criminal Tribunals and the future of (*ad hoc*) international criminal justice: Questions of legality, efficiency, and fairness**

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The fate of the two *ad hoc* criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), established in 1993 and 1994 by the UN Security Council (SC), represents one of the most sensitive cases for international criminal justice since the beginning of the present century. After some permanent Members of the SC had begun to voice their discontent in relation to the activities of the two Tribunals,<sup>1</sup> a ‘Completion Strategy’ was outlined between 2003 and 2004, with the conclusion being that all judicial activities should be brought to a close by the end of 2010.<sup>2</sup> Not surprisingly, however, that project proved impossible to implement. Besides the critical issue that, at the time, some of the major accused who were indicted before the Tribunals were still at large or their trials were in the preliminary stages, the very fact of a fixed deadline being set for the Tribunals was perceived by the bench as a threat to judicial autonomy, or as a gateway to impunity.<sup>3</sup>

A compromise solution was eventually worked out within the SC in 2010 with the adoption of Resolution 1966 (2010), setting forth the framework for an *ad hoc* Mechanism intended to ‘carry out a number of essential functions of the Tribunals, including the trial of fugitives who are among the most senior leaders suspected of being most responsible

<sup>1</sup> See the US ‘State Department views on the future for War Crimes Tribunals’ as reported in (2002) 96 AJIL 482-484, as well as the criticism on the activity of the ICTY expressed by the representative of the Russian Federation in UNSC Verbatim Record (2 June 2000) UN Doc S/PV.4150, at 15.

<sup>2</sup> See UNSC Res 1503 (28 August 2003) UN Doc S/RES/1503 and 1534 (26 March 2004) UN Doc S/RES/1534.

<sup>3</sup> Cf the statement of the then President of the ICTY, Theodor Meron, before the SC in UNSC Verbatim Record (9 October 2003) UN Doc S/PV.4838, at 6.

for crimes, after the closure of the Tribunals'.<sup>4</sup> Acting under Chapter VII of the UN Charter, the SC therefore decided to establish the 'International Residual Mechanism for Criminal Tribunals' (MICT) with two branches which will commence functioning respectively on 1 July 2012 (for the ICTR) and 1 July 2013 (for the ICTY). At the same time, the SC requested that the two Tribunals take all possible measures to complete all their remaining works no later than 31 December 2014, to prepare for their closure and to ensure a smooth transition to the Mechanism.<sup>5</sup> In fact, the ICTR officially closed on 31 December 2015, whereas the ICTY is expected to close its doors at the end of 2017. The competence, the structure and the functioning of the MICT are governed by the Statute annexed to Resolution 1966 (2010), as well as by specific Rules of Procedure and Evidence drafted along the lines of the rules of the two *ad hoc* Tribunals.<sup>6</sup>

While, according to the wording of the Preamble of Resolution 1966 (2010), the MICT is conceived as 'a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions',<sup>7</sup> in fact it is charged with the substantial task to 'continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR'.<sup>8</sup> The competence of the MICT as regulated in the Statute, as well as the fact that its creation is based on Chapter VII authority, apparently bring this institution close to a new *ad hoc* criminal court established by the SC, rather than an operational device merely intended to manage the closure of the two pre-existing Tribunals. In this vein, the new initiative of the SC is likely to revive – if not to perpetuate since its jurisdiction is open-ended – all the questions of legality and opportunity which were raised a long time ago with the establishment of the ICTY and the ICTR.

<sup>4</sup> UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966, para 6 of the Preamble.

<sup>5</sup> *ibid* operative para 1 and 2.

<sup>6</sup> *ibid* operative para 5, requesting the UN Secretary-General to submit draft Rules of Procedure and Evidence of the Mechanism. The Rules were adopted by the Judges of the Mechanism on 8 June 2012 and subsequently further amended: see MICT, 'Rules of Procedure and Evidence' (26 September 2016) UN Doc MICT/1/Rev.2.

<sup>7</sup> UNSC Res 1966 (2010) (n 4) para 7 of the Preamble.

<sup>8</sup> *ibid* operative para 4. See also art 1(1) of the Statute of the Mechanism annexed to Resolution 1966 (2010).



On the other hand, the fact that the mandate of the MICT is subject to the material and temporal constraints provided for in Resolution 1966 (2010) – all allegedly intended to promote efficiency, cost-saving and expediency – may raise concerns about the effectiveness, impartiality and fairness of the judicial activities performed by this new institution.

QIL asked three scholars renowned in the field of international criminal law to evaluate the issues above. While Alexandre Skander Galand has devoted his attention to the question of legality of the MICT from the point of view of the Security Council's Chapter VII powers, the papers of Andrea Carcano and Yvonne McDermott address under different perspectives the issue of fairness before the MICT. Taken together, the three contributions offer an integrated assessment of both persistent and new complexities raised by ad hoc judicial bodies in the administration of international criminal justice.