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What Happens to the Acquitted?

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Abstract

According to the ICTR, Emmanuel Bagambiki is an innocent man. The trial chamber and the Appeals Chamber have each unanimously acquitted the former Prefect of Cyangugu of crimes relating to Rwanda's horrific 1994 genocide. And on 19 July 2007 Bagambiki was reunited with his wife in children in Belgium, having been granted asylum a few days earlier. It is tempting to conclude that justice has been done in Bagambiki's case. That conclusion, however, would be too facile: Bagambiki was acquitted in February 2006, nearly 18 months before his family reunion. In the interim he lived in a safe house in Arusha paid for by the United Nations, wanted by Rwanda for trial on related charges and unable to convince Belgium that he posed no danger to its peace and security. Bagambiki, moreover, is one of the lucky ones: the nightmare of being free but having nowhere to go continues for two of his acquitted roommates in the safe house, Andre Ntagerura and Andre Rwamakuba, Rwanda's Minister of Transport and former Minister of Education respectively. Bagambiki's ordeal and Rwamakuba and Ntagerura's ongoing plight illustrate one of the basic problems facing international criminal tribunals: what to do with the acquitted. An acquitted defendant normally has two options: return to his country of origin, or find a third country that will grant him asylum. Both options, however, have been problematic for defendants acquitted by the ICTR and are likely to prove equally problematic for defendants who may be acquitted in the future by the ICC. This short essay explains why – and identifies what the international community should do about it.

Key words

acquitted; asylum; double jeopardy; immigration law; innocent; International Criminal Court; international criminal law; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia; international tribunal; *ne bis in idem*; refugee law; Rwanda

According to the International Criminal Tribunal for Rwanda (ICTR), Emmanuel Bagambiki is an innocent man. The former prefect of Cyangugu has twice been acquitted of crimes relating to Rwanda's horrific 1994 genocide, first by the trial chamber, then unanimously by the Appeals Chamber.[1] And on 19 July 2007 he was reunited with his wife and children in Belgium, having been granted asylum just days earlier.

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1 This description of Bagambiki, of course, is contestable. As a matter of law, an acquittal means that the prosecution failed to prove the defendant's guilt beyond a reasonable doubt, not that the defendant could not have committed the crime. Nevertheless, given that all defendants are presumed innocent until proven guilty, I think it is fair to describe a defendant who has been unanimously acquitted of serious international crimes by an appellate chamber as 'innocent'. Otherwise, the presumption of innocence means very little.

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Bagambiki, moreover, is one of the lucky ones. His ordeal has ended, but the nightmare of being 'free' but having nowhere to go continues for two of his acquitted fellow occupants of the safe house, Andre Ntagerura and Andre Rwamakuba, Rwanda's former Minister of Transport and of Education respectively. They cannot return safely to Rwanda, where the government and an outraged populace continue to insist on their guilt. And they cannot find countries that are willing to take them off the United Nations' hands, the stigma of being accused *génocidaires* making them international pariahs. How long they will continue to live in Arusha as virtual prisoners is anyone's guess.

Rwamakuba and Ntagerura's ongoing plight illustrates one of the basic problems facing international criminal tribunals: what to do with the acquitted.[2] An acquitted defendant normally has two options: return to his country of origin, or find a third country that will grant him asylum. Both options, however, have proven problematic for defendants acquitted by the ICTR – and are likely to be equally problematic for defendants who may be acquitted in the future by the ICC. This essay explains why.

The essay itself is divided into four sections. Section 1 addresses the legal and physical dangers likely to be faced by an acquittee who returns to Rwanda, focusing in particular on the inadequate *ne bis in idem* provisions of the ICTR Statute.[3] Section 2 explains why refugee law makes it exceedingly difficult for an ICTR acquittee to find a state willing to grant him asylum – and why even a grant of asylum may prove to be short-lived. Section 3 discusses why defendants acquitted by the ICC will likely find it no easier to return home or find asylum elsewhere. Finally, section 4 suggests some practical reforms that could substantially reduce, although not eliminate, ICTR and ICC acquittees' *ne bis in idem* and asylum problems.

1. Returning home

Returning home has been painless for defendants acquitted by the ICTY, who have uniformly been greeted as 'hometown heroes' upon their arrival.[4] Mirjan, Zoran,

2 It is not the only problem. The ICTR Appeals Chamber has specifically held that acquittees have no right to compensation for being prosecuted and acquitted. See *Rwamakuba v. Prosecutor*, Decision on Appeal against Decision on Appropriate Remedy, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, para. 10. Moreover, although the Appeals Chamber recently upheld a trial chamber judgment ordering the Registrar to pay Rwamakuba US$2,000 in damages for denying him counsel in the early months of his detention, ibid., at para. 28, the Registrar has nevertheless refused to pay the award, choosing instead simply to refer the trial chamber's order to the Security Council. See 'The ICTR Registrar Is Unable to Enforce a Judgment of the ICTR', Hirondelle News Agency, 18 September 2007. Rwamakuba will thus have to return to court to enforce the order.

3 In principle, the discussion applies equally to defendants acquitted by the ICTY. As discussed below, however, ICTY acquittees have been able to return to their countries of origin, mooting the *ne bis in idem* and asylum issues.

4 P. M. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age', (2001) 5 *Washington University Journal of Law and Policy* 87, at 106.

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and Vlatko Kupreškić, for example, arrived in their native Ahmici – the site of the massacre that led to the charges against them – to fireworks, a band playing patriotic Croatian songs, and more than a thousand well-wishers, including hundreds of students who were given the day off from school to attend the reunion.[5] Dragan Papić received a similarly effusive welcome, all organized and overseen by the president of the Central Bosnia Veterans Association.[6]

For defendants acquitted by the ICTR, by contrast, returning home has not proven a viable option. To begin with, ICTR acquittees have ample reason to fear for their personal safety in Rwanda, as the ICTR has itself acknowledged.[7] The Rwandan government has expressed outrage at four out of the five ICTR acquittals, describing the most recent ones – of Bagambiki and Ntagerura – as a 'joke'.[8] That reaction is no laughing matter for the acquittees: human rights groups such as Human Rights Watch and Amnesty International have documented numerous instances in which individuals seen as hostile to the Rwandan government have been extrajudicially killed,[9] disappeared,[10] or tortured.[11] Rwandan authorities, moreover, have done little to stem the violence; on the contrary, the police justified a recent spate of 20 extrajudicial killings by noting that most of the victims were 'of extreme criminal character ready to die for their genocide ideology' – this despite the fact that none of the victims had been tried for participating in the 1994 genocide, much less convicted.[12]

ICTR acquittees also have reason to fear violence at the hands of their fellow Rwandans. Approximately 10,000 Hutus demonstrated in Kigali and Cyangugu against Bagambiki and Ntagerura's acquittals, many holding placards with inflammatory slogans like 'Revisionist ICTR' and 'Bagambiki the Killer'.[13] Given that ethnic violence between Hutus and Tutsis continues to be a problem in Rwanda, open hatred of the acquittees could all too easily devolve into vigilante justice.[14]

Physical safety, moreover, is not the ICTR acquittees' only concern. Returning to Rwanda would also expose them to two serious legal dangers: trials that lack basic due-process protections and unfair subsequent prosecutions.

1.1. Unfair trials

Perhaps most obviously, it is very unlikely that ICTR acquittees who are prosecuted in a Rwandan court would receive trials that satisfy international standards of due process, despite the fact that Rwanda has ratified the International Covenant for Civil and Political Rights (ICCPR).[15] Acquittees could be tried either by an ordinary

5 D. Sito, 'Pray for Them, Too!', *Transitions Online*, 31 October 2001.
6 'ICTY Indictee Dragan Papic Who Has Been Cleared of All Charges Has Arrived in His Native Vitez', *HRT Web*, 17 January 2000.
7 'Rwandan Compensation Award Sets Precedent', *Institute for War & Peace Reporting*, 2 April 2007.
8 'Rwanda Furious over Acquittal of Two Suspects', *East African*, 1 March 2004.
9 See, e.g., Human Rights Watch, *There Will Be No Trial: Police Killings of Detainees and the Imposition of Collective Punishments* (2007), at 1.
10 See, e.g., *Amnesty International Report 2007*, Rwanda ('Update: Enforced Disappearances').
11 See, e.g., *Amnesty International Action Report*, 'Rwanda/Uganda: Forcible Return/Fear of Torture or Ill-Treatment', AI Index AFR 47/004/2007, 16 March 2007.
12 See Human Rights Watch, *supra* note 9, at 2.
13 See 'Rwandan Compensation Award', *supra* note 7.
14 See, e.g., Human Rights Watch, *Killings in Eastern Rwanda* (2007), at 1.
15 1966 International Covenant for Civil and Political Rights, 999 UNTS 171 (1966). Rwanda acceded to the ICCPR on 16 April 1975.

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Rwandan criminal court or by an informal gacaca court: ordinary criminal courts have jurisdiction over Category One offences, which include 'the planning or organization of killings, as well as the commission of sexual crimes such as rape', while gacaca courts have jurisdiction over Category Two offences such as murder and complicity in murder.[16] Neither court is a particularly attractive option. Ordinary criminal courts are plagued by numerous problems, ranging from lengthy pre-trial detentions in conditions that amount to cruel, inhuman, or degrading treatment[17] – detentions often lasting more than a decade when the suspect is a political opponent of the Rwandan government[18] – trials that limit the defendant's right of confrontation and ability to call witnesses,[19] convictions based on insufficient evidence,[20] and the absence of fair and effective appellate review.[21] Those problems have proven particularly acute in trials involving government officials believed to have been involved in the 1994 genocide, such as the former president, Pasteur Bizimingu, and former transport minister Charles Ntakirutinka.[22]

Gacaca courts have an even more disappointing record. Government officials routinely interfere with their independence;[23] the majority of gacaca judges are not lawyers and receive minimal training in criminal law;[24] and the judges are unpaid, leading to endemic problems with bribery.[25] The rules of evidence that apply to gacaca trials are ill-defined, particularly concerning critical concepts such as the rule against hearsay.[26] Defendants have the right neither to silence nor to counsel,[27] and they are often prevented from cross-examining the prosecution's witnesses or calling their own.[28] A number of witnesses who have refused to give false testimony against a defendant have been persecuted by the government.[29] And there is no right to appeal against conviction to a non-gacaca court, even for a Category Two offence that can lead to a sentence of life imprisonment.

1.2. Unfair subsequent prosecutions

ICTR acquittees would also face a related – though rarely acknowledged – legal danger if they returned to Rwanda: subsequent prosecutions that would violate the spirit, if not the letter, of the ICTR's *ne bis in idem* provision. Article 9 of the ICTR

16 C. J. Le Mon, 'Rwanda's Troubled Gacaca Courts', (2007) 14 *Human Rights Brief* 16, at 17.
17 US Department of State, 2006 Country Reports on Human Rights Practices, Rwanda, section 1.d (Prison and Detention Center Conditions).
18 See *Amnesty International Report*, *supra* note 10.
19 See US Department of State, *supra* note 17, section 1.e (Trial Procedures).
20 Ibid.
21 Ibid.
22 See Human Rights Watch, 'Rwanda: Historic Ruling Expected for Former President and Seven Others', backgrounder, 16 January 2006.
23 See US Department of State, *supra* note 19.
24 See Le Mon, *supra* note 16, at 16.
25 Ibid.
26 See US Department of State, *supra* note 19.
27 J. Fierens, 'Gacaca Courts: Between Fantasy and Reality', (2005) 3 *Journal of International Criminal Justice* 896, at 912.
28 See US Department of State, *supra* note 19.
29 Amnesty International, 'Gacaca: A Question of Justice', AI Index AFR 47/007/2002, 17 December 2002, at 36.

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Statute provides that

> No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.[30]

As written, Article 9 would permit a Rwandan court to pursue one kind of subsequent prosecution that cannot be reconciled with an ICTR acquittal, namely a prosecution that involves different charges, but is based on a mode of participation in the charged crimes that the ICTR specifically rejected. A mode of participation such as command responsibility or aiding and abetting is not itself an 'act constituting a serious violation of international humanitarian law'; it is simply the legal basis for holding the defendant criminally responsible for such an act. Article 9 would thus not be triggered by a subsequent prosecution based on a rejected mode of participation.

This restrictive interpretation of Article 9, it is important to note, is confirmed by the Statute and Rules of the ICTY: Article 9 is a verbatim copy of Article 10 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY),[31] and Rule 13 of the ICTY Rules makes it clear that the *ne bis in idem* provision only prohibits retrying a defendant 'for a *crime* for which that person has already been tried by the Tribunal'.[32] Both Articles, moreover, are narrower than Article 20(1) of the Rome Statute of the International Criminal Court (ICC), which specifically provides that 'no person shall be tried before the Court *with respect to conduct which formed the basis of crimes* for which the person has been convicted or acquitted by the Court'[33] – a formulation that clearly extends to conduct underlying a mode of participation.[34]

As long as it brought different charges against an acquittee, then, a Rwandan court would not violate Article 9 by concluding – even on the same evidence – that the ICTR wrongly rejected a particular mode of participation. Indeed, that is exactly what has happened in Bagambiki's case: a Rwandan court recently sentenced Bagambiki to life imprisonment *in absentia* for rapes[35] that he allegedly committed in Cyangugu 'individually and in concert with others',[36] despite the fact that both chambers of the ICTR held that the prosecution had failed to prove beyond reasonable

30 Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994) (hereinafter ICTR Statute), Art. 9.

31 Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993), Art. 10.

32 ICTY Rules of Procedure and Evidence, as amended 13 September 2006, UN Doc. IT/32/Rev.39 (2006), Rule 13 (emphasis added).

33 Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (1998), Art. 20(1) (hereinafter Rome Statute) (emphasis added).

34 Art. 20(2), by contrast, parallels the more restrictive formulation of Article 10 of the ICTY Statute, providing that '[n]o person shall be tried by another court for *a crime* referred to in article 5 for which that person has already been convicted or acquitted by the Court'. Ibid., Art. 20(2).

35 It is not clear whether he was convicted of rape as a domestic crime or as a form of genocide. Human Rights Watch indicates that it is the latter. See Human Rights Watch, 'UK: Put Genocide Suspects on Trial in Britain', 1 November 2007.

36 'Rwanda Intends to Prosecute Ex-governor Emmanuel Bagambiki for Rape', Hirondelle News Agency, 8 March 2006.

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doubt that he had participated directly in the Cyangugu massacres[37] or exercised either de facto or *de jure* control over the gendarmes and soldiers who committed them.[38] There is no question that the Rwandan prosecution is based on the same alleged conduct as the ICTR prosecution; indeed, the *amicus* brief originally filed with the ICTR by the Coalition for Women's Human Rights in Conflict Situations, urging the Tribunal to amend the indictment against Bagambiki (and Ntagerura) to include sexual violence charges, admits as much:

> [T]he Defendants are charged with planning, ordering, and directly participating in the genocide that, according to the testimony of Witnesses LBI and LAM, included mass killing, rapes, enslavement and other sexual violence against Tutsi women. Moreover, the Defendants are charged with being responsible for the actions of their subordinates in carrying out the massacres. The Amici note that the evidence on record shows that these subordinates also raped and enslaved Tutsi women in the course of their killing for which the Prosecutor claims that the Defendants are criminally liable. *Thus, the sexual violence to which the Witnesses testified is part of the same course of events for which the Defendants are being tried.*[39]

To convict Bagambiki on the 'new' rape charges, therefore, the Rwandan court had to specifically reject the legal conclusions of eight ICTR trial and appellate judges regarding Bagambiki's lack of direct or command responsibility for the Cyangugu massacres – a dramatic illustration of Article 9's failure adequately to protect acquitted ICTR defendants from unfair subsequent national prosecutions.

2. Finding a new home

Given the threats to their personal safety and the likelihood that they will subjected to trials that lack due process and violate the spirit, if not the letter, of the ICTR's *ne bis in idem* provision, it is not surprising that none of the ICTR acquittees have wanted to return to Rwanda. Unfortunately, as the acquittees quickly learned, it is very difficult to convince a state to grant asylum to an accused *génocidaire* – even one who has been unanimously acquitted. Ntagerura has been turned down by France[40] and has been ignored for years by Canada.[41] Rwamakuba's wife and children live in Switzerland, but the Swiss government has not been willing to arrange even some kind of temporary residence for him, much less grant him asylum.[42] Bagambiki has finally been reunited with his wife and children in Belgium, but only after three years of legal wrangling, including having his request for asylum initially turned down on the ground that he posed a threat to Belgium's 'law and order'.[43] Ignace Bagilishema,

37 *Prosecutor v. Ntagerura, Bagambiki & Imanishimwe*, Judgement and Sentence, Case No. ICTR-99-46-A, 7 July 2006, paras. 307, 319.
38 Ibid., paras. 339–347. The Appeals Chamber also agreed with the trial chamber that although Bagambiki had effective control over the Kagano communal police, he did not know that they were involved in the attacks against Nyamasheke parish. Ibid., para. 351.
39 Coalition for Women's Human Rights in Conflict Situations, 'Amicus Curiae Brief Respecting the Need to Include Sexual Violence Charges in the Indictment', 1 March 2001, paras. 14, 15 (emphasis added).
40 'ICTR Struggles to Make Its Acquittals Recognized', Hirondelle News Agency, 17 October 2006.
41 T. Goldenberg, 'Innocent Rwandan Afraid to Go Home', *Toronto Star*, 13 May 2007, A11.
42 'Acquitted Ex-minister Obtains Compensation', Hirondelle News Agency, 4 February 2007.
43 'Acquitted by the ICTR but Unwelcome in Belgium', Hirondelle News Agency, 30 April 2007.

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the former mayor of the Mabanza commune in the Kibuye prefecture, was finally given asylum in France[44] after being turned down by two Scandinavian countries and initially by France itself.[45] The only genuine success story is Jean Mpambara, the former mayor of Rukara commune in the Kibungo prefecture, whom the French government allowed to join his family on Mayotte, a small French island in the Indian Ocean, not long after his acquittal.[46]

2.1. Requesting asylum and 'safe third countries'

The major obstacle facing ICTR acquittees such as Ntagerura and Rwamakuba is that a state is only obligated to consider a request for asylum when a refugee is 'at the border or in [its] territory'.[47] There is little question that, as former officials of the Interim Government in Rwanda, both men would qualify for refugee status under the 1951 Refugee Convention,[48] given the threats to their physical safety and the likelihood that they would be persecuted on the basis of political opinion (whether per se[49] or implicit in their conduct[50]) if they returned to Rwanda. The problem is that, because they are living as virtual prisoners in Arusha, they have no way to physically enter the territory of a state in which they want to seek asylum. At most, they could request asylum at a state's embassy – a request that is unlikely to succeed, for a number of reasons.

To begin with, very few states formally accept asylum applications at their embassies. As of 2005, for example, only three European states did so: France, Spain, and the United Kingdom.[51] In most situations, then, the most an acquittee could hope for is access to a Protected Entry Procedure (PEP), a mechanism that permits 'a non-national to approach the potential host state outside its territory with a claim for asylum . . . and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final'.[52] PEPs are more widely available – in Europe, for example, in Belgium, Germany, Ireland, Italy, Luxembourg, and Portugal – but they 'have been sparsely used'.[53]

To be sure, an acquittee who shows up at an embassy where he cannot formally apply for asylum or take advantage of a PEP would still be protected by Article 33 of the Refugee Convention against *refoulement* – direct or indirect return to a state

44 See 'ICTR Struggles', *supra* note 40.
45 'Acquitted Rwandan Genocide Suspect Has No Place To Go', Middle East News Online, 16 July 2001.
46 'Jean Mpambara, Acquitted by the ICTR, Has Found Refuge in Mayotte', Hirondelle News Agency, 3 January 2007.
47 EU Council Regulation No. 343/2003, 18 February 2003.
48 1951 United Nations Convention Relating to the Status of Refugees, 189 UNTS 137, entered into force 22 April 1954 (hereinafter Refugee Convention).
49 See, e.g., J. C. Hathaway, *The Law of Refugee Status* (1991), 149 (noting that 'persecution on account of political opinion was conceived in liberal terms', including 'diplomats thrown out of office', persons 'whose political party has been outlawed', and 'individuals who fled from revolutions').
50 See, e.g., ibid. ('An alternative to grounding a claim on adherence to political opinion per se is to rely on evidence of engagement in activities which imply an adverse political opinion, and which would elicit a negative governmental response tantamount to persecution').
51 G. Noll, 'Seeking Asylum at Embassies: A Right to Entry Under International Law?', (2005) 17 *International Journal of Refugee Law* 542, at 542 n. 1.
52 Ibid., at 543.
53 Ibid., at 542 n. 2.

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where he will be at risk of persecution for a Convention reason[54] – simply by virtue of being present in territory that is 'subject to a state's jurisdiction'.[55] There is no question that an embassy qualifies as such territory for the purposes of Article 33: the European Court of Human Rights specifically noted in *Banković v. Belgium* that 'recognised instances of the extra-territorial exercise of jurisdiction by a state include cases involving the activities of its diplomatic or consular agents abroad',[56] and scholars agree with that conclusion.[57]

Even that protection against *refoulement* could turn out to be short-lived, however, because the state might still be able to expel an ICTR acquittee from its embassy on the ground that he should have sought asylum in Tanzania instead. A number of states have adopted so-called 'safe third country' policies that permit 'a person claiming refugee status to be sent to any "safe" state through which he or she may have passed en route to the country in which he or she is now present',[58] despite nearly unanimous scholarly insistence that such policies are inconsistent with the object and purpose of the Refugee Convention.[59] In order to reach a state's embassy, an ICTR acquittee would obviously have to pass through Tanzanian territory. Any state with a 'safe third country' policy – which includes all of the EU, the United States, and Australia[60] – would thus be entitled to deny the acquittee admission to its embassy if it concluded that Tanzania qualifies as safe.

Whether a state would reach that conclusion is a difficult question. Objectively, it probably should not: although once hailed for its generosity toward refugees,[61] the Office of the United Nations High Commissioner for Refugees has said that 'Tanzania's legislative and policy framework concerning refugees is not fully consistent with the provisions of the 1951 Refugee Convention',[62] and the US State Department recently concluded that 'the government [does] not provide protection against *refoulement*'[63] – both necessary conditions for a state to qualify as 'safe'.[64] If a state agreed, it would be required to consider the acquittee's asylum request,[65] because 'the sending state would breach Art. 33 if there is a real chance that the

54 See J. C. Hathaway, *Rights of Refugees* (2005), 163.
55 Ibid., at 160.
56 *Banković v. Belgium*, 11 BHRC 435, ECHR 12 December 2001, at para. 73.
57 See, e.g., G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2007), 252 (noting that when an individual 'seeks asylum in a diplomatic mission in a third state . . . the principle of non-refoulement applies, since the asylum seeker is outside the country of origin'); Hathaway, *supra* note 54, at 169–70 (noting that, 'at a minimum', such territory within a state's jurisdiction 'includes both situations in which a state's consular or other agents take control of persons abroad, and where the state exercises some significant public power in territory . . . in which it is present by consent, invitation, or acquiescence').
58 Hathaway, *supra* note 54, at 295.
59 See, e.g., Goodwin-Gill and McAdam, *supra* note 57, at 392.
60 See, e.g., Hathaway, *supra* note 54, at 399–407.
61 UNHCR, *State of the World's Refugees* (2006), Box 4.3.
62 Ibid. In particular, the framework provides only for temporary asylum, restricts refugee movement, and does not allow for judicial review when asylum applications are rejected.
63 US Department of State, *2006 Country Reports on Human Rights Practices*, Tanzania, section 2(d) (Protection of Refugees) (noting that in 2006 Tanzania deported more than 1,700 Burundians and 15,000 Rwandans after refusing to 'co-operate with the UNHCR to ensure that none held valid refugee status').
64 See Goodwin-Gill and McAdam, *supra* note 57, at 394.
65 See Hathaway, *supra* note 54, at 301 (noting that when indirect *refoulement* is possible, 'Art. 33 amounts to a de facto duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk').

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partner state may remove the refugee claimant to another state in which the risk of *refoulement* exists'.[66]

It is important to note, however, that states decide for themselves whether another state qualifies as safe.[67] It is thus possible that a state would consider Tanzania a safe third country, despite the evident problems with its asylum procedures. If it did, the acquittee seeking asylum would become the responsibility of the Tanzanian government – an undesirable prospect, for two reasons. First, even if Tanzania did not intentionally return the acquittee to Rwanda, its inadequate procedures for determining asylum could still lead to his indirect *refoulement*.[68] Second, all refugees who are permitted to remain in Tanzania are placed in dangerous and overcrowded refugee camps and settlements[69] in which they live as virtual prisoners.[70] At best, then, an acquittee would be forced to choose between two different kinds of imprisonment, a refugee camp or a UN safe house. Most rational acquittees would choose the latter.

2.2. Excluding 'war criminals'

Regardless of how or why a state considers an acquittee's request for asylum, that request faces another serious – and most likely fatal – procedural hurdle: Article 1F of the Refugee Convention, which permits a state to exclude a person from asylum if it concludes that there are 'serious reasons for considering' that he has committed a war crime or a crime against humanity.[71] One would think that a state could not find such 'serious reasons' when an international tribunal has unanimously acquitted the person of the asylum-excluding crime. But that is not, in fact, the case: an acquittal means that the prosecution failed to prove the defendant's innocence 'beyond a reasonable doubt', not that there is no evidence that the defendant committed the crime. That is a critical distinction, because national courts have uniformly concluded that the 'serious reasons' standard is substantially lower than 'proof beyond a reasonable doubt',[72] ranging from 'clear and convincing' evidence in Canada[73] to the equivalent of 'probable cause' in the United States.[74] Indeed, a UNHCR expert

66 Ibid., at 325.

67 See, e.g., S. H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', (2003) 15 *International Journal of Refugee Law* 567, at 575.

68 See ibid., at 585 ('[C]hain *refoulement* can result when a person is returned to a country that does not consciously practice *refoulement* but which lacks a fair refugee determination system. In such a case, an inaccurate determination can result in *refoulement* . . . This has been a major problem'). Fortunately such indirect *refoulement* would be unlikely in Bagambiki's case, because the Tanzanian government promised the ICTR not to arrest him and extradite him back to Rwanda. See 'Acquitted by the ICTR', *supra* note 43. Tanzania should be encouraged to make such promises for all ICTR acquittees.

69 See US Department of State, *supra* note 63, section 2.d; UNHCR, *supra* note 61, Box 4.3.

70 See US Department of State, *supra* note 63, section 2.d (noting that, in 2006, '[i]t remained illegal for refugees to live outside their camps or settlements, or to travel outside of their camps without permits').

71 Refugee Convention, *supra* note 48, Art. 1F(a).

72 See M. Bliss, '"Serious Reasons for Considering": Minimum Standards of Procedural Fairness in the Application of Article 1F Exclusion Clauses', (2000) 12 *International Journal of Refugee Law* (Special Supplementary Issue) 92, at 115–16.

73 See *Cardenas v. Canada*, (1994) 23 *Immigration Law Review* 92d, 244, 252.

74 See *Ofosu v. McElroy*, 933 F. Supp. 237, 239 (SDNY 1995); see also *McMullen v. INS*, 788 F.2d 591, 599 (9th Cir. 1996) (holding that, to exclude an asylum-seeker under Article 1F, the INS 'need not find as a matter of fact

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round table specifically concluded that the 'serious reasons' standard is satisfied by evidence sufficient for a court to *indict* a defendant[75] – a position that has been embraced by at least one Belgian court[76] and even by the otherwise progressive European Council on Refugees and Exiles.[77] There is no reason, therefore, that a state could not invoke Article 1F to exclude an acquittee simply by virtue of the fact that he once stood trial before the ICTR – especially given that 'it falls to each contracting state to decide for itself when a refugee claimant is within the scope of an exclusion clause'.[78]

If a state did invoke Article 1F, the consequences for the acquittee would be potentially disastrous: the Refugee Convention would no longer protect him against *refoulement* to Rwanda[79] or extradition to any state that has universal jurisdiction over war crimes and crimes against humanity.[80] That would not necessarily mean that the acquittee would actually be expelled from the state in which he sought asylum; return or extradition might still be limited by international human rights law. It is an open question, however, how protective that law would be.[81]

The most important limitation would be the prohibition on torture, a norm that almost certainly enjoys *jus cogens* status.[82] Article 3 of the 1984 Convention against Torture specifically prohibits a state party from expelling, returning, or extraditing a person to another state 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'.[83] Similarly, the European Court of Human Rights (ECHR) has held that Article 3 of the European Convention on Human Rights[84] prohibits a state party from either expelling[85] or extraditing[86] a person to face torture. Those protections may well prohibit a state from returning an acquittee to Rwanda, given the significant evidence that torture is an integral

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that [the applicant] was directly involved . . . either beyond a reasonable doubt or by a preponderance of the evidence').

75 See UNHCR Lisbon Expert Roundtable, 'Summary Conclusions: Exclusion from Refugee Status' (2001), para. 17.

76 See S. Kapferer, 'Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium, and the United Kingdom', (2000, Special Supplementary Issue) 12 *International Journal of Refugee Law* 195, at 209.

77 European Council on Refugees and Exile, *Position on Exclusion from Refugee Status* (2004), 17 ('In terms of the ICC Statute, this corresponds with what is required by the Prosecutor of the ICC to convince the Pre-Trial Chamber to open a trial against a person on charges within the jurisdiction of the Court, i.e. substantial grounds to believe that the person has committed the crime charged').

78 See Hathaway, *supra* note 54, at 215.

79 See Bliss, *supra* note 72, at 92.

80 Switzerland and Belgium, for example, have both prosecuted officials in Rwanda's Interim Government for their involvement in the genocide. See M. A. Drumbl, *Atrocity, Punishment, and International Law* (2007), 83–4.

81 See, e.g., J. Dugard and C. Van den Wyngaert, 'Reconciling Extradition with Human Rights', (1998) 92 AJIL 187, at 187 (noting that '[t]he incremental and casuistic response of extradition law' to human rights law 'fails to provide a proper legal framework for the balancing of the human rights of the fugitive and the interest of states in the suppression of transnational crime').

82 Ibid., at 198.

83 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (1984).

84 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (1950).

85 See, e.g., *Cruz Varas et al. v. Sweden*, Judgment of 20 March 1991, [1991] ECHR (Ser. A), at para. 70; *Vilvarajah et al. v. United Kingdom*, Judgment of 30 October 1991, [1991] ECHR (Ser. A), at para. 103.

86 See *Soering v. United Kingdom*, Judgment of 7 July 1989, [1989] ECHR (Ser. A), at paras. 88, 91.

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part of the government's law-enforcement repertoire[87] – although it is important to recognize that the prohibition against torture 'may not exclude differences in interpretation over what constitutes' it.[88]

Other human rights limitations on return and extradition may also protect acquittees who are excluded from asylum under Article 1F, but they are likely to be far less effective than the prohibition against torture. Most of the important extradition conventions, for example, contain asylum-like discrimination clauses that prohibit extradition if the requested state has grounds to believe that it is being sought 'for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, or political opinion'.[89] Unfortunately, such discrimination clauses are rarely used in practice.[90]

Even a promising limitation such as the right to a fair trial, guaranteed by Article 14 of the ICCPR, may not provide acquittees with effective protection against return or extradition. The ECHR suggested in *Soering* that the Convention may prohibit extradition of a person 'in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country',[91] and legislation in a number of states expressly prohibits extradition in such circumstances.[92] Nevertheless, not only does the burden of proving flagrant unfairness fall squarely on the extraditee,[93] but also the difficulties inherent in a state judging the (potential) fairness of trials in other states – a judgement that often requires bridging the gap between very different legal cultures, traditions, and systems – mean that, in practice, 'requested states will normally accord a wide margin of appreciation to the requesting state . . . and courts of the requested state will probably refuse extradition only where there is clear evidence of a flagrant and systematic denial of fair trial rights in the requesting state'.[94]

Barring evidence that he is likely to be tortured, then, an acquittee who is excluded from asylum by Article 1F may well face *refoulement* to Rwanda or extradition to another state to stand trial on new charges. In the latter case the requesting state would simply have to charge the acquittee with an offence that satisfied the ICTR's inadequate *ne bis in idem* provision – which should not be difficult, for reasons noted above.[95]

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87 See, e.g., Amnesty International, 'Suspects Must Not Be Transferred to Rwandan Courts for Trial Until It Is Demonstrated that Trials Will Comply with International Standards of Justice', AI Index AFR 47/013/2007, 2 November 2007, at 7–8 (summarizing evidence).

88 Dugard and Van den Wyngaert, *supra* note 81, at 198.

89 1957 European Convention on Extradition, 359 UNTS 273 (1957), Art. 3(2); see also 1981 Inter-American Convention on Extradition, 20 ILM 733 (1981), Art. 4(5) (same).

90 See S. Kapferer, *The Interface between Extradition and Asylum* (2003), 34; Dugard and Van den Wyngaert, *supra* note 81, at 202.

91 See *Soering* case, *supra* note 86, at para. 113; see also *Drozd and Janousek v. France and Spain*, Judgment of 26 June 1992, [1992] ECHR (Ser. A), at para. 110.

92 See, e.g., UK Extradition Act 1989, section 12(2)(a); Canadian Extradition Act 1999, section 44(1)(a).

93 See, e.g., *Cox v. Canada*, 31 October 1994, UN Doc. CCPR/C/52/D/53/1993, para. 10.3.

94 Dugard and Van den Wyngaert, *supra* note 81, at 204.

95 Presumably all states are obligated to comply with Article 9's *ne bis in idem* provision. See, e.g., ICTR Statute, *supra* note 30, Introduction, para. 2 (providing that 'all States shall cooperate fully with the International Tribunal . . . and shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute'); ibid., Art. 28(1) ('States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of

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Moreover, even if the excluded acquittee is not returned or extradited, he is likely to face an uncertain future in the state that has excluded him. Although some excludees are given a different legal status, such as the United Kingdom's 'exceptional leave to remain' or France's humanitarian status, most are simply consigned to the limbo of having no legal status whatsoever.[96] Even worse, the state denying the acquittee asylum may itself choose to prosecute the acquittee instead of leaving him in that troublesome limbo.[97]

2.3. Subsequent extradition

Finally, it is important to note that ICTR acquittees who are actually granted asylum will still have to live with the constant threat of losing that status and subsequently being extradited to Rwanda or elsewhere. Although the principle of non-*refoulement* is generally understood to protect a person from extradition,[98] that protection is contingent upon the principle of non-*refoulement* continuing to apply. An ICTR acquittee who has received asylum will thus always be in a precarious position; despite not having been initially excluded on Article 1F's 'serious reasons' grounds because of the ICTR charges, the filing of new criminal charges elsewhere could always lead to his exclusion and extradition at some point in the future. Article 1F consideration is not a single-occasion affair: a state can invoke the article whenever justiciable criminal charges against a refugee are pending in another state.[99] Prior to Rwanda's ill-advised decision to convict Bagambiki *in absentia*,[100] for example, Belgium had promised to consider extraditing Bagambiki to Rwanda if the Rwandan government could demonstrate that he faced charges there that the ICTR had not rejected.[101]

Even receiving asylum, in short, does not provide an acquittee with much protection. No matter how much time has passed, the acquittee will likely be stripped of his asylum and extradited whenever another state brings justiciable charges against

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international humanitarian law.'). It is important to note that although bilateral and multilateral extradition treaties often contain their own *ne bis in idem* provisions – provisions that in some cases are broader than Article 9 – those provisions apply to judgments by states parties, not to judgments by international tribunals. The Schengen Convention, for example, provides that '[a] person whose trial has been finally disposed of *in one Contracting Party* may not be prosecuted in another Contracting Party for the same acts'. 1985 Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders, and the 1990 Convention Applying the Agreement, 30 ILM 68, Art. 54 (emphasis added). Outside the extradition context, moreover, there is no international principle of *ne bis in idem*. See G. P. Fletcher, 'Against Universal Jurisdiction', (2003) 1 *Journal of International Criminal Justice* 580, at 582.

96 See Kapferer, *supra* note 76, at 219.

97 Ibid.

98 See Goodwin-Gill and McAdam, *supra* note 57, at 262.

99 See Hathaway, *supra* note 49, at 214.

100 Ill-advised because the European Convention on Extradition, like most extradition conventions (see Kapferer, *supra* note 90, at 40), prohibits extradition when the request is based on convictions obtained *in absentia* unless the requested person will be given a new trial. See 1978 Second Additional Protocol to the European Convention on Extradition, ETS No. 98 (1978), Art. 3. Bagambiki is very unlikely to receive a new trial, effectively ending Rwanda's ability to extradite him from Belgium. The Rwandan government would have been better off trying to extradite him prior to trial.

101 See 'Country Angry with Belgium over Genocide Suspect', *The Monitor*, 23 July 2007. The availability of the death penalty would previously have barred Belgium – or any other EU country – from extraditing anyone to Rwanda, but Rwanda recently eliminated the death penalty. See 'Rwanda: Country Abolishes Death Penalty', *Bua News*, 2 August 2007.

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him that satisfy the various human rights limitations on extradition – even if the subsequent prosecution violates the spirit of the ICTR's inadequate *ne bis in idem* provision.

3. The International Criminal Court

Because the ICTR is scheduled to complete its work in 2010,[102] there is a limit to how many Rwandan defendants may still find themselves in Ntagerura and Rwamakuba's unenviable position.The ICC, however, is just now preparing its first cases for trial – and is, of course, intended to be a permanent international court. The problem of what happens to the acquitted will thus not disappear with the ICTR.

3.1. Returning home

Because the Court has jurisdiction over both international and internal armed conflicts and reserves the right to prosecute individuals on both sides of a conflict, some ICC defendants will have little problem returning home following an acquittal. Repatriation should normally not be a problem, for example, for acquittees who were involved in an international armed conflict or who were on the winning side of an internal armed conflict. In both situations the acquittees' government will likely welcome them back into the fold. Two other categories of acquittees, by contrast, will almost certainly find it difficult, if not impossible, to return home safely: government officials and soldiers on the losing side of an internal armed conflict – such as the ICTR acquittees – and members of rebel groups involved in an ongoing internal armed conflict with a state's government. Such individuals are unlikely to be allowed to return home in peace despite being acquitted of the charges against them.

Unfortunately, three of the four situations currently being investigated by the ICC – Uganda, the Democratic Republic of the Congo, and the Central African Republic – fall into the latter category. As Antonio Cassese has noted with justifiable scepticism, 'the striking feature all three self-referrals lies in the fact that in each case the referring state asked the Prosecutor to investigate crimes allegedly committed by *rebels* fighting against the central authorities'.[103] The only exception is the situation in Darfur, which was referred to the ICC by the UN Security Council[104] over the Sudanese government's bitter opposition.[105] If Ahmad Harun or Ali Kushayb, the two Sudanese officials for whom the ICC has issued arrest warrants,[106] are ever tried and acquitted, there is no question that the Sudanese government would welcome them home with open arms.[107] Should Thomas Lubanga Dyilo or Joseph Kony ever be tried and acquitted, however, they would be greeted far less enthusiastically.

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102 See UN Doc. S/RES/1503 (2003).
103 A. Cassese, 'Is the ICC Still Having Teething Problems?', (2006) 4 *Journal of International Criminal Justice* 434, at 436 (emphasis in original).
104 See UN Doc. S/RES/1593 (2005).
105 See Cassese, *supra* note 103, at 436.
106 See, e.g., *Prosecutor v. Harun and Abd-Al-Rahman*, Warrant of Arrest for Ali Kushayb, Case No. ICC-02/05–01/07, 27 April 2007.
107 See 'Sudan Rejects ICC Arrest Warrants', *Sudan Tribune*, 2 May 2007.

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Moreover, even if a defendant like Lubanga or Kony could return home safely, an ICC acquittal would not preclude their countries of origin from prosecuting them domestically on different charges based on a mode of participation specifically rejected by the Court. Like Article 9 of the ICTR Statute, Article 20(2) of the Rome Statute only prohibits a national court from trying a defendant 'for a *crime* referred to in article 5 for which that person has already been. . . acquitted by the Court',[108] permitting a subsequent national prosecution that involves different charges but is based on a rejected mode of participation. Even worse, the ICC would be powerless to intervene if the subsequent prosecution did not respect the acquittee's right to a fair trial. As I have explained elsewhere, the absence of national due process does not make a case admissible before the ICC.[109]

3.2. Finding a new home

In many cases, then, ICC acquittees will be forced to find a new home elsewhere. Unfortunately, there is no reason to believe that states' reluctance to grant asylum to defendants acquitted by the ICTR will not extend to defendants acquitted by the ICC. States obviously continue to see defendants acquitted of serious international crimes as threats to their security, as demonstrated by Belgium's insistence on considering Bagambiki to be a threat until a court held otherwise. Moreover, given that the ICTR is widely viewed as an extremely pro-prosecution tribunal,[110] making its acquittals all the more persuasive, ICC acquittals are likely to be greeted with greater scepticism.

That said, EU states will find it difficult to avoid at least considering the asylum requests of ICC acquittees. The Dublin Regulation, adopted by the European Union in 2003, commits at least one member state to consider a refugee's application for asylum.[111] That obligation is only triggered by an application filed 'at the border or in [the] territory' of a member state,[112] which would seemingly limit an ICC acquittee to requesting asylum in the Netherlands, Belgium, or Germany. In practice, however, '[a]ny application for international protection is presumed to be an application for asylum'[113] – which means that an acquittee could trigger a member state's obligation to consider asylum simply by showing up at its embassy in the Netherlands and demanding protection against *refoulement* under Article 33. Although the Netherlands is a 'safe third country' under the Dublin Regulation,[114] the Regulation does not permit a refugee to be expelled to another EU member state.[115]

An ICC acquittee who wants to seek asylum outside the EU, by contrast, may well find that desire frustrated by 'safe third country' policies. The acquittee would have

108 Rome Statute, *supra* note 33, Art. 20(2) (emphasis added).
109 See K. J. Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process', (2007) 17 *Criminal Law Forum* 255, at 258.
110 See, e.g., Amnesty International, 'Rwanda: Unfair Trials: Justice Denied', AI Index AFR 47/08/97, 8 April 1997.
111 Council Regulation No. 343/2003, 18 February 2003, Preamble, para. 4.
112 Ibid., Art. 3(1).
113 Ibid., Art. 2(c).
114 All EU member states are considered safe. See ibid., Preamble, para. 2.
115 See Goodwin-Gill and McAdam, *supra* note 57, at 401.

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to pass through Dutch territory to get to a non-EU embassy, triggering application of the policy. Any state with a 'safe third country' policy that agreed with the EU's determination that the Netherlands is safe could thus force the acquittee to request asylum there instead. That cannot be a happy prospect for the Netherlands, which has already assumed responsibility for housing all the international tribunals. Nor would it be an attractive option for the acquittee himself: despite being considered safe, the Netherlands has been criticized for using accelerated asylum procedures that 'in many cases deprives asylum seekers of their fundamental right to a full and fair consideration of their claims'.[116]

Regardless of which country ultimately considers an ICC acquittee's request for asylum, that request will face the same likely fatal obstacle discussed earlier: Article 1F exclusion. If the 'serious reasons for considering' standard is satisfied by evidence sufficient to indict a defendant on war crimes or crimes against humanity charges, states will always be able to use Article 1F to reject an acquittee's asylum request. As discussed above, such exclusion would mean that the acquittee could be returned to his country of origin or extradited to a country with universal jurisdiction over war crimes or crimes against humanity, as long as the normal human rights limitations on extradition and the ICC's inadequate *ne bis in idem* provision were satisfied.

Nor is that all. As noted earlier, a state can invoke Article 1F whenever justiciable and extraditable criminal charges against a refugee are pending in another state.[117] An ICC acquittee fortunate enough to receive asylum will thus always have to live in fear of new charges being filed against him – which would be neither difficult nor unlikely, given that universal jurisdiction, for all its benefits, also means that '[t]here is no guarantee whatsoever against hounding an accused in one court after another until the victims are satisfied that justice has been done'.[118] If such charges were filed, the acquittee would likely find himself swiftly extradited to the state filing them.

The bottom line is that, in practice, asylum will almost certainly prove just as elusive and insecure for ICC acquittees as it has for ICTR acquittees. Many will still seek it, especially those who have family elsewhere. But at least some may not, preferring the security of ICC protection to the whims of a sovereign government. The ICTR has proven admirably protective of its acquittees, refusing to return them to Rwanda or otherwise expose them to harm, and there is no reason to believe that the ICC would be any less protective. An ICC acquittee may thus view a safe house in The Hague as the lesser of two evils – at least it would be the devil that the acquittee knew.

116 Human Rights Watch, 'Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy' (2003), at 7.
117 See Hathaway, *supra* note 49, at 214.
118 See Fletcher, *supra* note 95, at 582.

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4. Suggestions for change

Clearly, the system is not working as well as it should. Acquitted defendants should not have to choose between living as virtual prisoners under international protection or returning home to face significant physical and legal dangers. The question is – what can be done?

4.1. Returning home

Although the ICTR and the ICC are obviously powerless to make it physically safer for acquittees to return to their countries of origin, there are steps they could take to eliminate the legal dangers that a returning acquittee would face. The ICTR has made transferring pending cases conditional on Rwanda's assurances that it will provide the defendants with fair trials and will allow Prosecutor-appointed monitors to observe the trials,[119] and there is no reason why it could not impose the same conditions on subsequent trials of acquittees – at least those who, like Ntagerura and Rwamakuba, are under UN protection and would have to be transferred by the ICTR to Rwanda. Even better, the ICTR may be able to use its authority under Article 28 specifically to order Rwanda not to re-prosecute such acquittees.[120]

The ICC could take similar steps for its acquittees by invoking states parties' general obligation under Article 86 of the Rome Statute to co-operate with the Court.[121] The absence of national due process might not make a case admissible, but there is no reason why the Court could not make a *subsequent* national prosecution conditional on assurances of fair trials and ICC monitoring, especially where the subsequent prosecution would require the Court to transfer the acquittee to the state party. Similarly, the ICC could condition accepting a self-referral on a state party promising not to prosecute an acquitted defendant a second time.[122]

Assuming that an acquittee would receive a fair national trial, a complete ban on subsequent prosecutions may seem too draconian. An alternative would be for the ICTR and ICC to amend their *ne bis in idem* provisions to prohibit states from trying an acquitted defendant on different charges if the national prosecution would be based on a mode of participation that the tribunal had already rejected. Using as a model Article 20(1) of the Rome Statute,[123] the revised provisions could provide that '[n]o person shall be tried by another court with respect to *conduct which formed the basis of crimes* for which the person has been convicted or acquitted by the Court'. A state would then be able to bring a subsequent prosecution against an acquittee only if it had new evidence – evidence not presented to and rejected by the tribunal – establishing his criminal responsibility.

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119 See, e.g., 'U.N. Genocide Court Requests Case Transfer to Rwanda', Reuters, 13 June 2007.

120 Art. 28(2) provides that '[s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber'. See ICTR Statute, *supra* note 30, Art. 28(2).

121 Article 86 provides that 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. See Rome Statute, *supra* note 33, Art. 86.

122 My thanks to Mark Drumbl for suggesting this possibility.

123 Rome Statute, *supra* note 33, Art. 20(1) ('Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court').

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4.2. Finding a new home

There are also positive steps that the ICTR and the ICC could take to make it easier for their acquittees to obtain asylum elsewhere. The best solution would be for the tribunals to identify states willing to grant defendants refugee status in the event that they are acquitted, much as they identify states that are willing to incarcerate defendants if they are convicted.[124] Presumably neither the ICTR nor the ICC could force states to grant asylum to an acquittee – although Ntagerura has recently asked the ICTR to order Canada to do exactly that.[125] Simple fairness dictates, however, that they try to convince states that judicial integrity requires taking seriously the obligation to make adequate provision for acquitted defendants.

If pre-identifying asylum states proves unworkable, the ICTR and the ICC could at least ask states to accept the idea that there cannot be 'serious reasons' for considering that an acquitted defendant (or perhaps a unanimously acquitted defendant) might still have committed a war crime or a crime against humanity. Acquittees would stand a much better chance of obtaining asylum if states agreed – and unlike granting asylum itself honouring such a request would seem to fall within their general obligation to co-operate with the tribunals.[126]

Amending the ICTR and ICC's *ne bis in idem* provisions would also be useful in the asylum context. A narrower test that limited subsequent prosecutions to evidence not considered and rejected by a tribunal would make it more difficult for states to bring justiciable new charges against acquittees. That restriction, in turn, would greatly reduce the likelihood that an acquittee who was excluded from asylum under Article 1F – either on his first request or after initially receiving it – would be extradited to face new charges. Yet it would still allow states to extradite an acquittee who was legitimately suspected of being responsible for crimes that were not addressed in the international prosecution.

Finally, when an acquittee is extradited to face (legitimate) new charges, the ICTR and the ICC should ask the requested state to require assurances from the requesting state that it will give the acquittee a fair trial. Such conditional extradition is not uncommon – and although states tend to resent it, their desire to obtain the suspect normally leads them to agree.[127] Moreover, given that such assurances are difficult to enforce, the requested state should also demand the right to monitor the subsequent trial. 'Consular and diplomatic officials regularly monitor trials involving their own nationals, in addition to other trials of political interest to the diplomat's

124 See ICTR Statute, *supra* note 30, Art. 26; Rome Statute, *supra* note 33, Art. 103. A number of ICTR convicts are currently imprisoned in Mali, while Benin, Swaziland, France, Italy, and Sweden have all signed agreements with the ICTR indicating their willingness to enforce sentences. See Drumbl, *supra* note 80, at 53. Similarly, ICTY convicts are currently imprisoned in Austria, Denmark, Finland, France, Germany, Italy, Norway, Spain, Sweden, and the United Kingdom.

125 See 'Ntagerura Asks the ICTR to Order Canada to Grant Him Asylum', Hirondelle News Agency, 9 November 2007.

126 Because the ICC was created by treaty, not by the Security Council, Art. 86's obligation to cooperate is binding only on parties to the Rome Statute. See Rome Statute, *supra* note 33, Art. 86 (referring to 'States Parties'). The ICTR's obligation to co-operate, by contrast, applies to all states. See ICTR Statute, *supra* note 30, Art. 28(1) (referring to 'States').

127 See Dugard and Van den Wyngaert, *supra* note 81, at 206.

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sending state, without causing offence to the receiving state.'[128] Indeed, there is a precedent for such a demand: the ICTR has made transferring the trial of Fulgence Kayishema to Rwanda conditional on the Rwandan government's willingness to allow representatives from the African Commission on Human and Peoples' Rights to monitor his trial.[129]

5. Conclusion

Everard O'Donnell, the ICTR's Deputy Registrar, has pointed out that although defendants 'can't get more innocent than seven or eight judges telling the world that they are innocent . . . [s]omehow, the fact that they have been indicted haunts them for the rest of their existence'.[130] There is nothing anyone can do to eliminate the social stigma of being an accused war criminal or *génocidaire*. But the international community can – and should – ensure that individuals acquitted of such crimes do not continue to suffer the legal stigma of being accused. Yet that is exactly what is happening to ICTR acquittees, who are unable to return home and find it difficult, if not impossible, to find new homes elsewhere. Moreover, unless something changes, that is exactly what will happen to defendants who are acquitted by the ICC. Reform *is* possible – but whether the international community has the will to carry it out remains to be seen.

128 Ibid., at 208.
129 See *Amnesty International Report 2007*, *supra* note 10, at 6.
130 G. Obulutsa, 'UN Genocide Court Finds No Home for Acquitted', Reuters, 27 October 2006.

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