

## PAROLE AND EARLY RELEASE – AN EVALUATION OF THE PRACTICE AT THE ICTR

Gershom Otachi BW'Omanwa

*( May we observe a minute of silence in honour of Jean Bosco Barayawiza, a detainee serving sentence in Benin who passed on on 25<sup>th</sup> April 2010.)*

As the mandate of the ICTR draws to a close, the issue of how and where prison sentences are served and the related aspects of parole and early release are becoming crucially important. As a preliminary matter the sentencing practice at the ICTR has been very harsh when compared to the ICTY especially in view of the number of life sentences, and the MUCH longer sentences pronounced by the ICTR judges. This is Despite the fact that both ICTR and ICTY were formed in similar circumstances have Statutes with more or less identical provisions and share a common Appeals Chamber.

In these circumstances, the issue of pardon parole and commutation of sentences is extremely important.

Rules 124 to 126 of the ICTR rules contain provisions relating to pardon and commutation of sentences. They provide as follows:

**Rule 124:** If, according to the law of a State in which a convicted person is imprisoned, he is eligible for pardon or communication of sentence, the State shall, in accordance with Article 27 of the Statute, notify the Tribunal of such eligibility.

### **Rule 125: Determination by the President**

The President shall, upon such notice, determine, in consultation with the members of the Bureau and any permanent Judges of the sentencing Chamber who remain Judges of the Tribunal and after notification to the Government of Rwanda, whether pardon or communication is appropriate.

Some of the issues of concern that need to be addressed include the following:

- There are divergent practices with regard to the prison conditions as well as the process of parole and/or commutation of sentences between ICTR and ICTY prisoners.
- Prisoners in European countries prisons appear more privileged in this regard as compared to those in African country prisons.

- The possible granting of pardon, parole or commutation of sentences is at the discretion of the host State and neither the detainee nor the ICTR is involved in triggering the process under the rules. The possibility of a detainee applying depends entirely on the practice of the host state.
- There is no mechanism to ensure comparatively equal treatment with regard to parole, commutation of sentence or pardon with regard to detainees in different countries.

It will be noted firstly that the possibility of pardon depends entirely on the practice in the host state and secondly that the rules do not envisage the role of the prisoner in seeking the remedy but leave initiation of the process to the host state.

The ICTY and ICTR have both entered into agreements with various states to hold convicted persons in their national prisons. An examination of these agreements, as well as incarceration practices of the tribunals and the states concerned, reveals great disparities of this process.

It should be noted that the Chambers have always been silent as to the countries where sentences may be carried out. Despite this silence, the differences in the prison systems of the states that take part in the imprisonment regime are a foremost concern for any convicted person. Article 26 of the ICTR specifies that sentences shall be served in accordance with the national law of the host state, subject to the supervision of the tribunal, which in practice may lead to great inequality as regards parole decisions.

The reality of this system of imprisonment is that each convicted person has the chance of being imprisoned in different states, operating under different schemes regarding parole, pardon or commutation of sentence.

The divergent incarceration schemes that have developed as a result of these agreements pose two interesting dilemmas. First, the problem exists that there is a wide discrepancy in prison conditions faced by convicted persons of the ICTY and ICTR. Second, as convicted persons are held according to the incarceration laws of the host state, these differences can make a substantial impact on the actual amount of time a convict may serve.

In the end, it is up to the tribunals to determine where convicted persons should serve their sentences. In making these assessments, several criteria can be taken into account and these include proximity to the location of family members or the prisoner's relation to the country in question, such as whether the convicted person was arrested in that country. However, by examining the practice of the tribunals, it is not always evident that these considerations have factored into the formula for determining where to send convicted persons, especially in the

case of the ICTR. For instance it is not clear why Mali and Benin are preferred whereas other countries are willing to host the prisoners on the face of it they don't some of the conditionalities including proximity to the families of the accused..

These are the only two countries that have taken convicts as compared to about ten states that have taken convicted persons from the ICTY.<sup>1</sup> This is despite the fact that the ICTR HAS agreements with Swaziland, France, Italy and Sweden. The 6 m dollar question is –why is it the ICTR prisoners are subjected to discriminatory prison conditions?

Most European countries hosting ICTY detainees such as France, Sweden, Norway and Italy have rules that allow for the commutation of sentences prior to the expiration of the full term and indeed many ICTY detainees have benefitted from this system.<sup>2</sup> However, the African nations that have signed agreements to accept ICTR prisoners do not have similar provisions.

#### PROPOSALS/RECOMMENDATION

- A mechanism to regularly monitor prison conditions to ensure best practices be established.
- A system be established (i.e by the way or a standing committee or board- that includes representation by Defense Counsel) to ensure some measure of standardization/harmonization in practices relating to parole, pardon or reduction of sentence for both ICTY and ICTR prisoners.
- A system be established whereby such a committee /board can be engaged by prisoners and/or initiate dialogue with the host country on matters or parole, etc.
- Guidelines relating to commuting of sentences, early release, parole or pardon be established for purposes or uniformity in practice with regard to prisoners in different countries.
- The rules of procedure be appropriately amended to accord the Prisoners a more active role in triggering the process of parole , pardon or release rather than play a passive role.

---

<sup>1</sup> Those states are the United Kingdom, Finland, Denmark, France, Italy, Germany, Sweden, Austria, Spain and Norway. Two others, Belgium and Ukraine, have signed agreements on the enforcement of sentences. n305 Germany has signed two ad hoc agreements with the ICTY.

<sup>2</sup> See for instance Prosecutor v. Predrag Banovic Decision of the President on commutation of sentence 3 Sept 2008

