

# *Deceased Accused: The Practice of International Tribunals vs the Pursuit of Justice*

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## **Introduction**

Justice is one of the principle ideas that led to the birth of International Criminal Law. Justice can be characterized as the efforts to end impunity and to ensure that victims have redress for their grievances. However, it does not exist in a vacuum. International Criminal Law processes are also influenced by issues such as determining what is in ‘the interest of justice’ and deciding how to allocate scarce resources. Particularly, when it concerns the death of an accused, the practice of most international criminal law courts is to terminate the proceedings.<sup>1</sup> But does this discontinuation of the legal proceedings make adequate consideration of what is just?

In answering this question this article will first further contextualize the practice of international tribunals as it concerns accused persons dying before a judgment is made. It will then discuss this practice in relation to the overarching pursuit of justice.

## **Explanation**

### **Current practice**

International tribunals have been consistent in terminating cases when an accused person dies before the rendering of a judgment.<sup>2</sup> An example of this is seen by the International Criminal Tribunal for Rwanda (ICTR) terminating the case of Augustin Bizimana, the Minister of Defence

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<sup>1</sup> Jens Iverson, ‘The Possibility of Disclosing Findings after a Detainee Dies in International Criminal Proceedings’ (European Journal on International Law: Talk, 21 December 2017) <<https://www.ejiltalk.org/the-possibility-of-disclosing-findings-after-a-detainee-dies-in-international-criminal-proceedings/>> accessed 25 February 2023.

<sup>2</sup> Tatiana Bachvarova, ‘Impact of the Death of a Convicted Person on Pending Proceedings before the International Criminal Court’ (2012) 10 J Int’l Crim Just 547.

of Rwanda who was charged with, *inter alia*, genocide and crimes against humanity.<sup>3</sup> The case was closed when Bizimana died and his remains were identified by the mechanism in the Republic of Congo.<sup>4</sup> The status of the case in the ‘case information sheet’ stands as ‘Accused deceased’.<sup>5</sup> Similarly, on the 14<sup>th</sup> of October 2022, the International Criminal Court (ICC) terminated the proceedings against Paul Gicheru, a Kenyan lawyer, after being informed of the defendant’s passing.<sup>6</sup>

### **Relationship with the pursuit of justice**

#### ***The Rationale behind the practice***

There has been very little formal discussion on the issue of the death of an accused in international criminal law. This is evident in the fact that the Rome Statute is silent on the issue.<sup>7</sup> Therefore, the rationale behind the practice of the international community is debatable. The following three reasons are what this paper believes to be the most prominent reasons for the termination of a case when an accused person dies before the judgment has been rendered.

Firstly, the tribunals do not have jurisdiction over the dead. The ICC explicitly stated this as a reason in its decision regarding the termination of the case against Raska Lukwiya, Kony, Otti, Odhiambo, and Ongwen.<sup>8</sup>

The second reason is to avoid wasting resources. Prosecuting the dead is seen as a waste of resources as there would be no consequence to the proceedings, such as having the accused

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<sup>3</sup> ‘Deceased – Bizimana, Augustin (MICT-13-39)’ (UN-IRMCT) <<https://www.irmct.org/en/cases/mict-13-39>> accessed 24 February 2023.

<sup>4</sup> *ibid.*

<sup>5</sup> ‘Case Information Sheet (UN-IRMCT) <[https://www.irmct.org/sites/default/files/cases/public-information/cis\\_bizimana\\_en.pdf](https://www.irmct.org/sites/default/files/cases/public-information/cis_bizimana_en.pdf)> accessed by 25 February 2023.

<sup>6</sup> Decision Terminating the Proceedings against Paul Gicheru (ICC-01/09-01/20), Trial Chamber III, 14 October 2022.

<sup>7</sup> Tatiana Bachvarova, ‘Impact of the Death of a Convicted Person on Pending Proceedings before the International Criminal Court’ (2012) 10 J Int’l Crim Just 547.

<sup>8</sup> Decision to Terminate the Proceedings Against Raska Lukwiya, Kony, Otti, Odhiambo and Ongwen (ICC-02/04-01/05-248), Pre-Trial Chamber II. 11 July 2007.

imprisoned. This aspect is considered because of the scarcity problem faced by the tribunals, as they have limited resources but a lot of cases to prosecute. Evidence of this is found in the Policy Paper regarding the interest of justice wherein it is stated that the Office of the Prosecutor (OTP) has the discretion to prosecute after considering the particular circumstances of the accused, such as the age and infirmity of the accused.<sup>9</sup>

The last reason behind the practice of international tribunals on this matter is the human right to a fair trial. This right is protected under Articles 10 and 11 of the Universal Declaration of Human Rights. It includes the right of an accused to be present at their trial, as codified in Articles 63(1) and 67(1)(d) of the Rome Statute. As such, because deceased persons cannot be present in the trials it would be contrary to ‘their right’ to fair trial to hold the trial in their absence. However, it is debatable whether deceased persons can be right holders.

### ***Comparison with trials in absentia***

Trials in absentia are a legitimate legal procedure in International Criminal Law. They are allowed in very specific circumstances in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and ICTR as seen under Rule 61 of the Rules of Procedure and evidence.<sup>10</sup> This rule has been used in the ICTY in, for example, the *Prosecutor v. Radovan Karadžić and Ratko Mladić* case.<sup>11</sup>

However, it is quite noticeable that some of the criticisms against trials for deceased persons can easily be extended to trials in absentia. This is because in a trial in absentia, the accused is also not present for his/her trial, and because there is no guarantee that they will serve out their sentence if convicted. The practice, therefore, challenges the notion that there needs to be a consequence for trials not to be seen as a waste of resources. In reality, society does not check in regularly to ensure that convicts are serving their time. Additionally, the rights of an accused to a

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<sup>9</sup> Office of the Prosecution, ‘Policy Paper on the Interest of justice’ (ICC, September 2007) <<https://www.icc-cpi.int/sites/default/files/ICCOTPInterestsOfJustice.pdf>> accessed 25 February 2023.

<sup>10</sup> Anne Klerks, ‘Trials in absentia in international (criminal) law’ (June 2008) ANR:908200 <<http://arno.uvt.nl/show.cgi?fid=81103>> accessed 25 February 2023.

<sup>11</sup> *ibid.*

fair trial need to be balanced against the rights of victims. It is also important for victims' grievances to be formally recognized through the confirmation of their offenders' guilt by a court's ruling. So how do trials in absentia differ from trials of the dead? And why are trials in absentia an acceptable international criminal law procedure?

The answer is that there is still a chance for the accused persons to serve out their sentence under a trial in absentia. This possibility legitimizes the legal proceedings for trials in absentia, whereas the certainty of the inconsequentiality in the criminal proceedings for the trials of the dead makes their wastefulness more burdensome. Moreover, trying dead people seems barbaric and archaic in the modern world.

### ***Consideration of the pursuit of justice***

Finally, consideration must be made on whether terminating the legal proceedings disproportionately affects the pursuit of justice. As discussed above, the OTP may use its prosecutorial discretion to assess whether to prosecute or not. It is when exercising this discretion that the OTP may consider the health and age of an accused person.<sup>12</sup> This consideration essentially entails an added defense that is available to accused persons as their health or death would shield them from prosecution. Taking into account the fact that most senior leaders are often old men, who are likely suffering from health issues, victims could, as a result, not get the retribution they deserve.

However, the reality of international crimes is such that criminal responsibility is not only attributable to one person. The systematic nature and gravity threshold of the crimes prosecuted in international tribunals ensures that more than one person can be held responsible for these crimes. International Criminal Law also accounts, not only, for *de jure* leadership, but also for *de facto* leadership. Furthermore, the likelihood of all suspects in a given situation dying is improbable. As a result, the truth and suffering of victims in these grave situations can always be confirmed in a court of law. Therefore, there is no need to resort to prosecuting the dead as justice can still be served.

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<sup>12</sup> Office of the Prosecution, 'Policy Paper on the Interest of justice' (ICC, September 2007) <<https://www.icc-cpi.int/sites/default/files/ICCOTPInterestsOfJustice.pdf>> accessed 25 February 2023.

## **Conclusion**

In conclusion, the pursuit of justice does not require the international community to start trying deceased persons. This is because usually in international criminal law, there is not a shortage of accused persons to charge. As such victims will typically still be able to get redress for the harms they suffered and people will be held accountable. Granted it may seem unfair that deceased individuals accused of doing harm will go unpunished, but it is impossible to punish the dead. Therefore, the rights of the accused and the legitimacy of these proceedings must be prioritized.

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This article aimed to examine a niche topic in international criminal law and to present arguments for and against it. Although no controversial conclusions were made as a result of the analysis presented herein, it was still important to examine a seemingly incontestable stance taken by the international law community.