THE ICTR AND THE CHALLENGE OF COMPLETION

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Almost twelve years after their establishment, the ad hoc international tribunals for the Former Yugoslavia and Rwanda are at the height of implementation of their respective completion strategies designed to bring closure to their mandates.

United Nations Security Council Resolution 955 (1994) established the International Criminal Tribunal for Rwanda (ICTR) as the international community's response to dealing with the aftermath of a horrific tragedy which it had failed to prevent. Although established as an ad hoc tribunal, and therefore a temporary institution, there was no indication in the resolution or anywhere else as to how long the life of the tribunal was to last. How much time did it have to discharge its onerous mandate to prosecute persons responsible for serious violations of international humanitarian law committed in Rwanda in 1994 and by Rwandan citizens in neighbouring countries during the same period.

The answer to this question was provided by the Security Council only nine years later in its Resolution 1503 of 28 August 2003. By the said resolution, the Security Council called on

"the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010."

For institutions which had seemingly operated on the basis of an indefinite life time, these deadlines proved challenging immediately notwithstanding that the benchmarks had been formulated in consultation and agreement with the tribunals themselves. For the Office of the Prosecutor (OTP) at the ICTR, the immediate implication of the completion strategy was the need to review the workload as well as the strategies of the office in furtherance of the new decision of the Security Council. It was clear that the workload now had to be narrowed down from the several hundred targets being pursued to what was practically possible to conclude within the deadline. Resolution 1503 gave some policy guideline in this respect by urging the tribunals to "formalise a detailed strategy to transfer cases involving intermediate and lower rank accused to competent national jurisdictions" in order to enable the courts meet the deadlines.

Hence the tribunals were meant to concentrate on the cases of those who fell within the leadership cadre, those who played a leading role in the genocide of 1994 in Rwanda. But consistent with the prosecutorial discretion with regard to
selection of targets the responsibility of identifying such leadership cases fell on the shoulders of the Prosecutors. How and by what criteria were leadership cases to be identified?

The OTP-ICTR workshop of February 2004 focussed on identifying the criteria which would guide us in the selection of cases. We concluded that leadership cases could be identified principally by the status of the person in Rwanda at the time of the genocide, the extent of involvement of the person, the nature and the seriousness of the offences alleged, for example, sexual violence as well as the need for geographical spread of the targets in Rwanda to ensure nationwide coverage. These considerations assisted us in narrowing down the total workload as well as in identifying those cases eligible for trial in Arusha or for referral to a national jurisdiction."

Having identified the workload we then turned our attention to the strategies required for the implementation of the completion. Essentially, based on the experience of the ICTR, we decided on a new indictment policy which shifted away from multi accused cases to single accused cases unless this would lead to duplication of evidence and witnesses with potential for conflicting factual findings by Judges; we agreed to file shorter indictments with fewer counts - "the lean and mean indictments"; we agreed that in order to save time we would select and proof fewer witnesses (those essential to prove the case) and ensure that we are trial ready by the time any new indictment is confirmed; we would be open to, indeed encourage guilt plea negotiations; we would work hard to ensure that charges of sexual violence could be established in court through extensive investigations and encouragement to witnesses and victims to come forward - quite a challenge in itself.

Internal capacity building to handle the workload was essential. The high vacancy rate of the OTP was substantially reduced through an active recruitment programme of person with proven experience in criminal prosecutions. A temporary freeze in recruitment during 2004 occasioned by short falls in member states’ budgetary contributions proved to be a temporary setback.

The overall capacity of the ICTR itself was enhanced with additional Ad Litem Judges and the installation of the fourth courtroom which increased the number of cases being heard concurrently.

The ICTR successfully delivered on the first deadline by completing investigations by the end of December 2004. By that date all investigations into new genocide cases closed and the OTP turned its attention to evaluating the evidence in order to determine what new indictments, if any, were to be filed. In early 2005, the OTP filed eight new indictments several months ahead of the schedule which were confirmed by the Judges.
We had to deploy considerable effort in UN Head Quarters in New York to dispel the assumption by member states that with the closure of investigations into new cases, there would no longer be any need for the OTP Investigations Division in Kigali and that the division would be closed. Clearly there is a need for staff to provide trial preparation, trial and appeal support as well as tracking and witness handling. This has resulted in the retention of the division and its gradual phasing out as the workload reduces. There will thus continue to be some investigative capacity in the OTP albeit in dwindling numbers until closure in 20 I O.

Where are we now with the completion strategy two years from the next important benchmark of end 2008 for completion of trials? What are the prospects for attaining that target? So far, the ICTR has concluded the trials of 31 accused persons of whom 26 have been convicted and 5 acquitted. Six of these convictions have been based on guilty plea accords between the accused and the Prosecutor, half of them during the period 2005 and 2006. Those convicted include the former Prime Minister, five former cabinet Ministers, two Prefects, seven bourgmestres, two counsellors, three senior military officers, four media and two clergy and others. A strong indication of support of the prosecution's case that the genocide was planned and organised at a government level. Those acquitted include two former cabinet Ministers as well.

Currently standing trial are 25 detainees, most of them co-accused persons in five large multiple accused cases which have been proceeding for a considerable period. The accused persons include six former cabinet Ministers, eight senior military officers, three prefects, and three leaders of the former ruling MRND party. Four of the accused are being tried singly and the rest are spread out in five multiple accused cases. The time taken by these five big cases appears to justify the OTP's shift away towards single accused cases. Our estimate of about four months trial time has generally held, with some exceptions, in these cases. In the multi accused cases it is worth noting that actual courtroom time has been a fraction of the entire trial time. For instance, in the Butare case, which has lasted over six year now actual trial time is close to just one year. We anticipate nonetheless that the cases of twelve of the accused in the trials will be concluded by end of 2007 or early 2008 and the remaining 10 by end of 2008.

There are, however, 12 detainees currently awaiting trial as single accused cases. Some of them may not proceed to full trial as guilty plea negotiations are in progress. It is expected that such negotiations would lead to positive outcomes.

With the conclusion of a number of single accused cases in early 2007 and some of the multiple accused in late 2007 we are confident that what remains of the list of twelve persons currently awaiting trial, after making allowance for any guilty pleas and Rule 11 bis referrals, can be tried and concluded before the end of 2008. So in a nutshell we believe that the ongoing cases as well as these detainees can be concluded in time. This is notwithstanding the fact that there
remains more work to be done in the years that lie ahead, than has been concluded in the previous decade. With the experience of the past, enhanced capacity in OTP, the Chambers and the Registry and a firm commitment to the completion strategy goals we have good reason to be optimistic. The recent decision of the Appeals Chamber in Prosecutor v Karemera et al requiring judicial notice to be taken of the genocide of 1994 - a decision of great legal, moral and strategic significance - has reduced the burden of proof on the Prosecutor. It has the potential therefore to reduce the length of trials by eliminating the need for proof of the genocide, a fact I must say the OTP has established by proof twenty-five times in the twenty-five judgments delivered by the Trial Chambers.

The real challenger, however, lies with the 18 indictees who continue to remain at large. They include senior figures such as Felicien Kabuga, Protais Mpiranya, the former commander of the Presidential Guard in Rwanda, Augustin Bizimana, the former Minister of Defence and Augustin Ngitabatoare, the former Minister of Planning. Despite the intensification of our tracking program, their apprehension and transfer to the ICTR continues to be a serious challenge partly due to shortcomings in state cooperation on the one hand and the refuge of the indictees in inaccessible areas such as the Eastern part of the DRC on the other. Significantly, our fugitives prefer to seek refuge in territories where they are afforded protection or in areas where there is de facto no state authority.

What is evident however is whilst it is undesirable to close with these fugitives remaining at large, if our tracking program were to succeed in apprehending and having all or most of them transferred to Arusha, it would represent a significant addition to our workload. Such a load cannot be concluded by the end of 2008. We plan to try in Arusha only the priority targets from that list of 18 fugitives. Clearly, to close by end of 2008 or 2010, as the case may be, with these indicted fugitives at large walking the streets of the world's capitals would undermine the effort in combating impunity. The priority targets amongst them need to be arrested and tried in Arusha; the remainder with any of those priority targets not arrested by end 2007 need to have their cases referred to national jurisdictions for trial in accordance with Security Council Resolution 1503.

Herein lies perhaps the biggest challenge to the ICTR completion strategy. The referral of cases under Rule 11 bis of the RPE [Rules of Procedure and Evidence] is a vital component of the completion strategy. Indeed its success will determine the success of the completion strategy. Despite the call by the Security Council in Resolution 1503 for member states to accept such cases and for the international community to assist with capacity building of national legal systems for those willing to accept such cases, there are very few states that are both willing and able to take such cases. Despite an active campaign to encourage states, particularly in the African region to do so, many that are able do not seem to be willing. Many of those willing are so far unable. African states which have been approached whilst generally favouring the idea have excused themselves on
the grounds of lack of capacity in their judicial systems and an accumulating backlog of cases at the local courts. The United Nations whilst calling for assistance in capacity building has not developed a program to focus on meeting the needs of states willing to accept such cases. Instead it has been left to potential recipient states to make arrangements with donors for assistance in this respect. The ICTR has no resources to provide except in an advisory and consultative capacity. At the last meeting of the Security Council in June 2006 to consider the reports of the tribunals it was proposed by the delegate of Tanzania that the UN Security Council should study and advise on the measures that need to be taken to make capacity building for the transfer of cases a reality. Although time is not on our side, I do hope that this will be followed through.

The recent decision by the Trial Chamber in the Rule 11 bis motion, filed by the Prosecutor in respect of Michel Bagaragaza and confirmed by the Appeals Chamber of the ICTR has, by requiring that an indictee can only be transferred to a country where he or she can be tried for the specific crimes with which he or she is charged at the ICTR, further limited our options regarding choice of states. It was for this reason that the application to refer the case to Norway, a country which was willing to accept the case, was rejected by the Trial Chamber. It would appear now that all those countries which do not have the crimes of genocide, crimes against humanity and war crimes in their statutes are not eligible to receive Rule 11 bis cases. I gather this may not be an inconsiderable number of states. Whilst understanding the reasoning of the court one had hoped for a more purposive approach which would permit referral of a case to a national jurisdiction where the accused could be prosecuted generally for his conduct, however, legally characterised if not for the same offence as charged in the ICTR.

Two other European jurisdictions have indicated their willingness to receive Rule 11 bis cases. Fortunately the criminal codes include the specific offences within the mandate of the ICTR. But the number of cases going to Europe will be few and whilst very welcome will not significantly impact on the numbers earmarked for referral. Many such European jurisdictions further limit the cases to those individuals who have some connections, such as residence, with the country concerned.

I believe Rwanda is, in many respects, our best option for transferring cases for trial. It is the locus of the crimes charged and so the primary jurisdiction, save for the primacy of the tribunal, for the trials; Security Council resolution 1503 has specifically included Rwanda as a jurisdiction to be considered for referral of cases; Rwanda is willing to take on all the cases earmarked for referral; for legacy purposes and in order to promote reconciliation and greater Rwanda involvement in the international criminal justice process there is merit in having some of the cases transferred to Rwanda.
Despite its willingness to accept RII bis cases, Rwanda is not yet eligible under the rules. As you may be aware, the trial chambers will refer a case under RII bis to a country that

a) has jurisdiction over the cases;
b) is willing to accept such cases;
c) ensures that the death penalty will not apply to such accused; and
d) guarantees a fair trial to the accused.

Only the last two conditions remain in issue in the legal side with respect to Rwanda. I am optimistic that these two issues will be resolved soon as the Rwandan government has indicated its readiness to proceed to enactment of legislation which excludes the death penalty and provides detailed guarantees for fair trial for all accused transferred by the ICTR or by other states to Rwanda for trial. If, as is expected, the legislation is enacted before the end of the year, I propose in the first quarter of 2007 to submit requests to the judges for the referral of a number of cases to Rwanda for trial.

We propose to seek referral orders in respect of up to 20 cases, mostly relating to fugitives but including as well a number of detainees awaiting trial. The majority of the cases, given the limited options we face in obtaining consent of states, would be earmarked for trial in Rwanda. As you may be aware, so far, I have handed over to the Rwanda Prosecutor General the files of 30 suspects who have been under investigation by the ICTR-OTP but against whom no indictments have been drawn. It will be up to the Rwandan authorities now to determine how to proceed, if at all, with those cases.

The proceedings of cases referred to national jurisdictions need to be monitored by the Prosecutor or his representative in order to determine whether they are being effectively conducted and whether the accused is having the benefit of a fair trial. In this respect, I am pleased to announce that the African Commission on Human and People Rights has agreed to monitor the trial of all cases released to African jurisdictions. The Commission you may recall is an organ of the African Union and has the mandate to promote and protect human
rights through a complaints procedure in all African states.

The referral of cases to national jurisdictions is important not only for the success of the Completion Strategy but also for the partnership between national and international jurisdictions in the field of international criminal justice. The worst thing that could happen to the Completion Strategy would be a failure to obtain referral orders either because countries are unwilling to accept cases because ICTR chambers are unwilling to refer such cases to particular jurisdictions.

If that worst case scenario were to arise we would face the prospect of either the Tribunal closing with indictees free to roam the world or, where they are already in the custody of the Tribunal, an extension of the mandate of the ICTR beyond the completion dates. That possibility is, I am certain, one that is hardly likely to please many member states.

Whilst there is a commitment to and confidence in our ability to finish the job, it must be stated that the very fact of having a Completion Strategy in place raises a challenge in terms of availability of human resources to do the job. As the Completion dates approach some of our best staff naturally will begin, and indeed have begun, to look for more secure employment elsewhere. We experienced a serious drain of experienced investigators from the Division in Kigali as we approached the end of 2004 when investigations into new cases were scheduled to end. That experience is likely to be repeated in the Trials Section of the OTP as the 2008 deadline for completion of trials approaches. Both Tribunals are, together with the UN Secretariat, studying proposals for a retention bonus system designed to reduce, if not halt, the drain of human resources at the time that the tribunals may require them most for a proper completion.

As prosecutors also we must reckon with the fact that the longer the cases await trial the more difficult it becomes to conduct a successful and more effective prosecution.

Long pre-trial delay affects the quality of the evidence too for the prosecution. Increasingly we are losing prosecution witnesses who have been waiting several years to testify; some die, some relocate, some no longer want to reopen what they may regard as old wounds. For a variety of reasons, some witnesses are no longer available for the prosecution. The allegations against the accused remain. We at the OTP then have to find substitute witnesses in support of these allegations. It requires further efforts at investigations. It may raise disclosure issues, etcetera.

The ICTR may complete and close by end of 2010; but it will not necessarily go away altogether. Both Tribunals will leave behind a host of legacy and residual issues which should continue to occupy others for some time. Closure
will not be as final as would be expected. Amongst these issues will be the hearing of applications by convicted persons for review of their cases on the basis of newly discovered facts. Since there is no time limit for filing such motions, unlike in the case of the Prosecutor who has only one year from the date of acquittal to do so, some mechanism will need to be established after 2010 to activate a judicial process to deal with such applications on an ad hoc basis. Requests for remission of sentences, access to transcripts of in camera proceedings and confidential records, witness protection issues may have to be similarly dealt with. Then there is the fate of prisoners who finish serving their terms - where do they go? The potential difficulties of their relocation and resettlement are highlighted by the fact that even those acquitted by the Tribunal have found it difficult to be accepted by any country for resettlement.

Challenging as it may be, we are nonetheless committed to and confident of completion and completion in a proper way that would not undermine the struggle against impunity; to end in a way which we can all be proud of. One of the lessons to be drawn from all these is that it is appropriate from the onset of intervention in a particular situation to try as much as possible to define ones workload, one's objectives, the desired outcome - start planning your completion and exit strategy even as you enter.

I thank you very much for your attention.