INTRODUCTION

For a period of just about 100 days from April 6th 1994 the world witnessed one of the worst humanitarian tragedies of history unfold in Rwanda. By informed estimates close to between a million or more innocent men, women and children of mostly Tutsi ethnicity were slaughtered on the sole grounds of their ethnicity. Along with them too perished many brave and courageous Hutus who opposed the mass killings. The genocide was eventually halted with the defeat of the extremist Hutu government which had presided over it by the rebel Rwanda Patriotic Front (RPF).

Shocked by this unprecedented mass murder the international community recognizing the threat to peace and security posed by the situation and the need to bring to justice those who had played a leading role in this serious breach of international humanitarian law and convinced that the process of justice would facilitate the restoration of peace and reconciliation within Rwanda and acting within the U.N. Security Council under chapter 7 of the Charter of the United Nations decided to establish an international tribunal to prosecute such persons. The council also adopted the Statute of the Tribunal modeled along the lines of the ICTY which had been established earlier.

Security Council Resolution 955(1994) of 8th November 1994 which established the ICTR as an ad hoc tribunal with a mandate to prosecute persons who committed serious violations of international humanitarian law in Rwanda between 1st January 1994 and 31st December 1994 as well as such violations by Rwandan citizens in neighbouring states during the same period did not provide a time frame within which the mandate of the tribunal was to be completed.
It was not until August 2003 that the Security Council in its Resolution 1503(2003) (28th August 2003) set out a time frame for the conclusion of the work of the ICTR. The Council called on both 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…”

As a result of concern that these timelines might not be met, the Security Council by its Resolution 1534 (2004) of 26th March 2004 adopted under Chapter 7 of the U.N. Charter emphasized the “importance of fully implementing the Completion Strategies” as set out in its Resolution 1503. The Council directed the ICTR and ICTY Prosecutors to review their caseload with a view to determining which cases should be proceeded with within that time frame concentrating on the “most senior leaders suspected of being most responsible for the crimes” and to devise strategies for the referral of the middle and low level perpetrators to national jurisdictions for trial.

In this report I propose to examine briefly what measures the ICTR has taken with a view to attaining the objectives of the Completion Strategy, the challenges in its implementation, the current status of the strategy as well as prospects for the future.

IMPLEMENTATION

In accordance with the directives of the Security Council the Office of the Prosecutor (OTP) set in motion the process of identifying the cases which it felt it could and should proceed with to trial and those which could be dealt with by transfer, either through Rule 11 bis of the Rules of the ICTR in respect of indictees, or through prosecutorial cooperation with national counterparts who could accept case files of non-indictees from the OTP for further investigation and possible prosecution.

Guided by agreed criteria such as the status of the offender, the extent of participation of the offender, the nature of the crime and the need for geographic
spread of targets throughout Rwanda as the genocide was committed nationwide
the OTP concluded that the number of indictees should not exceed 100 if we were
to comply with the Completion Strategy time frame. Even of these 100 indictees,
up to 5 detainees and a number of fugitives were earmarked for transfer to national
jurisdictions.

It was not however just a matter of assessing numbers. It was not an
arithmetical exercise. Prosecutorial and judicial management strategies had to be
reviewed and improved. Thus within the OTP we decided to move away from
multiple accused cases – which from our experience have taken much longer to
conclude and raise complex management issues – to the single accused cases
which can be completed in a shorter period. Thus no multiple accused indictments
have been filed in the ICTR since then. We decided on shorter and more focused
indictments with fewer counts. In respect of trial preparation we committed
ourselves to cutting down the number of witnesses per case, to selecting and
proofing witnesses in a timely manner and to ensuring that each case was trial
ready well in time. Systems of indictment review and trial readiness review were
set up within the OTP as quality checks on the work of the OTP in relation to the
cases for trial.

We decided and announced through a Prosecutions Regulation that the OTP
was open to negotiating guilty plea accords with the accused persons. If a case
could be settled, properly, and satisfactorily to the prosecution, the court, the
accused and in some sense the victims/survivors without any prolonged
proceedings, much time and resources would be saved.

The staffing situation in the OTP also came under review. By 2003 the
vacancy rate at the OTP was quite high, a reflection perhaps of the difficulty of
attracting suitable personnel to the very pleasant but distant city of Arusha in
Tanzania. An active recruitment process was set in motion with an emphasis on
employing persons having hands on criminal trial experience in order to strengthen
the capacity of the prosecution trial teams to enable them deliver their work plans.

The physical distance between Kigali (Rwanda) where the OTP
Investigations Division is based and Arusha (Tanzania) where the Prosecution
Division is located had engendered a distance in the working relationship between
the two sections of the OTP. It goes without saying that any successful prosecution
has to be based on an effective and efficient investigation. The latter too does not have a life or agenda of its own but must be geared towards the needs of the trial teams. Some effort needed to be made to ensure better coordination between investigations and trials. Investigators and trial attorneys need to work together closely. One of the measures the OTP took was to embed investigators into the trial teams handling the big multi-accused trials.

The number of fugitives being sought for trial remained high. Their arrest and transfer to Arusha for trial has always been a priority. The Tracking Team of the OTP was strengthened with more staff and new strategies adopted - including longer periods of field work for trackers.

Similar efficiency enhancing measures were taken by or for the Registry and the Chambers, the two other organs of the ICTR. A fourth courtroom was created and equipped. This enabled the chambers to increase the number of trials it could conduct simultaneously. By its Resolution 1512(2003) of 27th October 2003 the U.N. Security Council amended the Statute of the ICTR to both increase the number of ad litem judges as well as to enhance their role by authorizing them to adjudicate in pretrial proceedings.

OUTCOME

These measures and others instituted by the ICTR to facilitate the attainment of the Completion Strategy deadlines have paid off in several respects, but not in all.

The OTP was able to conclude by the end of December 2004 as required by the Security Council all investigations into new genocide cases. By June of 2005 the last indictments relating to the genocide had been filed by the Prosecutor and confirmed by the judges.
Since 2003 six guilty pleas have been successfully negotiated and concluded between the OTP and accused persons, compared with only two between 1994 and 2003.

Enhanced action and new strategies saw the arrest of several more fugitives. Nonetheless thirteen fugitives, including four top level accused earmarked for trial at ICTR, continue to successfully evade justice. This remains a major challenge for a successful implementation of the Completion Strategy.

Of the 94 accused indicted by the ICTR, all save the above 13 fugitives have been arrested and transferred to Arusha, a strong indicator of the level of cooperation that the tribunal has received from member states. The case of 36 of these accused have been completed with 31 having been convicted and 5 acquitted. Currently the trials or appeals of 31 accused persons are in progress. There are 9 accused in detention awaiting trial.

With the timeline of 31st December 2008 drawing near it is now evident that the benchmark set by the Security Council for completion of trials at first instance cannot be attained by the ICTR. Trial activity will thus continue into 2009.

**CHALLENGES TO COMPLETION STRATEGY**

A number of factors have contributed to this setback in the Completion Strategy. Some major multi-accused trials such as **Prosecutor vs Karemera et al** and **Prosecutor vs Nyiramashuhoko et al** (the Butare case) cannot conclude in 2008 and will spill over into 2009. It is now likely that another case i.e. **Prosecutor vs Ndildiyimana et al** (the military2 case) may also follow into 2009 due to the recall of witnesses for further examination. It is to be noted that it is extremely difficult to plan with precision the timeline of the judicial process. It is subject to so many variables – parties, witnesses, counsel may for various legitimate reasons become unavailable, the interests of justices may require adjournment of the proceedings etc.. etc..
Secondly there were new arrests of senior level figures earmarked for trial at the ICTR were effected at a time which did not permit their trial before the end of 2008. These were Augustin Ngitabatware, Callixte Nsabonimana and Dominique Ntawkuriyayo. Their cases have thus had to be scheduled for trial in 2009.

Thirdly the strategy for the referral of cases to national jurisdictions, an important element of the Completion Strategy, has also suffered setbacks.

The Prosecutor of the ICTR has been able to hand over some thirty case files to Rwanda in respect of unindicted persons and some others to some European jurisdictions. But there has been so far a limited success in respect of transfer of the cases of indictees. Two such cases were transferred to France (L. Bucyibaruta and W. Munyeshaka); Efforts to transfer to Norway and the Netherlands were thwarted by jurisdictional issues (Michel Bagaragaza).

The transfer of the cases of the indictees is regulated by R11 bis of the Rules of Procedure and Evidence of the ICTR (ROPE). Under the Rules the decision to transfer is made by the Judges upon the request of the Prosecutor. The Judges will order a transfer only upon being satisfied that the proposed recipient country is willing and able to try the case, has competent jurisdiction over the matter, the accused will not suffer the death penalty there in the event of conviction – given that the maximum penalty at the tribunal is imprisonment for life – and that the accused will receive a fair trial in all respects in that country.

With no African country willing to take these cases – other than Rwanda – due to capacity issues and few other states outside the continent willing to consider the possibility, the referral strategy has had to focus on Rwanda as the principal recipient jurisdiction. In 2007 the Prosecutor filed a number of requests to transfer the cases of indictees to Rwanda (Munyaazi, Gatete, Hategekimana, Kanyarukiga, Kayishema). Although Rwanda had in preparation for these transfers abolished the death penalty, enacted a special law incorporating fair trial provisions as well as guarantees for the defence and also taken capacity building measures in respect of the legal system, the ICTR trial and Appeals Chambers have so far consistently declined to transfer the case of any indictee to Rwanda. Whilst acknowledging the
independence and impartiality of the Rwanda judiciary and the various reforms undertaken to improve the legal system, the Chambers of the ICTR have declined the requests essentially due to concerns that the accused may not have the benefit of a fair trial in Rwanda on the grounds that defence witnesses may, out of fear for their safety, be unwilling to testify and that adequate protective measures may not be available for them.

As a result of these decisions the cases of four of the detainees earmarked for R11 bis referral have now had to be scheduled for trial at the ICTR in the course of 2009.

Thus despite the efforts at Completion at the ICTR a combination of cases spilling over to 2009, new arrests of top level fugitives and setbacks in the referral strategy have made the conclusion of trials at first instance by the end of 2008 an improbable prospect.

As a consequence the U.N. Security Council by its Resolution 1824(2008) noting the new projections of the tribunal for the Completion of first instance trial activity before the end of December 2009 decided to extend the terms of office of all the Judges of the ICTR – permanent as well as serving ad litem judges – to 31st December 2009 in order to cater for the trials during that period. It should be noted that the ICTY on the other hand has projected the end of 2010 for the conclusion of its trials.

LOOKING AHEAD

The ICTR has not abandoned its R11 bis referral strategy. Whilst the trials will continue into 2009 as scheduled and, barring any misfortunes and unpredictable scenarios the trial workload could be completed by end of 2009, it is important that the referral strategy continues to be pursued. For a number of reasons. Any reduction in the current ICTR trial workload increases the prospect of a timely completion of the ICTR mandate. Secondly successful R11 bis referral to Rwanda would enable the ICTR to close its mandate without any, or few, of the fugitives, remaining on its books as a lingering legacy. The Rules permit the referral of a fugitive in absentia. Thirdly it would set a good precedent to enable national jurisdictions extradite suspects to Rwanda for trial. A number of such
extradition requests have been considered or are pending in national jurisdictions. The decisions of national courts are likely to be influenced by the decisions of the ICTR. A failure to extradite to Rwanda runs the risk of opening a big gap in the struggle against impunity. The requested state which declines extradition may lack jurisdictional competence to prosecute. In the end the interest of justice is thwarted. For there may be neither extradition nor prosecution. For all these reasons the work on R11 bis transfer needs to continue. Rwanda itself recognizes the importance of this process and has committed itself to taking new measures that will meet the concerns of the Judges. The ICTR Prosecutor on the other hand is committed to submitting new requests for transfer once he is satisfied that Rwanda has taken such measures.

LEGACY AND RESIDUAL ISSUES

Proper completion of the ICTR mandate is not however solely about concluding trials and appeals. A host of issues are thrown up by the closure of the ICTR and the ICTY which would need to be addressed in a way that preserves a positive and lasting legacy for international criminal justice. The ICTR will leave behind a colossal amount of material – witness statements, courts transcripts, court exhibits, documents, state papers, video recordings, administrative records, etc.. Who will take custody of such material? Where will it be situated? How will it be managed? Who will have access to such material and under what conditions, bearing in mind that some of it is confidential and others relate to the protection of witnesses? Some of the material, particularly under the control of the OTP is “live” material which may be of benefit to national and other prosecuting authorities in the investigation and prosecution of international crime.

Whilst the tribunal may close down it does not obviate the need for further judicial processes thereafter. For instance persons convicted by the ICTR have the right under the Rules to apply for a review of conviction at any time on certain grounds. Bearing in mind that several of the convicts are serving life sentences the prospect for interminable applications for judicial review is very real. What judicial mechanism or process could be put in place post closure to deal with such requests?

These and several other issues are now engaging the attention of the ICTR, the ICTY as well as the U.N. Security Council which is the authority to decide
such issues. There is every hope and indication that they will be resolved in a way that will leave a lasting positive legacy.

CONCLUSION

Although the Completion Strategy target of concluding trials at first instance by the end of 2008 will not be achieved for the reasons outlined earlier, a significant amount of work has been undertaken and concluded by the ICTR. In terms of the numbers and the level of accused persons whose cases have been concluded, the jurisprudential legacy and generally the experience and expertise developed over the years in the management of international criminal justice. The remaining trial caseload is anticipated to be completed within the new time frame. It is however conceivable that the time frame for conclusion of appeals may well have to be revised at some future date as an inevitable consequence of the deferral of the date for conclusion of trials. Meanwhile the referral strategy needs to be pursued diligently to a successful conclusion.