United Nations A/55/382–S/2000/865

General Assembly
Security Council

Distr.: General
14 September 2000
English
Original: French

General Assembly
Fifty-fifth session
Agenda item 52
Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Security Council
Fifty-fifth year

Identical letters dated 7 September 2000 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council

I am attaching for your consideration and for the consideration of the members of the General Assembly and the Security Council a letter, dated 12 May 2000, from the President of the International Tribunal for the Former Yugoslavia, Judge Claude Jorda (annex I).

In the report enclosed with his letter, President Jorda reviews the current situation regarding the conduct of trials before the Tribunal. On the basis of experience gained in the conduct of trials to date and in the light of information supplied by the Prosecutor regarding new investigations and probable future indictments, he also projects how the Tribunal's activities are likely to evolve in the future, both in the medium and longer term. On the basis of this assessment, President Jorda concludes that, should the Tribunal maintain its current structure and should it continue to function in accordance with its existing procedures (as adjusted in the light of the recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda), then the Tribunal is likely to require a considerable period of time to complete the trials of all of those persons who are currently being, and who it can be anticipated will in the future be, prosecuted before it.

President Jorda, with the unanimous support of the judges of the International Tribunal for the Former Yugoslavia, proposes three measures to address this situation.

The first of these measures consists in conferring on senior legal officers of the Trial Chambers certain of the powers that are currently vested in the judges to take decisions regarding the conduct of the pre-trial process. Adoption of this measure would not appear to require any formal action on the part of the Security Council. It

00-47821 (E) 180900 200900

would, however, require action on the part of the General Assembly, to approve the related increase in the Tribunal's budget.

The second measure that is proposed would involve the creation of a pool of ad hoc judges, "judges ad litem", on which the Tribunal could draw, as and when needed, to put together new Trial Chambers, to supplement the existing three Trial Chambers. Adoption of this measure would require the amendment by the Security Council of the Tribunal's Statute. The amendments which the judges would propose to this end are set out in appendix III to President Jorda's report.

The third of the measures that are proposed would involve the enlargement of the Appeals Chambers of the International Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda by the addition of two further judges, drawn from the Trial Chambers of the International Criminal Tribunal for Rwanda. Adoption of this measure would require the Security Council to amend both the Statute of the International Tribunal for the Former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda.

In the event that the Security Council adopted the second and third of these measures, the General Assembly would subsequently be requested to approve the related increases that would be required in the budgets of the two Tribunals.

Finally, and depending upon the manner in which the Security Council might decide to give effect to the second and third of the measures proposed, it might be necessary that the Security Council and the General Assembly elect additional judges both to the International Tribunal for the Former Yugoslavia and to the International Criminal Tribunal for Rwanda.

The Registry of the International Tribunal for the Former Yugoslavia has indicated that the preliminary estimated costs of adoption of the second of the three measures that are proposed in the report attached to President Jorda's letter would be approximately US$ 7million for six judges appointed for a period of six months each, for the first year (2001). The continuation of related staff beyond 2001 would entail additional estimated requirements of $2.5 million per year, making a total annual cost on a continuing basis of approximately $9.5 million. These requirements do not include provisions for office space and, if necessary, additional courtrooms.

With respect to the third measure, relating to the addition of two judges to the Appeals Chambers of the two Tribunals, the preliminary estimated costs for each year would amount to approximately $654,000 on a continuing basis. In addition, non-recurrent costs for the first year are estimated at approximately $268,000.

In view of the fact that adoption of the third of the three measures that are proposed in the report attached to President Jorda's letter would require the amendment of the Statute of the International Criminal Tribunal for Rwanda, I have sought the views of the President of that Tribunal on that proposal. I attach for your information and for the information of the members of the General Assembly and the Security Council a letter dated 14 June 2000 which President Navanethem Pillay has sent in response (see annex II).

(*Signed*) Kofi A. **Annan**

Annex I

Letter dated 12 May 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General

On behalf of the entire bench of Judges of the International Tribunal for the former Yugoslavia, I have the honour of presenting to you a prospective plan for improving the operation of the Tribunal, with a particular eye to enabling the Tribunal to accomplish even better the missions entrusted to it.

This plan meets two needs: firstly, it allows for a review of the state of the Tribunal nearly seven years since it first began operating whilst also analysing its future prospects. Having studied the numerous measures that could be taken to improve the Tribunal's operation, it also enables to propose those which are adjudged sufficiently effective and flexible to fit in with the Tribunal's longer term activity.

The plan is first and foremost the result of the Judges' reflections, Judges conscious that the time is ripe to examine the future of the Tribunal. It is also the outcome of advice, encouragement and suggestions given to me unsparingly by several Permanent Representatives of Member States and several organs within your Secretariat during my trip to New York last February.

Since February, the plan has received the endorsement of the Bureau before being unanimously adopted by the Judges of the Tribunal at an extraordinary plenary on 18 April. Some issues, especially those relating to the implementation of the proposed solution, were discussed and the conclusions are reproduced in the report.

The document having potential diplomatic, legal, administrative and financial implications, I would be grateful if you could bring it before both the General Assembly and the Security Council as you deem most fit.

On this point, you will note that, at this stage of the study, the report does not contain a financial assessment of the additional resources required to ensure the implementation of the solution advocated by the Judges. Nevertheless, the plan is flexible enough to allow the beginnings of its implementation to be included in the 2001 budget, which would constitute the first step.

Mindful of the need for the transparency, the Judges opted to take stock of the state of the Tribunal by suggesting the measures which they believe to be the most pragmatic and most productive in responding to the increasing activity of the Tribunal over the coming years. The Judges nonetheless rounded off their reflections with a series of proposals and suggestions on how to implement the measures advocated.

It is in light of the foregoing that I remain available to you and to the President of the General Assembly, the President of the Security Council and the respective members thereof in order to take in any observations and to respond to the questions and concerns to which the report might give rise.

Finally, I would like to draw your attention to the fact that the present report has been communicated to the Office of the Prosecutor and, although the Prosecutor

herself has not had the opportunity to study it, her Office has expressed general agreement with the assessment of the Tribunal's projected workload, support for a more dynamic pre-trial process and recognition of the need to increase the Tribunal's capacity to try cases. The proposals would, of course, have resource implications for the Prosecutor's Office.

(*Signed*) Claude **Jorda**
President

Current state of the International Tribunal for the Former Yugoslavia: future prospects and reform proposals

Report on the operation of the International Tribunal for the Former Yugoslavia, submitted by Judge Claude Jorda, President, on behalf of the judges of the Tribunal

Introduction

1. The purpose of the present report is to set out the medium- and longer-term measures designed to improve the operation of the International Tribunal for the Former Yugoslavia, over which I have had the honour of presiding since November 1999.

2. Many of the preliminary observations which I shall expand upon in this introduction were put forward previously during the productive exchanges held at The Hague with the Expert Group mandated by the Secretary-General, pursuant to General Assembly resolutions 53/212 and 53/213 of 18 December 1998, to evaluate the effectiveness of the activities and operation of the ad hoc Tribunals. These observations were also made when I met with the most senior political, diplomatic and administrative officials at United Nations Headquarters in New York in February 2000.

3. The introduction presents a review of the main issues and the objectives pursued, followed by a brief explanation of the method used to formulate the Tribunal's proposals.

Background

4. The current situation was analysed in depth by the Expert Group. In its response of 31 March 2000 (see A/54/850), the Tribunal demonstrated its determination to make use of all the recommendations to deal with some of our present problems.

5. However, above and beyond that which the Organization is legitimately entitled to expect from the application of the experts' conclusions, the President of the Tribunal, in full agreement with all the judges, deemed it necessary to anticipate several problems. The time now appears ripe. For many reasons, which are explained below, the Tribunal has reached a turning point in its history. Significant political changes, whose impact should be noted, are emerging and even gaining pace in the Balkans. Furthermore, there is now sufficient distance between the Tribunal and much of what it has done since its creation. It has managed to form itself into a fully operational judicial instrument and even though its case law, especially on appeal, is not consolidated — indeed, far from it — it may nevertheless attempt this projection with the large amount of information now available to it and even allowing for some margin of error (which is analysed as well).

6. This information is as follows:

(a) **The increasing number of indictments and arrests**. The Tribunal now faces the problem of managing quantity while not allowing itself to sacrifice the exemplarity and quality of its proceedings. The consequential trial length results in the accused spending more and more time on remand. Reconciling the two imperatives is not easy;

(b) The proposed reform plan **must also take into account the forecast of the Office of the Prosecutor**, that is, the prosecution policy which will be pursued in the months and years ahead. In this regard, it should be noted that for the first time a Prosecutor has agreed to set out her programme in the medium and long term, thus making it possible to assess the future workload of the Chambers further to an assessment of her investigative goals in terms of precise figures;

(c) **Procedural constraints**. It goes without saying that our trials set out to be exemplary. However exemplary though the trials may be, this does not exclude their becoming increasingly complex as questions and problems for which no ready-made solutions exist in international criminal law arise for the judges to resolve (inter alia, cooperation of States, arrest conditions, subpoenae and binding orders, form and content of indictments, protection of confidential sources, witness protection, development of law on appeal particularly regarding detention and legal aid, harmonization of sources of international humanitarian law);

(d) **The ever greater expectations of the international community**. The Tribunal proved itself during the first trials brought before it. However, the most senior officials have yet to be tried. The Tribunal must be fully operational by the time they are arrested — arrests which appear inevitable given the declared resolve of Heads of State and Government and the statements of the highest-ranking officials of the North Atlantic Treaty Organization (NATO). If this does not happen, the Tribunal will provoke frustration and lose some of its credibility. It is difficult to imagine the senior political and military leaders of the countries involved in the conflict spending many months on remand before their trials can begin;

(e) The place of the Tribunal within the international humanitarian law mechanism in view of the inception and establishment of the International Criminal Court. There can be no doubt that much of what is being done at The Hague and in Arusha will, at best, serve as an example to follow and, at worst, serve as a counter-example. In this respect, by demonstrating that a universal criminal justice is possible and feasible, the Tribunal has in some way helped to set up a more permanent judicial organ. However, the demonstration must be exemplary to the very end. A failure of the Tribunal, for whatever reason, would deal a very serious blow to the future Court at the very moment that many States are on the brink of ratification.

Goals

7. These take several forms:

(a) A **projection** must be made to determine how the **activity** of the Tribunal will evolve in the months and years to come.

(b) **An evaluation of the judicial resources** required to accomplish this activity is necessary. Although this does not fall directly within the province of the present study, there can be no doubt that such an assessment will be important for listing the human and logistical resources implicated by the analysis. The first imperative is to use our resources to the maximum, as advocated, moreover, by the Expert Group. Additional resources cannot be requested until they are proved to be absolutely necessary. However, all the questions put here may enable the actual decision makers to sketch out the major points of a **long-term plan** which would allow the Tribunal to close having accomplished the core aim of its missions.

(c) The political and administrative decision makers at the helm of the Organization must also be able to begin to form a relatively exact idea of the **length of the mandate of our ad hoc Tribunal** and manage the resultant workload over time as best and as rationally as possible.

(d) In addition, an analysis of the situation must also make it possible to question **whether the present "format" of the Tribunal is suited to its mission** as it has now developed. We cannot side-step the question of whether there are alternatives to purely and simply increasing resources. Even if finally discarded, all solutions, from the most theoretical to the most pragmatic, must be analysed, with the exception of matters relating to the Prosecutor's prosecution policy.

(e) The political and administrative decision makers need **as much information as possible** in order to make the best possible decisions. At this point in the history of the Tribunal, it is appropriate to take measures not so as to resolve problems in the very short term but to deal with them from a global perspective. For the most part, what guided the approach taken by the authors of the present study was the search for a pragmatic and flexible solution so that, depending on how its judicial activity develops, the Tribunal will always be able to meet different expectations, especially those of the victims and the international community, particularly with regard to the requirement for expeditious and fair trials.

(f) The less direct impact of the study on the establishment of the future permanent Court is not negligible, especially in terms of resources, and more generally in provoking thought as to how **the future Court and the Tribunal** will be linked.

Observations and plan

8. Several difficulties arose during the preparation of the present report:

(a) First there was the problem of establishing **parameters which were both exact and reliable** despite the relatively small distance between the Tribunal and its judicial activity. This activity truly began only in late 1995 with the *Tadic* case, which ended on appeal several weeks prior to the submission

of the present report. Most of the sentences have been handed down in the first instance.

(b) Next, there arose the problem of making a **precise assessment** of the impact of the implementation of new pre-trial proceedings on the duration of trials.

(c) Finally there was the problem of taking qualitative account of certain **random judicial parameters** deriving from the number of investigations and prosecutions announced by the Office of the Prosecutor (end date of investigations, actual number of arrests, complexity of cases, variable level of responsibility of the accused, etc.).

(d) Furthermore, without a doubt the assessments **lose some accuracy** as the projection advances further forward in time.

- Nonetheless, the work that has been accomplished provides an essentially reliable and accurate idea of the **scale of the task** which awaits the Tribunal in the years to come and makes it possible, within a reasonable margin of error, to estimate the number of mandates the Tribunal will still require.
- The **trial length estimates** presented in part one take into account all the improvements made subsequent to the conclusions of the Expert Group.
- The **effect of the appeals** could not be taken fully into account. Appeals proceedings are admittedly much shorter, but it should be pointed out that all cases go to appeal and that the Appeals Chamber for the Tribunal for the Former Yugoslavia also hears appeals from the Rwanda Tribunal. Moreover, the distance from cases on appeal is even less than for cases in trial. In any event, where necessary, in both parts of the present study an explanation of the appeal is brought to bear.
- The drafters of the study wanted to put forward **other possible ways in which the Tribunal could operate** and **other Tribunal formats**. Having analysed their advantages and disadvantages, they discarded them either for technical reasons or because they deemed that it was the political decision makers alone who had the responsibility of deciding whether or not a step falls outside the authority of the judges.
- In formulating these proposals, **the most wide-ranging collaboration** was undertaken, with both the Office of the Prosecutor and the Registry, whose Judicial Support Section carried out, inter alia, all the impact studies. All of the study's guiding principles were unanimously adopted first by the Bureau and subsequently by the judges meeting in a special plenary.

9. In part one, my aim is to present as precisely as possible the current state of the Tribunal's caseload. This opening commentary is followed by a section setting out a projected schedule for both ongoing cases and cases which will commence once pre-trial proceedings have been completed. I then attempt to define the prospects for the coming years which necessarily depend on the future arrests and indictments resulting from the Prosecutor's currently ongoing investigations.

10. On the strength of the observations made in part one, I set forth some proposals in part two which, in my view as well as that of the judges, should make it possible for the Tribunal to meet the challenges ahead. Some of the measures do not directly involve the Tribunal and it could not legitimately advocate them. They have nonetheless been included to make the record as exhaustive as possible. Conversely, other measures involve the operation and organization of the Tribunal more or less directly and these have been presented in ascending order of expected effectiveness.

Part One
Current state of the Tribunal and future prospects

11. In this part I first provide a commentary on the current state of the Tribunal: a type of inventory. Such an exercise is indispensable in order to be able to project into the future and take particular account of upcoming cases as announced by the Prosecutor.

12. For the above reasons, it seemed preferable to deal with the particular situation of the Appeals Chamber separately.

13. In the first part of this section bearing on the current state of the Tribunal, the figures provided for the various time periods have incorporated as far as possible the gains in productivity resulting from the strict application of the recommendations of the Expert Group.

I. Present state of ongoing cases in the first instance

A. Statistical data

14. It is appropriate to clarify what is meant by "ongoing cases", namely, both the cases actually being tried in the courtrooms (at the time of the present report) and the cases relating to all the other detainees which, depending on their arrest date, are at varying stages of the preparatory (pre-trial) phase.

15. Thirteen cases in the first instance pertaining to 26 accused are currently[1] on the docket of the Tribunal.

16. **Four trials are ongoing**. Two approaches are being taken in managing case files. Under the first (in Trial Chamber I), two trials are conducted in parallel, in principle each being heard alternately for two weeks at a time. Under the second approach (in Trial Chambers II and III), a single trial is dealt with at a time without interruption. The rationale for this procedure is that some judges are also in charge of case files in the Appeals Chamber and also that two trials held consecutively will last no longer than two trials held in parallel. These are arguments in favour of each approach and an assessment based on actual results has yet to be carried out.

17. Nevertheless, it may be taken for granted that each of the Trial Chambers will have to hear two trials a year. This does not mean, however, that those two trials will necessarily be completed during the same calendar year.

18. **Nine other cases are in the pre-trial phase**. The length of the pre-trial preparation period is a particularly complex parameter to assess and depends upon the length of the time periods set down by the Rules of Procedure and Evidence. In this respect, the minimum time period is about six months (proceedings under rules 66 to 68, barring pre-trial motions). Moreover, it is difficult to say with certainty to what extent the amount of time taken until now has been attributable to the requirements of the individual proceedings or whether the time taken in the pre-trial phase was determined by the fact that courtrooms were unavailable until the construction of courtrooms 2 and 3 in 1998 and also that the judges were still occupied with previous cases, thus preventing the newer trials from beginning.

19. A statistical study of the length of pre-trial preparation was conducted on the cases which have been through the pre-trial phase and/or trial. The findings of the study are reflected in table 1. It should be stressed that the table is not intended as an analysis of the reasons for the length of each trial. Such an analysis, carried out as part of the study conducted by the Expert Group, would require very detailed explanations on a case-by-case basis. The table instead constitutes a snapshot of the present state of the cases.

Table 1
Length of pre-trial preparation of cases

B. Projected schedule

20. Using the statistical data from table 1, it is possible to deduce the time the Tribunal will need in order to hear those cases currently before it in the first instance. These calculations are made using the following elements, bearing in mind the resources currently available:

- Currently available statistical data regarding the length of pre-trial preparation and trials (see table 1);
- The number of accused currently in detention and in trial in the first instance, i.e., 26 detainees;[2]
- A technical capacity of three courtrooms operational at 215 working days a year, functioning 75 per cent of the time;[3]
- An estimated reduction in the length of time taken for deliberations and drafting of judgements to an average of two months;
- A theoretical appraisal of the degree of complexity of the cases[4] and the number of witnesses.[5]

21. The assessment does not run contrary to the theoretical capacity of each of the Trial Chambers to deal simultaneously with one trial on the merits and three or four in the pre-trial phase. Three to six judgements on the merits can be delivered per year depending on the nature of the cases assigned to each Trial Chamber.

22. It goes without saying that the estimated projected times for the ongoing trials shown in figure 1 were arrived at with the greatest of reservations since experience at the Tribunal to date has shown that cases never proceed according to the estimated schedule, as a result of any number of possible events which may affect the length of the proceedings, and even lead to the interruption of the trial. Taking into account all the data currently available and the reservations expressed above, the trial schedule could be arranged as presented in the schedule in appendix I and in figure 1.

Figure 1

23. In determining these estimates the recommendations of the Expert Group were taken into account, in particular those relating to measures to expedite the proceedings (recommendations 1-13). The Tribunal's three Trial Chamber presiding judges were guiding themselves by the recommendations as much as possible even before they were anticipated (especially since some of them had already become practice, in particular, in all pre-trial phase related matters). It is still too early to provide more accurate figures for the expected gains in productivity, but it is now possible to define the projected length of the pre-trial phase of a case and the length of the trial itself, provided that the case is not exceptional owing to the status of the accused or the judicial difficulties which arise.

24. It is important to note in addition that two committees at the Tribunal (the Judicial Practices Working Group and the Rules Committee) are constantly working to improve its proceedings and to harmonize judicial practice within the Chambers, with the aim of expediting trials even further and consolidating the achievements of the Tribunal.

25. **All the measures being taken up or already implemented will make it possible to reduce the length of pre-trial preparation to eight months.** They have been borne in mind in establishing the projected schedule.

26. Figure 1 shows that the schedule showing when the various Trial Chambers are hypothetically available to commence new trials relating to accused still at large or newly indicted has been drawn up as follows:

- Trial Chamber I: Second half of 2002;
- Trial Chamber II: Beginning of 2003;
- Trial Chamber III: Second half of 2003.

In this connection, the most recently arrested accused, Dragan Nikolic (22 April 2000), will not see his trial commence before the second half of 2002 at the earliest, that is, after more than two years in detention, of which a mere 6 to 12 months will have been "necessary" for pre-trial preparation under the Rules of Procedure in force.

27. The cases could be equally redistributed between the Trial Chambers by applying the escalator principle[6] such that, on the basis of currently ongoing cases and taking a rather optimistic overview, all the trials might be completed by about the **middle of 2003**.

II. Projection: future cases

28. The term "future cases" refers to those in which one or several of the accused have still not as of yet been arrested as well as those cases still being investigated by the Office of the Prosecutor.

A. Cases concerning those accused not yet arrested or at large

29. Discounting those whose indictments are secret, the list of accused at large (30 as of 2 May 2000 in 13 case files) is as follows:

IT-94-3 ("Prijedor")
(Indictment 13 February 1995, last amended 14 December 1995)
1. Goran Borovnica

IT-94-4 ("Omarska camp")
(Indictment 13 February 1995, last amended 2 June 1998)
2. Zeljko Meakic
3. Momcilo Gruban a/k/a "Ckalja"
4. Dusan Knezevic a/k/a "Duca"

IT-94-5 ("Bosnia and Herzegovina")
(Indictment 25 July 1995)
5. Radovan Karadzic
6. Ratko Mladic

IT-95-8 ("Keraterm camp")
(Indictment 21 July 1995, last amended 21 July 1998)
7. Dusko Sikirica a/k/a "Sikira"
8. Dragan Fustar a/k/a "Fustar"
9. Nenad Banovic a/k/a "Bani"
10. Predrag Banovic a/k/a "Cupo"
11. Dusan Knezevic a/k/a "Duca"

IT-95-9 ("Bosanski Samac")
(Indictment 21 July 1995)
12. Blagoje Simic

IT-95-10 ("Brcko")
(Indictment 21 July 1995, last amended 19 October 1998)
13. Ranko Cesic

IT-95-11 (“Shelling of Zagreb”)
(Indictment 25 July 1995)
14. Milan Martic

IT-95-12 (“Stupni Do”)
(Indictment 29 August 1995)
15. Ivica Rajic a/k/a “Viktor Andric”

IT-95-13 (“Vukovar”)
(Indictment 7 November 1995, last amended 2 December 1997)
16. Mile Mrksic
17. Veselin Sljivancanin
18. Miroslav Radic

IT-95-15 (“Lasva Valley”)
(Indictment 10 November 1995)
19. Zoran Marinic

IT-95-18 (“Srebrenica”)
(indictment 16 November 1995)
20. Radovan Karadzic
21. Ratko Mladic

IT-95-23/2 (“Foca”)
(Indictment 26 June 1996, last amended 7 October 1999)
22. Gojko Jankovic
23. Janko Janjic
24. Dragan Zelenovic
25. Radovan Stankovic

IT-99-37 (“Kosovo”)
(Indictment 24 May 1999)
26. Slobodan Milosevic
27. Milan Milutinovic
28. Nikola Sainovic
29. Dragoljub Ojdanic
30. Vlajko Stojiljkovic

On average, one arrest is currently made per month. Using only simple mathematics, this means that all the accused might be detained within 30 months, i.e., by the middle of 2003.

30. In the best-case scenario and provided that all the accused under the same indictment are arrested simultaneously or in very short order,[7] it is theoretically possible that the 13 cases could be spread among the Trial Chambers as and when they become available. The extra time required for disposing of the additional caseload over and above that indicated in the schedule shown in figure 1 would then be approximately four years per Trial Chamber if the statistical parameters worked out above were applied.[8]

31. The Trial Chambers would have then finished with the current caseload during 2007 at the earliest. It must be noted that shortening the time for pre-trial preparation will have no impact on these estimates because, as shown above, the capacity of each Trial Chamber to try remains theoretically limited (bottleneck principle).

B. Impact of ongoing investigations

32. As specified in the introduction, the further one moves away from the present — itself dependent on numerous variables — the more difficult it becomes to set a projected schedule, if only because it is impossible to set arrest dates for those indicted, let alone those yet to be indicted by the Office of the Prosecutor. Nevertheless, bearing in mind that the judges’ workload will in any case be considerable, it was deemed important to attach figures to these future prospects, at least in terms of mandates of the judges of the ad hoc Tribunal.

33. According to the information presented by the Prosecutor at the plenary of the judges *“36 new investigations will culminate in 29 separate important trials. Of course, in reality, the accused will not be arrested or tried together and the actual number of trials might be significantly higher”*.

34. Applying the method used above to evaluate the length of proceedings yields a figure of 29 cases to be distributed among three Trial Chambers, i.e., about 9 or 10 cases per Trial Chamber, or nine years of trials in the first instance for the entire Tribunal.

Summary of the assessment

35. Based on the above observations, trials might end **in the first instance** as follows:

– Present caseload: Middle of 2003;

– Trial of accused at large: End of 2007;

– Trial of new cases: End of 2016.

36. Under this outcome, at the minimum[9] four additional four-year mandates will be required for the Tribunal to accomplish its mission. Given the unforeseeable factors involved in carrying out arrests and the possibility, as raised by the Prosecutor, that

there will be a greater number of indictments, this time-frame might well be greatly increased.

37. Conversely, and keeping in mind unforeseeable parameters relating especially to the uncertainty surrounding future arrests, the data which are based on the assumption that all arrests in 41 cases will be carried out, can be mathematically weighted as follows:

- With 75 per cent of arrests made, that is, 30 case files, another 10 years would be necessary;
- With 50 per cent of arrests made, that is, 20 case files, another 6 years would be necessary.

III. The Appeals Chamber

38. The caseload of the Appeals Chamber is already heavy and will become even heavier with the increase in the number and the importance of the first instance cases.

39. Here, the difficulties of making an assessment are manifold:

- The proceedings are significantly different: hearings are notably fewer, but written submissions are far more numerous and, above all, much longer, focusing often as they do on complex legal issues;
- The distance from the practice is smaller and it is impossible to single out any telling statistics. One thing seems certain, however: all cases are appealed;
- The impact of the significance and the number of cases at the Rwanda Tribunal is as yet difficult to grasp. Besides the number and importance of the cases, there is the matter of judges travelling to the seat of that Tribunal;
- Interlocutory appeals represent an increasing workload for the Appeals Chamber. For instance, the Appeals Chamber is currently[10] hearing six interlocutory appeals for the former Yugoslavia Tribunal (including two in proceedings relating to contempt of court by counsel) and 13 for the Rwanda Tribunal.

Nonetheless, it was considered proper to apply the same assessment criteria since the Expert Group addressed the issue in its report on both of the Tribunals.

40. This being the case, it appears reasonable to consider that the Appeals Chamber could be in a position to render three to six judgements annually in addition to the interlocutory decisions,[11] for a total appeals proceedings time of 12 months (for both Tribunals). It is clear that the cases waiting to go to appeal will only increase from year to year because the number of new cases will be greater than the Chamber's ability to dispose of them.

Table 2
Appeals Chamber statistics

A. International Tribunal for the Former Yugoslavia (appeals on the merits)

1. Definitive sentences

Case No.	*Appeal*	*Date of appeal judgement*	*Length of appeal proceedings*
D. Erdemovic IT-96-22	23 December 1996	7 October 1997	10 months and 16 days
D. Tadic IT-94-1	3 June 1997	26 January 2000	2 years, 6 months and 23 days
Z. Aleksovski IT-95-14/1	17 May 1999	24 March 2000	9 months and 7 days

2. Ongoing appeals

Case No.	*Appeal*	*Length of appeal proceedings to 28 April 2000*	*Observations*
A. Furundzija IT-95-17/1	22 December 1998	1 year, 4 months and 6 days	Status conference: 29 June 2000
Delalic et al. IT-96-21	• Delic: 24 November 1998 • Mucic: 27 November 1998 • Landzo: 1 December 1998 • Delalic: 1 December 1998 • Prosecutor: 26 November 1998	• Delic: 1 year, 5 months and 4 days • Mucic: 1 year, 5 months and 1 day • Landzo: 1 year, 4 months and 28 days • Delalic: 1 year, 4 months and 28 days • Prosecutor: 1 year, 5 months and 2 days	Date of appeal hearing: 5 June 2000
G. Jelisic IT-95-10	15 December 1999	4 months and 13 days	Status conference: 17 July 2000
Kupreskic et al. IT-95-16	• Santic: 24 January 2000 • Josipovic: 26 January 2000 • V. Kupreskic: 26 January 2000 • Z. Kupreskic: 27 January 2000 • M. Kupreskic: 28 January 2000 • Prosecutor: 31 January 2000	• Santic: 3 months and 4 days • Josipovic: 3 months and 2 days • V. Kupreskic: 3 months and 2 days • Z. Kupreskic: 3 months and 1 day • M. Kupreskic: 3 months • Prosecutor: 2 months and 28 days	Status conference: 17 May 2000
T. Blaskic IT-95-14	17 March 2000	1 month and 11 days	Status conference: 30 June 2000

Average worked out but not significant: approximately 2 years.

B. International Criminal Tribunal for Rwanda (appeals on the merits)

Case No.	*Appeal*	*Length of appeal proceedings*	*Observations*
Kambanda ICTR-97-23	7 September 1998	1 year, 7 months and 21 days	Brief in reply: 12 May 2000
Akayesu ICTR-96-1	2 November 1998	1 year, 5 months and 26 days	Status conference in June 2000
Kayishema and Ruzindana ICTR-95-1	18 June 1999	10 months and 10 days	Briefs in reply: 12 June 2000 Hearing date in June?
Rutaganda ICTR-95-1	Rutaganda: 5 January 2000 Prosecutor: 6 January 2000	3 months and 23 days 3 months and 22 days	-
Musema ICTR-96-13	1 March 2000	1 month and 28 days	-

To date (11 May 2000) there have been no judgements rendered on the merits.

IV. Conclusion

41. The above presentation and supporting tables make it possible to assess the workload which the Tribunal will have in the months and years to come. Admittedly, it is appropriate to allow for the obvious margins of error inherent in this projection. However, it is no less clear that if changes are not made, whether they be in criminal policy, rules of procedure or format and organization of the Tribunal, and conversely if all the political and other facts evolve in such a way that the number of cases inescapably increases, there can be no doubt that we will need to think rather in terms of the number of mandates required.

42. From that perspective, it is reasonable to consider that a minimum of at least three further mandates would then be necessary.

Part Two
Proposed medium- and long-term measures

43. The aim of this part of our study is to examine all means which would enable the Tribunal to confront its current workload while accomplishing the missions entrusted to it: to judge the most senior officials, to render the victims justice, to work for history and to prevent the recurrence of such tragedies.

44. The judges undertook a rigorous analysis of all possible measures to accomplish these goals. Naturally, during their research, they discarded those which manifestly fell beyond the purview of the legal sphere, deeming that the mission entrusted to them was essentially to render justice and not to consider other political or diplomatic measures which clearly did not fall within their province. They focused on finding fresh solutions which would combine both procedural or internal organizational measures, in particular with regard to case preparation, with logistical and personnel support, which would enable a decisive increase in the Tribunal's trial capacity. A flexible and pragmatic approach was followed throughout.

I. Inventory of the possible measures

45. Some of the measures put forward in this section have already been discussed and in the end have been discarded while others, which are still under examination, will have, as things now stand, to be abandoned or at the very least considered with caution. The measures are arranged in categories based upon the extent to which they directly involve the Tribunal. It was decided to set aside and not analyse in detail those measures falling clearly outside the mandate of the Tribunal. This was the case for the proposals for the establishment of a Truth and Reconciliation Commission and the enactment of a general amnesty law.

46. With regard to the other measures put forward, the judges first analysed the respective advantages and disadvantages of each before stating what gains in productivity might be expected from them.

A. Measures with little or no involvement of the Tribunal

1. Hearing cases elsewhere

Description

47. "Hearing cases elsewhere" means that a State from the Balkans or any other State would be able to try a person indicted by the Prosecutor for having committed a serious violation of international humanitarian law pursuant to the provisions of the Statute or even to its own national law. Trials would accordingly be transferred to other States. This form of proceedings is not to be confused with the holding of trials away from the seat of the Tribunal by its judges, a measure which will be examined further below in the present section.

Advantages

48. The immediate benefit is obvious, because each trial thus transferred would be subtracted from the Tribunal's caseload. Furthermore, should a case be transferred to a State in the Balkans, the trials would become more visible to those facing trail and justice would be brought closer to the victims. The pedagogical impact would undoubtedly be heightened. Transferring cases to other States would constitute a form of voluntary contribution to the construction of a more universal justice.

Disadvantages

49. The main obstacle is a legal one. Granted, at the present time, nothing prevents a State from trying a person it has indicted pursuant to its national law. However, it would do so in accordance with its own legal system. The consequence would be a two-tier justice system which would result in the accused being treated unequally and there being possible inconsistencies in the case law. This does not even take into account the fact that the Prosecutor would in any case have to consent not to make a request for deferral.

50. Moreover, the whole issue of the confidentiality of documents relating to witness protection would remain completely open.

51. Additionally, an amendment to the Statute and a provision under the State's law would need to be drawn up if a State wished to try a person indicted by the Prosecutor pursuant to the provisions of the Statute.

52. The main disadvantage of the measure, however, would be that the very concept of unified international criminal justice would disappear or at the very least be eroded. This would go against all the efforts expended to establish an International Criminal Court.

Conclusion

53. Regardless of the undeniable and not inconsiderable advantages of the measure, the judges are of the view that the disadvantages far outweigh them. It is also appropriate to note that in the short term the measure could not be applied to the States from the Balkans owing both to the political climate and the issue of the safety of the witnesses, victims, accused and judges.

54. Accordingly, the judges do not advocate the measure in terms of gains of productivity.

Important comment: trials in the Balkans

55. One variation on this measure might consist of the countries from the Balkans trying persons accused of serious violations of international humanitarian law themselves. Naturally, those persons falling within the parameters of the Prosecutor's criminal policy would not be tried in this way. Consequently, it is not unthinkable that those same countries might be induced to try persons indicted by the Prosecutor under the supervision, for example, of international observers.

56. In this scenario, the Tribunal would concentrate on a restricted number of high-ranking leaders (Nürnberg model) and would in any case retain competence on appeal. These solutions appear premature, notwithstanding encouraging political developments in some countries, especially Croatia.

2. The creation of a second tribunal

Description

57. This measure entails the creation of a new judicial organ in the Balkans with competence similar to that of the Tribunal. Such a tribunal would call upon both national and international personnel and judges. By way of example, one might think of the creation of a tribunal as part of the mandate of the United Nations Interim Administration mission in Kosovo, whose jurisdiction might partially overlap with that of the Tribunal.[12] The Tribunal at the Hague could try the highest-ranking officials and the second tribunal could deal with lower ranking criminals. The Hague Tribunal would in any event retain competence on appeal for all cases.

Advantages

58. The immediate benefit is clear because each trial conducted at the new tribunal would be subtracted from the caseload of the Tribunal. This would markedly increase the visibility of the trials to those facing trail and would bring justice closer to the victims as well as having a pedagogical effect on all the citizens from the former Yugoslavia involved. Not insignificantly, material savings might also be expected, especially in respect of testimony and transporting the victims and witnesses to the seat of the local tribunal.

Disadvantages

59. The creation of a new organ entails a complex legal and political process; moreover, the reasons why the decision was taken to establish the Tribunal outside the former Yugoslavia still remain as clear as ever.

60. A two-tier justice system would be instituted, which might lead to the accused being treated unequally and to inconsistencies in case law. Moreover, the Prosecutor's prosecution policy is increasingly aimed at the senior officials, so that the gains in productivity from the second tribunal might be limited to only a few cases.

61. Lastly, it is to be expected that the overall material cost of setting up such an organ would be considerable and at the same time would not markedly reduce the current cost of the Hague Tribunal.

Conclusion

62. It appears that this solution could not be implemented rapidly and the anticipated gains in productivity would be marginal. Accordingly, the judges do not advocate the measure, at least not as part of the present management study.

3. Absorption by the International Criminal Court

Description

63. This measure would involve all or part of the Tribunal's caseload being transferred to the new International Criminal Court (ICC).

Advantages

64. The immediate benefit would be obvious because each trial transferred to the new ICC would be subtracted from the Tribunal's docket until the latter's caseload was exhausted. Another effect of such a transfer would be to reinforce the notion of international criminal justice rendered by a conventional organ.

65. This would also make it possible to get the ICC "up and running" before it exercises its jurisdiction over new armed conflicts.

Disadvantages

66. There are many legal disadvantages. The Rome Statute would first have to enter into force and this could take some time. In addition, since the Yugoslavia Tribunal and the ICC have totally disparate *ratione temporis* jurisdiction, the Statute must be modified by the Security Council as must the Rome Statute of the ICC by the States party thereto.

67. One preliminary question arises: how to organize the link between a conventional institution and a subsidiary organ of the Security Council from the viewpoint of the rules of international law?

Conclusion

68. The judges are of the view that in the best of cases this measure can only be applied after a considerable amount of time, given in particular the pace of ratification.

69. Moreover, even if this solution is tempting in the long-term, the judges consider that it constitutes no more than the simple transferral of the problems of the Tribunal to another international court.

70. The judges do not therefore advocate the measure, at least in the short term.

B. Measures involving the Tribunal more directly

1. Holding trials away from the seat of the Tribunal

Description

71. Holding trials away from the seat of the Tribunal is provided for under rule 4 of the Rules of Procedure and Evidence, which allows a Trial Chamber to exercise its functions away from the seat of the Tribunal in the interests of justice if so authorized by the President. Hence, the rule permits the judges of the Tribunal to hold trials or trial phases, such as victim-witness hearings, in the Balkans.

Advantages

72. The benefit in terms of visibility is considerable. It would bring justice closer to those facing trial, but above all to the victims. The pedagogical impact, closely linked to the deterrent and peacemaking component of the Tribunal's mission, would unquestionably be heightened.

Disadvantages

73. There are several. The main disadvantage is that the measure would have no impact on the caseload of the Tribunal. The opposite might even prove to be the case because the trials would be longer and more complicated, even without taking into account the additional problems faced by the judges and staff members involved in having to attend to other tasks while away from the seat of the Tribunal.

74. In the light of the current climate in the territory of the former Yugoslavia, security requirements would be great, particularly for the victims, witnesses and judges.

75. Finally, despite some material savings with regard to the transportation of victims and witnesses, the overall cost of such an operation would be much higher.

Conclusion

76. Regardless of the considerable benefit of increased visibility, the judges have arrived at the conclusion that the measure cannot, at least for the moment, have a positive impact on the management of the Tribunal's caseload.

77. The measure is accordingly not advocated by the judges as promoting any gains in productivity.

2. Holding trials before a single judge

Description

78. The goal of the measure is to enable a judge to preside over a trial alone rather than with two other judges, as is currently the case.

Advantages

79. As this would increase the productivity of the Tribunal threefold, it goes without saying that the impact on the Tribunal's docket would be considerable. Moreover, this is a classic solution recommended and established in practice by many national criminal systems confronted with problems occasioned by a rise in crime and overloading of the courts.

Disadvantages

80. The main concern is to establish whether the practice is acceptable for international trials. Given the complexity of the cases and the applicable international norms, the judges think that it is not. Furthermore, this proposal was examined and subsequently rejected by the drafters of the Statute.

Conclusion

81. Despite the considerable advantage to be gained in productivity, the judges are not considering this solution because the credibility of international justice would be too seriously affected. Accordingly, the measure is not advocated.

3. In absentia trials

82. The measure is mentioned only for the record. The matter was debated and discussed on several occasions and may consequently be considered closed.[13] The situation would be quite different for detainees who were granted provisional release and then failed to return for their trial. The matter is under discussion with a possible amendment of the Rules of Procedure and Evidence in mind.[14]

83. Holding in absentia trials would not resolve to any great extent the issue of the number and length of the trials. Quite to the contrary, it would increase the workload of the Tribunal since the accused would have to be retried following arrest.

4. Creation of an additional Trial Chamber

Description

84. This would entail the creation of three additional posts for judges, making up a fourth Trial Chamber.

Advantages

85. An immediate benefit would be that the new Trial Chamber could begin functioning almost immediately after new judges were elected.

86. The courtrooms currently available are operating at 70 to 75 per cent capacity and could in principle absorb this increase in activity. A great number of judges would add to the degree of flexibility available in composing chambers, especially on appeal.

Disadvantages

87. This would require a modification to the Statute and accompanying measures (creation of Legal Officer and secretary posts). Increased productivity in the first instance would ultimately increase the workload of the Appeals Chamber. Moreover, if the new judges were not to compose a new Trial Chamber but instead all the Trial Chambers were recomposed, as was done when Trial Chamber III was created, the transition period required for reducing the number of ongoing cases would be drawn out.[15] This solution, which had already been taken up and deemed valid in 1997, would now lack flexibility. It would not take into account developments in the workload and would have to be rethought once more if the workload were to grow. Finally, it would add to the burden of the Appeals Chamber.

Conclusion

88. Productivity in the first instance would grow by approximately 30 per cent in total through the reassignment of some of the caseload of the three existent Trial Chambers. The time-frame for commencing a trial on the merits could be brought down to the absolute minimum required for pre-trial preparation (eight months on average).

89. To illustrate how the measure might help with the ongoing cases as they currently stand, with reference to figure 1, it can be deduced that the transferral of one existing case from each of the Trial Chambers to the fourth Trial Chamber would reduce the projections made in paragraph 26 by one third, i.e. by about one

year. Thus the entire current caseload could be disposed of in the first instance by the middle of 2002.

90. Mathematically extrapolating the above gain in productivity to the trial of those still at large as well as the trial of new cases yields a proportionate reduction in the length of time required for disposal of those cases:

Trial of those at large:	Late 2005 (instead of 2007);
Trial of new cases:	Late 2011 (instead of 2016).

Three additional mandates after 2001 might then be required to try all the cases in the first instance.

91. The judges were of the opinion that this measure would be the perfect solution to the current caseload, i.e., not taking into account those still at large and new investigations. However, it does not enable us to address such a heavy workload in the long term.

92. **All of the measure described above have been dismissed for the reasons indicated. Nevertheless, it is clear that the creation of an additional Trial Chamber would seem on the surface to be a satisfactory solution for a limited period. In consequence, I believe that I must recommend other measures which are bolder and probably more effective in the medium and long term.**

II. Recommended solutions

93. The judges were of the view that it was still possible to increase productivity by speeding up and improving the pre-trial preparation of cases.

94. However, if this were done, resulting in an increase in the number of trial-ready cases and a decrease in the trial time of those cases because of the very careful preparation put into them, would it not then be appropriate to envisage a system with additional judges more specifically dedicated to hearings and rendering decisions. This is the principle of ad litem judges which was previously outlined in recommendation 21 of the Expert Group.

95. We advocate a combination of these two measures. What is sought above all else is the flexibility in how they are used and their lowest possible cost.

96. The guiding principles supporting the proposed solutions are as follows:

(a) **An even more marked separation of pre-trial preparation functions from the trial function** (real-time pre-trial management) while upholding judicial prerogatives. This is to be achieved by delegating more powers to experienced legal officers at the pre-hearing stage;

(b) **Reduction in the time allowed for hearings to the absolute minimum necessary.** This would make it easier to determine the precise length of a trial to be better quantified and thus to ascertain how long the ad litem judges would be required;

(c) **Flexibility**, which allows adaptation at any time to the **ebb and flow of the case load**.

A. Partially delegated pre-trial management

Description

97. The senior Legal Officers of the Trial Chambers would be invested with some of the pre-trial judges' powers to take judicial administrative decisions (setting deadlines, hearing witnesses by deposition, etc.). Truly jurisdictional decisions would however be excluded from this transfer of duties.

98. The Legal Officers could write up a form of procedural summary,[16] and report to the full bench of judges who would supervise the pre-trial preparation.

99. Amendments to the Rules of Procedure and Evidence (rule 65 ter) would have to be considered. Such amendments could serve to simplify the form of the status conferences which could be held in office with the representatives of the parties and a court deputy taking the minutes.

Advantages

100. Pre-trial preparation would be noticeably expedited and down time during the preparatory proceedings would be cut out altogether. The trial would benefit from better preparation and would focus solely on the actual factual and legal points of the case in issue. The trial length ought to be shortened in most instances. The judges could concentrate on the trial and maintain the proper distance from the two parties.

101. Furthermore, the detainees would perceive that their case was "advancing" from the moment they were arrested: The overall procedural schedule could be set at the earliest following their initial appearance. The proceedings would be managed in real time.

102. Additionally, the defence would become involved in the general progress of the case at an earlier stage.

Disadvantages

103. This solution would still not resolve the bottleneck at the trial stage. The time required for actual pre-trial preparation would admittedly be reduced, probably to about six months, but the overall trial capacity of the Trial Chambers would stay the same. This formula in no way addresses the problem of the often complex preliminary motions and the interlocutory appeals, which would remain within the province of the judges. A training and adaptation period would be necessary for the Legal Officers so that practices could be harmonized.

Anticipated results

104. The judges could devote more time to the trials on the merits and to the drafting of decisions. Pre-trial preparation would be expedited and a slight improvement ought to be seen in the overall length of the proceedings. A limited quantity of additional human and material resources would seem necessary.

105. This solution would have a true impact only if combined with a substantial increase in the trial capacity of the Trial Chambers.

B. Increase in trial capacity

106. The measure was debated in plenary. The outcome of these debates was a clear consensus on the principle of establishing a pool of ad litem judges.

Description

107. The general principle is that of establishing a pool of judges to be made available to the Tribunal to serve in one of the Trial Chambers for a given case as the need arose. The mechanism would operate as follows: if none of the Trial Chambers was available to hear a case as soon as its pre-trial preparation had been completed, judges from the pool would be called upon to constitute an ad litem Trial Chamber.

Advantages

108. The productivity of the Tribunal would be increased by a factor of 30 per cent[17] respectively depending upon the choices made from among the options suggested. The formula would also offer a great degree of flexibility insofar as it could be activated or deactivated according to need. And the involvement of States in the accomplishment of the Tribunal's mission would be noticeably more universal or, at the least, there would be many more States involved.

Disadvantages

109. The measure requires a modification (admittedly limited) of the Statute and perhaps the agreement in principle of the General Assembly on the selection process and financing. Several additional legal officer and support staff positions would have to be allocated. The issue of additional premises for hearings would have to be examined. And the Investigations Division of the Office of the Prosecutor would have to be provided with additional resources.

Conclusion

110. Implementation of this measure alone would enable the Tribunal to tackle the ebb and flow of the cases regardless of their number. This is why the judges unanimously advocate the measure.

111. Appendix II shows how the entire current and future caseload would be completely disposed of in the first instance by late 2007 instead of 2016 (cf. data in para. 35 above).

112. During their debates at the special plenary meeting, the judges addressed the main problems which the adoption of the measure would entail, using the observations of the Rules Committee as a starting point. Without prejudicing the opinion of the Office of Legal Affairs, the judges discussed the following points:

Status of the ad litem judges

113. In compliance with the principle of the equality of the judges, the ad litem judges would have to have the same qualifications and conditions of employment as the other judges (remuneration, pension, privileges and immunities). The **judges were unanimous** on this point.

114. However, they might not be granted some prerogatives given the ad litem nature of their position, e.g., as regards their involvement in plenaries and Bureau meetings.

115. The principle of incompatibility with occupying other posts will have to be applied to the judges in order to preserve their independence and impartiality. **Point adopted unanimously.**

Origin and background of the ad litem judges

116. Respect for the following principles was advocated:

- Principles of balance and international representation ("no more than one judge per State");
- Balanced representation of the different legal systems.

Moreover, the judges **unanimously** favoured the possibility of making use of former judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

Method of designation

117. Two possibilities were considered: election or appointment. There was **divided opinion** on the issue.

118. In favour of election, it was argued that:

- It is the normal selection process for judges at all international courts;
- Election ensures that the principle of equality between the judges, with a view to maintaining their independence and impartiality, is respected.

However, the process is more cumbersome than appointment.

119. In support of designation by appointment, it was noted that the system is more flexible and is already provided for by article 13, paragraph 3, of the Statute, without affecting the legitimacy of the judges.

120. The issue of whether the **length of the mandate** should be set at four years or be left indeterminate was also the subject of some debate. There was **divided opinion** on the matter.

Selection of judges (to sit in a trial)

121. Four possible methods were considered: selection by the Secretary-General, by the plenary of the judges (the most "legalistic" approach), by the President, or by the President upon consultation with the Bureau (predominantly "pragmatic" approach). The judges held the **unanimous view** that the decision should be made within the Tribunal, but **opinion was divided** over which of the selection processes would be most preferable.

Integration of the judges in the organization of the Trial Chambers

122. Two different methods were proposed (**divided opinion**):

- Autonomous ad litem Trial Chambers composed entirely of ad litem judges. The system would be simpler, quicker and more flexible. It could be implemented without delay. However, it might make the Tribunal's case law less consistent and have a negative impact on the organization of its work;
- Trial Chambers composed of judges and ad litem judges. The case law and practice of the hearings would be more homogeneous but there would necessarily be a wait for one of the Tribunal's three existing Trial Chambers to finish trying a case before it could be composed as a mixed Trial Chamber.

Number of ad litem judges

123. Their number could be predetermined and set by the Statute. Conversely, the principle itself, with no set number specified, could be written into the Statute. In this case, there would be an open list.

124. The issue is closely related to that of the method for designating judges. **Opinion at the plenary was divided.**

Terminology

125. The judges stated that they were in favour of a simplified terminology which excluded notions such as "regular judges" or "permanent judges". They indicated their preference for **judges** and either **ad litem judges** or **ad hoc judges**.

Financing

126. The possibility of Member States making judges available gratis was **unanimously dismissed** out of concern for respect for the principle of equality and in order to guarantee the independence and impartiality of the judges.

127. Two other methods for financing the measure were put forward:

- Through the voluntary contribution fund. This system makes it possible for the richest States or those already represented by a judge to contribute to the ad litem judge system and to the expedition of the proceedings;
- Through the regular budget.

The judges were of the view that this matter did not fall within their purview and refrained from formulating an opinion.

C. Combination of the solutions: legal officers delegated to perform pre-trial functions + ad litem judges

128. In order to obtain the greatest expected results, a combination of the two systems outlined above is proposed.

Description

129. The system would combine the systems 1 and 2 described in sections A and B above. Temporary judges would be called upon to sit in specifically designated trials. The pre-trial preparation would to a large extent be carried out by senior legal officers delegated by the Trial Chamber.

Advantages

130. The method would allow the advantages of both systems to be combined: pre-trial preparation would be expedited (real-time management), the judges would be more available to devote time to the merits of the cases, one or several additional Trial Chambers would be constituted and further support would be made available for the Appeals Chamber.

Disadvantages

131. It would be necessary to amend the Statute and the Rules of Procedure and Evidence (see discussions above).

132. Acceleration of the disposal of cases in the first instance would probably lead to an increase in the workload of the Appeals Chamber (see paras. 139-142 below). Complementary solutions would have to be found for appeals proceedings.

133. Provision would have to be made for additional staff such as legal officers, translators, etc., and possibly for technical resources (courtrooms, technicians, etc.). The Prosecution Division of the Office of the Prosecutor would have to be provided with additional resources.

Conclusion

134. Overall productivity in the first instance would clearly be increased considerably. It was not deemed useful to quantify these gains, as they would depend on the extent to which ad litem judges were called upon. “Just-in-time” disposal of cases might be considered: The full schedule for the case could be set either at the initial appearance of the accused or over the following days.

135. For example, the overall impact of the improvements might be estimated as shown in annex II: in the short term the entire current caseload would be tried before the end of 2002 instead of 2003.

136. However, it is in the long term that the gains would become significant. By making optimal use of the ad litem judges, it might be hoped that the entire current caseload plus the cases relating to those at large and the future cases would all be completed in the first instance approximately in late 2007 rather than late 2016.

137. In opting for this type of solution, the judges did not, however, underestimate the difficulties involved. They wished to study all its effects, whether in terms of texts to be amended (especially the Statute) or modifications to be made to the Tribunal’s internal organization (see para. 44 above and appendix III).

138. Apart from the reasons set out above which led the judges to adopt this proposal **unanimously**, the impact of the combined measure on the productivity of the Tribunal is an essential supporting factor.

The Appeals Chamber

139. For the reasons set out above, the impact on the Appeals Chamber would be difficult to measure at the current stage. Nevertheless, the judges considered that making use of ad litem judges should not be dismissed out of hand.

140. However, given that this is a problem which affects both of the Tribunals, it was held to be more appropriate to consider the views expressed by the Group of Experts in paragraph 107 of its report and recommendation 20 thereof, for adding two new judges to the Appeals Chamber. The two judges would come from the Rwanda Tribunal and would sit in The Hague and hear all appeals, whatever their provenance.

141. This solution was **unanimously ratified** by the judges of the Rwanda Tribunal upon consultation in plenary in Arusha on 18 February 2000.

142. It would have several advantages:

- It would be relatively easy to implement except for modifying the Statute;
- It would enable the problems of an overloaded Appeals Chamber to be resolved in the near future, all the more so since measures under the Rules of Procedure and Evidence to curb interlocutory appeals have been adopted and agreements with the Registry in Arusha to facilitate liaison between the Rwanda Tribunal Registry and the judges in The Hague are currently being firmed up;
- It would definitively associate the Rwanda Tribunal with the Appeals Chamber;
- While recognizing the advantage of making possible use of ad litem judges, the solution advocated would have the major advantage of consisting of a stable appeals bench, which is essential for consolidating and standardizing the case law;
- An end would thereby be put to the currently unavoidable and often criticized mixing of Trial Chamber and Appeals Chamber benches, which some of the recommendations of the Expert Group focus on.

Conclusion

143. This is the first time the Tribunal has attempted to make a projection into the future working from a critical assessment of its activity and the appraisal of the Group of Experts.

144. The only goal of the judges in this assessment was to improve the operation of the Tribunal and, in particular, to shorten trial length and the time spent in detention.

145. The first concern of the judges was to make it possible for the General Assembly, the Security Council and the Secretary-General to take the best decisions in order for this historic institution, whose credibility is at its highest, to be able to continue to meet the expectations of the international community. They also wished to provide the decision makers with the information necessary for evaluating the number of mandates required.

146. The proposed solution has sufficient flexibility to allow the Tribunal to adapt to the possible developments in the Prosecutor's criminal policy, especially in terms of indictments and arrests, while also keeping in mind the major administrative principles which govern the Organization and budgetary necessities.

147. Finally, the solution creates a synergy between the reflective and active contribution of the judges and the requisite support they expect from the international community to enable the Tribunal to accomplish its mandate.

148. The judges are not blind to the fact that the conditions for such a reform of the Tribunal may appear cumbersome and complex. They recall, as did the Expert Group in its recommendations, that:

> "To the extent that there may have been expectations that the Tribunals could spring to life and, without going through seemingly slow and costly developmental stages, emulate the functioning of mature experienced prosecutorial and judicial organs in national jurisdictions in adhering to a high standard of due process, such expectations were chimerical. No system of international justice embodying standards of fairness, such as those reflected in the creation of

ICTY and ICTR, would, under the best of circumstances, either be inexpensive or free of the growing pains that inhere in virtually all new organizations." (A/54/634, para. 264)

Notes

[1] As of 11 May 2000. Of the 26 accused 11 are in ongoing trials and 15 cases are in the pre-trial phase.

[2] As at 11 May 2000.

[3] This takes into account the need for the judges to devote time to studying the questions of law raised in many motions and to drafting many interlocutory orders as well as the judgements. The parties also need consultation time for complex legal issues. The judges must also devote time to other cases (e.g., status conferences, appeals, Bureau meetings).

[4] Depending on the different legal questions raised, e.g., characterization of the international armed conflict, difficulties over cooperation of States, procedural restrictions (see note 3 above), etc., which are not always linked to the level of responsibility of the accused.

[5] Unquantifiable or variable factor in most cases bearing in mind that, in principle, it is the parties who decide how many witnesses are called.

[6] By virtue of this principle, a trial-ready case is assigned to the first Trial Chamber available, that is, a Trial Chamber which has completed a previous case even though it did not direct the pre-trial preparation of the trial-ready case.

[7] There can never be enough emphasis placed on the judicial and organizational difficulties arising from co-accused not being arrested simultaneously.

[8] That is, four cases per Trial Chamber, each trial lasting on average 12 months. Pre-trial preparation, conducted in parallel with the trial of other cases, is not included in the time period.

[9] The length of appeals is not taken into account at this stage.

[10] As of 11 May 2000.

[11] Thus, in 1999, 74 and 43 decisions on interlocutory appeals were rendered for the former Yugoslavia and Rwanda tribunals respectively.

[12] Subject to a more exhaustive analysis of the founding provisions of such a court and without prejudging the Prosecutor's position on and judges' evaluation of the Tribunal's jurisdictional primacy.

[13] Especially since the measure was not adopted in the Rome Statute.

[14] Measure studied by the Group of Experts in paragraphs 51 to 60 of its report and recommendation No. 3. Under certain conditions, it would then be presumed that the accused had renounced his right to be present at his trial.

[15] It had been decided to recompose the Trial Chambers thus in order to ensure the homogeneity of the Tribunal and the consistency of its case law.

[16] The summary would incorporate, inter alia, the agreements reached by the parties on those points still in issue and testimony taken by deposition.

[17] Productivity could be increased in significantly greater proportions, depending upon the number of Trial Chambers or sections constituted under this system.

Appendix I

Tentative schedule of cases in progress (estimation as of 10 May 2000)

Appendix II

Court Calendar (forecast with “ad litem” Judges)

Appendix III

Proposed amendments to statute

Annex II

[Original: English]

Letter dated 14 June 2000 from the President of the International Criminal Tribunal for Rwanda

The judges of the International Criminal Tribunal for Rwanda have been invited to comment on the proposals made in paragraphs 140 to 142 of the report relating to the enlargement of the Appeals Chamber.

We have not had an opportunity to discuss the report in its entirety in the time available, as most of the judges are presently engaged in court sessions. We would like to consider the body of proposed changes in the light of their impact on the future work of ICTR and will attempt to do so at the plenary meeting of the judges scheduled for 26 June 2000 in Arusha.

It is also our intention to address long-term plans of the Tribunal once we receive the criminal prosecution projection from the Prosecutor and impact studies from the Registry's Judicial Support Services.

A. The Appeals Chamber

As stated in the report, at the Plenary of the ICTR trial and appeals judges in Arusha on 18 February 2000, the judges unanimously ratified the recommendation made by the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda for the enlargement of the Appeals Chamber. They agreed that the Appeals Chamber serving the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda shall be increased by the addition of two judges. They agreed that the additional two judges shall be drawn from the pool of existing ICTR trial judges and that they will serve in The Hague as members of the ICTY and ICTR Appeals Chambers.

Our further comments are:

1. The Statute of ICTY provides that five of the judges elected to ICTY shall serve as judges of the Appeals Chamber. The Statute of ICTR provides that the judges who serve on the ICTY Appeals Chamber shall also serve as judges of the ICTR Appeals Chamber.

The Appeals Chambers of the two Tribunals are statutorily distinct structures but coincide with regard to membership. The report (para. 8 (d)) reflects the position somewhat differently when it states "the ICTY Appeals Chamber also hears appeals from ICTR". The distinction must be borne in mind as it impacts on the substance of the proposed statutory amendments as well as the budgets of the two Tribunals.

2. The quorum of the Appeals Chamber remains at five judges.

3. The two additional judges shall be drawn from the judges who have been elected to ICTR. They shall be selected by the President of ICTR in consultation with the judges of ICTR.

4. The positions vacated by the two judges shall be filled by the appointment, not election, of two new judges. This may entail an amendment of the Statute of ICTR to provide for 11 judges instead of the present nine, or may be effected by the provision of ad-litem judges.

The judges have not formed an opinion on which of these courses ought to be followed. Clearly the latter recourse is an interim measure for the remainder of the term of office of the judges moving to the Appeals Chamber. The former course is more appropriate as it provides for the situation upon expiry of the current mandate.

5. A process has to be devised for the addition of two judges to ICTR during the term of the current mandate. After the expiry of the current mandate, the process will be by way of election. The judges are of the view that, for the present, the two positions should be filled by appointment rather than election. They believe that the appointments should be controlled by the Secretary-General in terms of the provisions in article 12, paragraph 4, of the Statute which reads: "In the event of a vacancy in the Trial Chambers, after consultation with the Presidents of the Security Council and the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned."

6. The judges are of the view that the newly appointed judges should have the same status and benefits as the judges they are replacing.

7. The Statutes of both Tribunals will require amendment to cater for the above.

8. With regard to appendix III to the report, that is, proposed amendments to the ICTY Statute, we note that the following amendments need to be incorporated:

(a) Expansion of the Appeals Chamber from five to seven judges;

(b) Provision for the service of the two ICTR judges in the ICTY Appeals Chamber;

(c) Competence of the two ICTR judges to hear appeals from the ICTY Trial Chambers.

B. Ad-litem judges

A provision for ad-litem judges is not necessary in ICTR to serve present needs. In the long term, ICTR may also face the imperative of having to cater for heavy caseloads, long trial waiting periods, or to fill vacancies occasioned by the inability of judges to serve. In this case it would be useful if such provision is to be made for ICTY that it also be made at this stage for ICTR to have access to a pool of ad-litem judges. The judges support the suggestions made in the report relating to the status of the ad-litem judges and that former judges of ICTR and ICTY should be considered for this pool. The proposed amendments to articles 13 and 13 bis and new article 13 ter are approved.

C. Legal officers to perform pre-trial functions and ad-litem judges

The judges are not in favour of delegating pre-trial preparation to senior legal officers. They view this area of work as judicial functions. Currently we follow the practice of assigning a single judge from each Chamber, usually the presiding judge, to serve on pre-trial and status conferences, meet with prosecution and defence counsel and supervise matters such as scheduling orders.

We thank the Secretary-General for offering us an opportunity to participate in this process.

(*Signed*) Navanethem **Pillay**
President