



"Intensifying International Criminal Tribunal (ICT) Cooperation in Africa: Protection of Victims and Witnesses: The African Experience" | Africa and the ICC: Lessons Learned and Synergies Ahead

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1. I) Introduction

1. The protection and support of witnesses and victims before the International Criminal Tribunal for Rwanda (ICTR) and the Special Court of Sierra Leone have been in Africa excellent tools for ensuring fair, transparent and equitable justice to both the victims and the accused persons. Witnesses are a key component of the judicial process before both jurisdiction in Arusha and Freetown given that much of the evidence consists of oral testimony.

2. The African Experience with the protection of witnesses and victims started with the ICTR, and then continued with the SCSL. It had evolved from humble beginnings over the past nineteen years into fully functioning operations which made it possible against great odds for over three thousand witnesses from more than fifty countries in Africa, Europe, America, and Asia to appear before the two jurisdictions and return safely to their respective countries of residence.

3. Witness protection has also been a critical strategic tool in the prosecution of individuals accused of serious violations of international humanitarian law committed in Rwanda and in the neighbouring countries during the year 1994. The Statutes and the Rules of procedure and evidence of these two jurisdictions provided an overall legal framework^[1] for the management of the witnesses and victims, their protection, support and participation before, during and after the trial proceedings.

4. With respect to the ICTR, it is worth noting that it adopted a holistic approach to witness protection and support. The cornerstone of this approach was to ensure that witnesses and victims are fully protected and their rights respected so as to enable them to participate directly or indirectly to the judicial process. Testifying before the ICTR should not be a cause or an occasion for further traumatism. Rather, the process had ensured that individuals, who accepted to testify before the Tribunal or to assist in the investigation carried out by both the Prosecutor and Defence, are handled with respect and dignity.

5. The Tribunal's achievements in this crucial area are all remarkable because it operates in Africa, more particularly in a region where there is no culture of witness protection, hence no precedent with respect to the prosecution of serious violations of international humanitarian law. As a result, the ICTR had to develop its own procedures from scratch and largely implemented protective measures by itself with much appreciated cooperation from United Nations Members States in order to find innovative solutions to the serious legal and practical immigrations problems relating to the status of some of its protected witnesses.^[2]

6. States cooperation has therefore been essential if not crucial for successful investigations conducted by both parties to the trial proceedings, and particularly in the prosecution of serious violations of international humanitarian law committed in Rwanda in 1994.

7. In this paper^[3], I will attempt to summarize the ICTR experience and the best practices gathered throughout the last nineteen years as well as the challenges that are facing the Tribunal in the area of cooperation with respect to witness protection which is necessary for the dispensation of justice aimed at putting an end to impunity.

1. II) ICTR experience and best practices in witness protection area and good administration of international justice

8. The Rwanda genocide is a complex problem that has been dealt within a complicated environment. From the onset, it was important to define exactly what was to be expected from the witness protection and support programme in our particular environment. Such

identification is the first and critical step for a successful comprehensive program. In this process, ICTR had also addressed other fundamental issues such as the legal status of the witnesses at places of residence, their movement requirements, the nature and scope of support to be provided prior, during and after the trial, including psychological, medical, administrative, legal, material and financial support to witnesses and their families where applicable. [4]

9. At the beginning of the Tribunal's investigative phase in 1995, it was necessary to gather information on crimes committed, massacres sites and potential suspects. States cooperation was critical in intelligence gathering, identification of potential witnesses, location of witnesses, tracking and arrest of accused persons and the collection of evidence. The evolution of investigations over the last fifteen years has also demonstrated the necessary reliance on the cooperation of States in the discharge of some critical tasks such as: openings of some mass graves, forensic work on evidence gathered to establish the cause and manner of death, drafting of indictments, interview of former UN Officials and maintenance of contacts with victims, witnesses and survivors.

10. ICTR had further come up with creative solutions on the issue of the nature of the travel documents necessary for international travels, including the escort and physical protection to be provided to the witnesses during international borders crossing far from their countries of residence where they may be living illegally. Member States' cooperation with the Tribunal from the beginning in the area of witness support and protection including in internal and external relocations, has been critically essential to the continued success of the Tribunal proceedings.

11. ICTR had developed the most comprehensive Witness Support and Protection Programme tailored around the particular environment of the Great Lakes Region which takes into account local and multifaceted dynamics. This enabled the Tribunal to take and implement all necessary measures to ensure the safety and well-being of witnesses and victims who present evidence before the Tribunal prior to, during and after their appearance in Court.

12. One of the other important features of ICTR's programme is the offering of impartial services to the Prosecution and Defence Witnesses. The Witnesses and Victims Support Section of the ICTR had at all times acted as an independent and impartial body of the Registry of the Tribunal which implemented the Registry Program while maintaining the integrity of the witnesses vis-à-vis the judicial proceedings and the best interest of all concerned parties.

13. Numerous policies relating to how, when, where and by whom the services might be provided during the different phases of the trial process have been duly adopted in the framework of the implementation of the ICTR comprehensive Witness Support and Protection Programme.

14. The ICTR experience had further shown that witness protection is a very expensive service which requires a great deal of resources and a strong political will and cooperation of Member States so as to laying down the basis of a solid foundation for an efficient protection programme.

15. The ICTR documented into practical guidance manuals, the collective experience of its dedicated staff members as well as the best practices developed over the years which were enriched by valuable suggestions from visiting international experts. These manuals offer basic working tools for any practitioner directly involved in witness support and protection work. They also serve as reference documents for practitioners and other persons, institution interested in this non-traditional UN endeavours. The manuals were conceived in order to serve as guidance documents for future activities of this kind at the international level, which take into account issues arising from many different countries.

16. ICTR in its outreach program had actively partnered with interested Non-Governmental Organizations, UN Agencies, Member States in strengthening national legal systems to combat gender-based crimes and violence against women, in integrating into national legal systems the best practices as developed in the area of witness protection and support, in the administration of justice and the reform of evidentiary rules of procedure, as well as mainstreaming legal aid, promoting reparation, domesticating international criminal justice developments. These best practices involved the adoption of national strategic plans to combat domestic violence and impunity including training programmes for the main stakeholders such as police, prosecutors, Defence counsel and witness protection personnel.

17. Moreover, ICTR had embarked on aggressive international advocacy campaigns to sensitize UN Member States in giving recognition to, addressing the challenges and taking ownership of its pioneering contribution.

18. It is worth stating that ICTR experience also served as a tool in strengthening the institutional capacity building process in many UN Member States on the African continent. This is illustrated in the enactment process of Witness Protection Acts and in the development of related programmes. States like Kenya and Rwanda have immensely benefited from ICTR experience and guidance in the elaboration and enactment process of their respective Witness Protection Acts. ICTR Support programme had also made provision for special assistance to victims of gender based-war crimes, including sexual violence and rape and those affected by HIV/AIDS. In that area, the pioneering work of the ICTR in assisting and protecting such victims highlighted its immense contribution to promoting accountability and ending impunity for gender crimes.

III) The challenges that faced ICTR in the area of State cooperation on witness protection matters

19. From its inception until the closure of its trial proceeding at the end of December 2013, ICTR encountered several obstacles in the movement and protection, including relocation of protected witnesses. Those challenges were made critical by the absence of any specific provision in the ICTR Statute that could have placed express obligations on the shoulder of Member States for the physical protection of witnesses, their movement and relocation.[5]

20. The key operative provision of Article 28 of the ICTR Statute relates to Cooperation on judicial assistance that Member States shall offer to the ICTR in investigation and prosecution of persons accused of committing serious violations of international Humanitarian law.[6]

21. Under those circumstances, the Registrar of the ICTR who is in charge of the Registry, one of the three organs of the ICTR was called upon from its inception, to play a central role in tackling some of those challenges.

22. As part of ICTR's strategy which enabled more than three thousand witnesses from more than fifty countries to appear before the Tribunal, it is important to underline some ICTR best practices, which had been developed as follows:

The appointment of focal points in countries of residence of witnesses to handle all cooperation requests as regards ICTR protected witnesses, had tremendously minimized the exposure of protected witnesses while guaranteeing the required confidentiality for the transfer of such individuals to the seat of the ICTR;

One of the greatest achievements of the ICTR had always been its ability to ensure the attendance of witnesses irrespective of their status vis-à-vis the immigration of their country of residence and to return them to the said country upon completion of their testimony. This was done without any prejudice to their legal status. The effective and efficient cooperation of States in issuing travel documents facilitated the timely availability of witnesses, including asylum seekers or illegal immigrants to the Headquarters of the Tribunal for their testimony;

National law enforcement agencies cooperated with the Tribunal for the execution of Court Orders, including the service and execution of summons to witnesses for their testimony in the interest of justice. They also did so for the effective transfer of detained witnesses, their protection in the detention facilities with segregated areas or relocation from one prison to another in order to ensure their security and safety;

ICTR had successfully solicited the cooperation of witnesses' country of residence in conducting joint threat assessments, and verification of information on alleged security threats or regional security issues. Any relocation of vulnerable witnesses was implemented with the assistance of the witness' host Government. They conducted the monitoring of the security situation of the witness in the post-trial phase.

In countries where there were wars or where the security situation was uncertain, the States, when necessary provided means of transportation and escorts to facilitate access of ICTR Officers to witnesses in the field. Together, they often secured witnesses attendance to proceedings in Arusha. When they were requested, witnesses' countries of residence sometimes offered physical protection to witnesses, facilitated their transit and escorted them during their journey to and from Arusha;

The safeguarding of protected witnesses accommodated in Safe Houses during their stay in Arusha for testimony purposes and the 24 hours surveillance of the same facilities during their stay in Arusha for testimony purposes were made possible with the assistance of the Tanzanian Police Services, under the supervision of the ICTR;

ICTR provided training and counselling to its officers, local and Government partners to enhance their skills;

ICTR through grants and other voluntary contributions from Member States had been able to sign contracts with external medical facilities for the provision of medical and psychological care to witnesses and to victims of gender-based violence in accordance with the strict confidentiality principle.

23. Finally, it is important to note that the issue of the relocation of protected witnesses remained serious challenges to the ICTR throughout its tenure to which no suitable or sustainable solution was found. Some countries expressed their reluctance and others timidly accepted to review ICTR's requests for cooperation in relocating vulnerable witnesses. A limited number of countries accepted to receive witnesses on their territories by way of exchange of letters with the ICTR or by expressing their willingness to sign an agreement with the ICTR on relocation of vulnerable witnesses.

24. ICTR had sometimes enjoyed the full cooperation of countries of residence of witnesses for the implementation of internal relocations of witnesses. This was not a subject of any formal agreement but was rather the result of formal requests for cooperation on a case by case basis or ad hoc and informal arrangements. ICTR experienced some difficulties with Member States while seeking their cooperation in the interviewing process of potential witnesses by Defence Counsels assigned to ICTR indigent accused persons. Some States accepted to cooperate with the Tribunal in this area, provided that an examining Magistrate of their own system would perform the task.^[7] Others requested the presence of a Magistrate during the testimony of witnesses by video-link from their countries. Some States invoked their national laws in order to avoid serving *Subpoenas* to witnesses on the basis that such summons contained coercive words that could not be given to a resident of their countries. Instead of facilitating the attendance of witnesses to court proceedings at the Seat of the Tribunal, other countries suggested to organize video-link testimonies from their territories as their national laws do not authorize the temporary transfer of a resident outside the country for his attendance to criminal proceedings.

1. IV) Conclusion

25. Although the ICTR could be proud of its contribution towards international justice delivery system in Africa, it is worth noting that the effectiveness of any witness protection programme, be it for the International Criminal Court will remain seriously challenged in the absence of firm political will and commitment to support such a program that is very costly. Firstly, it is important to initiate a vigorous outreach campaign must be conducted from its inception to sensitize partners who shall play a key role in its implementation. Secondly, a comprehensive legal framework must be adopted from the start and adapted to the realities on the ground in the States concerned, which will take into account the local environment and its internal and external dynamics.

26. Meeting those critical operational and diplomatic challenges at the national or international levels in the future, will undoubtedly strengthen the foundations of national and international efforts aimed at putting an end to impunity. This will also go a long way in consolidating the establishment of a more effective and credible justice system like the ICC, which will provide satisfaction to the victims and witnesses with respect to their contribution and participation to the international judicial proceedings. From the African Experience perspective, one can say that the ICTR legacy has already influenced positively and will continue to do so, the development of the protection and support mechanisms available to the ICC witnesses and victims. This can only be achieved with the crucial support of States Parties to the Rome Treaty.

[1]The Statute of the ICTR in its articles 14, 21 and 28 refers to the necessary protection of witnesses and the importance of cooperation of States with the International Criminal Tribunal for Rwanda. While Article 39 of the ICTR Rules of Procedure and Evidence ("The Rules") gives the power to the ICTR Prosecutor to take measures for the protection of its potential witnesses and informants, Article 17B of the Directive on Assignment of Defence Counsel provides Defence Counsel with the tool to take some measures for the protection of their witnesses at the investigative stage. Article 34 of the Rules invests the Registrar of the ICTR with the mandate of protecting witnesses and victims called to testify in proceedings, prior to, during and after their testimony before the ICTR while Article 56, 58 and 90 *bis* refer to the cooperation of States for the transfer of witnesses.

[2]Foreword by Dr. Agwu U. Okali, Former Registrar of the ICTR in "WVSS Manual of Operational Guidance", Vol. I, ICTR, Arusha, Tanzania, 2000.

[3]This paper has drawn immensely from the presentation entitled: "ICTR Experience, Lessons Learned & Best Practices on Cooperation with States & National Actors in Witnesses Protection Programming" by Mrs. Sylvie Becky-Kacou, former Chief of the Witnesses and Victims Support Section of the ICTR at the OHCHR Expert Meetings on Witness Protection for a Successful Investigation of Gross Human Rights Violations and International Crimes-Moving forward-Geneva 29-30 September 2009

[4] Preface by Mr. Roland Amoussouga, former Chief, ICTR Witnesses and Victims Support Section in the "Manual of Operational Guidance", Vol. .I, ICTR, Arusha, Tanzania, 2000.

[5] Paper on "The ICTR's Challenges in the Relocation of acquitted persons, released prisoners and protected witnesses" presented by Mr. Roland Amoussouga, Senior Legal Adviser and Chief of ERSPS, Forum between Offices of the Prosecutors of the UN *Ad Hoc* Criminal Tribunals and National Prosecuting Authorities, Arusha, Tanzania, 26-28 November 2008.

[6] Article 28 of the Statute of the ICTR provides:

"1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

(a) The identification and location of persons;

(b) The taking of testimony and the production of evidence;

(c) The service of documents;

(d) The arrest or detention of persons;

(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda".

[7] Opening Statement by Mr. Adama Dieng, Registrar of ICTR at the Forum on cooperation between Offices of the Prosecutors of the UN *Ad Hoc* Criminal Tribunals and National Prosecuting Authorities, Arusha, Tanzania, 26 November 2008.

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