



Security Council

Distr.: General
31 December 2008

Original: English

Letter dated 19 December 2008 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council

I. Introduction

1. The present letter is to inform the Security Council about the work of the informal Working Group on the International Tribunals, which Belgium had the honour to chair during 2008. In particular, I would like to update the Council on the significant progress made by the Working Group on the issue of the establishment of a residual mechanism or mechanisms to carry out certain essential functions of the International Tribunals for the former Yugoslavia and Rwanda after their closure. In its resolution 1503 (2003), the Council called upon the Tribunals to take all possible measures to complete all trial activities at first instance by the end of 2008 and to complete all work in 2010 (the completion strategies) and, in its resolution 1534 (2004), it emphasized the importance of fully implementing the completion strategies, although the Tribunals indicated that it is not likely that they will meet those deadlines.

II. Organizational matters

2. The Working Group was established on an informal basis in 2000 to consider matters relating to the United Nations and United Nations-assisted Tribunals, and consists of the legal advisers of the Missions of the members of the Security Council. Traditionally, its chairmanship has rotated with the monthly rotation of the presidency of the Council. Given the intensive work that was required in relation to the question of a residual mechanism, the Working Group took a decision at the end of 2007 that the matter would best progress under the chairmanship of a single delegation. Belgium was pleased to be nominated by the members of the Council to take up this challenge. The Working Group was assisted by the Office of Legal Affairs, which acted as the secretariat and provided valuable advice on legal issues arising.

3. The Working Group held 29 meetings during 2008. Its discussions were informed by a joint paper produced by the International Tribunals in March 2007 and revised by them in September 2007. There was considerable dialogue between the Working Group and the Tribunals throughout the year, by means of letters from the Office of Legal Affairs on behalf of the Working Group to the Presidents of the



Tribunals; videoconferences with the principals of the Tribunals; meetings with the principals of the Tribunals when they were in New York for their presentations to the Security Council; and a visit to each of the Tribunals by the Working Group.

4. The Working Group was briefed by Justice Richard Goldstone, Chairman of the Advisory Committee on Archives, which was established by the Registrars of the Tribunals to advise on possible locations for the archives and related issues. The report of the Advisory Committee was received, with covering comments from the Tribunals, too late in the year for the Working Group to consider it in any detail. The Working Group also had informal consultations with the “jurisdiction States”, Rwanda and the countries of the former Yugoslavia, and exchanged views with the Registrar of the Special Court for Sierra Leone, Herman von Hebel, and a consultant working on residual issues for the Special Court, Fidelma Donlon.

5. There was agreement from the start of the year that the Working Group should have the aim of finalizing a Security Council resolution dealing with the residual issues before the end of 2008 if at all possible. During the first part of the year, discussions were of a more general nature, based on the Tribunals’ joint paper. From around June, the focus moved to elements for a possible Council resolution, drafted by the Chairman with the assistance of the Office of Legal Affairs. That draft became the basis for the discussions, and passed through two readings, leading to three successive versions of the draft. While a number of elements of the draft resolution are gaining support, significant areas of difference remain and it will not be possible to finalize the draft before the end of 2008.

III. Working Group visit to The Hague and Arusha

6. At the invitation of the Presidents of the International Tribunals, the Working Group visited the Tribunals in The Hague and Arusha during the week beginning 29 September 2008. The Working Group also spent a day in Brussels, at the invitation of the Belgian Government, at a seminar on the “Legacy of the International Criminal Tribunals”. The purpose was to gain a better understanding of the Tribunals’ work and progress towards the completion strategies and to discuss the possible establishment of a residual mechanism to carry out necessary functions after the Tribunals have closed. The Working Group spent two days at each of the Tribunals for meetings with the two Presidents, the Prosecutors and Registrars, the judges and staff, and visited the detention facilities of each of the Tribunals. I gave an oral report of the visit to the Security Council in informal consultations.

7. Among the issues discussed during the visit were the question whether there should be one joint residual mechanism or a mechanism for each of the Tribunals; the location of the mechanism or mechanisms; the question of referrals to national jurisdictions under rule 11 bis of the Rules of Procedure and Evidence; the timing of the establishment of the mechanism or mechanisms; the question of which residual functions of the Tribunals the mechanism or mechanisms should carry out; and the need for efficiency and cost-effectiveness.

8. In addition to the meetings with the principals, meetings were held with staff from the Chambers, the Office of the Prosecutor and the Registry of each Tribunal at which they briefed the Working Group on the practical aspects of their work and expressed their views on which functions it would be necessary for the residual mechanism or mechanisms to carry out.

IV. Consideration by the Working Group of a possible residual mechanism or mechanisms

9. The Tribunals' joint paper identified a number of residual functions that might need to be carried out by a residual mechanism after the closure of the Tribunals. These included the trial of fugitives; the protection of witnesses; the supervision of sentences; the review of judgements; the referral of cases to national jurisdictions; proceedings for contempt; the prevention of double jeopardy; issues relating to defence counsel and legal aid; claims for compensation; public information and capacity-building; and issues relating to human resources. The Working Group discussed each of those possible residual functions, identifying questions for the Tribunals and considering the answers provided by them. Two "readings" of the joint paper were completed on that basis. My predecessor, Johan Verbeke, gave an oral report of the discussions so far to the Security Council in informal consultations in May.

10. The focus then moved to a discussion on the basis of the Chairman's draft elements for a Security Council resolution. The following areas of early agreement emerged:

(a) The fugitives must face trial: impunity is unacceptable. The most senior fugitives, those most responsible, must face international trial by the mechanism or mechanisms;

(b) Transfer to national jurisdictions is an important part of the completion strategies of the Tribunals;

(c) Continuing witness protection is of critical importance;

(d) The archives of the Tribunals are the property of the United Nations and must be kept under its control.

11. Further discussions on the basis of three successive Chairman's drafts of a possible Security Council resolution largely identified the structure of the possible residual mechanism or mechanisms, although important differences of view remain. The following basic structure has emerged:

(a) The residual mechanism or mechanisms would have a trial capacity, based on a roster of judges that could be activated to compose a Trial or Appeals Chamber when needed;

(b) The staff of the residual mechanism or mechanisms would be small in number and efficient, commensurate with the reduced work of the residual mechanism or mechanisms;

(c) The residual mechanism or mechanisms would inherit the rights and obligations of the Tribunals and would have jurisdiction to try the most senior and most responsible indictees;

(d) Apart from trial activity, the residual mechanism or mechanisms would continue certain essential residual functions of the Tribunals, including the protection of witnesses, but agreement has not yet been reached on the scope of any further functions;

(e) The residual mechanism or mechanisms would be established by a Security Council resolution at a date yet to be determined, with the authority of the

mechanism or mechanisms set out in that resolution and Statutes based on amended Statutes of the International Tribunals;

(f) The Rules of Procedure and Evidence of the International Tribunals would also require amendment, although it has not yet been determined how these amendments would be effected.

12. The principal issues that remain to be resolved concern:

(a) Whether there should be one residual mechanism or two, and the related question of location;

(b) Whether the resolution should determine a specific date on which the residual mechanism or mechanisms will commence functioning, or whether that date should be determined later in the light of the progress of the Tribunals towards completion;

(c) Whether the jurisdiction of the residual mechanism or mechanisms should extend to all fugitive indictees at the date of closure of the Tribunals, or only to a limited list of such indictees, and, if the latter, how to ensure that there is no impunity for the remaining indictees;

(d) Whether the residual mechanism or mechanisms should have authority to refer further cases to national jurisdictions under rule 11 bis and to revoke such referrals or any referrals previously made by the Tribunals;

(e) Whether the judges on the roster should be chosen from the permanent and ad litem judges of the Tribunals, or whether they should be elected;

(f) Where the archives of the Tribunals should be located and whether the residual mechanism or mechanisms should be co-located with the respective archives;

(g) The structure of the mechanism or mechanisms;

(h) The scope of residual functions to be carried out by the mechanism or mechanisms.

13. These areas of difference remain for further discussion, as do issues not yet considered in any detail, in particular the question of the archives. Questions that will need to be addressed in relation to the archives concern their location, whether they should be co-located with the residual mechanism or mechanisms, and how confidential material should be handled. I would urge the Security Council to seize the momentum that has been generated during 2008 to continue with this pace of discussions on the basis of the draft resolution so that progress can be made in the first few months of 2009.

14. On 19 December, the Security Council adopted a presidential statement (S/PRST/2008/47) acknowledging the progress made in the consideration of these issues by the Working Group and paving the way for its future work.

V. Judges of the International Tribunals

15. In order to facilitate the completion strategies, various requests were made by the Presidents of the International Tribunals during the year for the extension of the terms of office of judges and greater flexibility in their appointment to cases. Those

requests were considered by the Working Group, and recommendations were made to the Security Council for the adoption of appropriate resolutions. As a result, the Council adopted resolutions 1800 (2008), 1824 (2008), 1837 (2008), 1849 (2008) and 1855 (2008).

16. By its resolution 1800 (2008), adopted on 20 February, the Security Council authorized the Secretary-General on a temporary basis to appoint ad litem judges to cases at the International Tribunal for the former Yugoslavia in excess of the statutory maximum of 12, up to a maximum of 16. That temporary authorization was due to expire on 31 December 2008. In view of the current caseload and the anticipated length of ongoing trials, the President of the Tribunal recently requested an extension of the period of authorization beyond 31 December 2008, which was granted by the Council by its resolution 1849 (2008), adopted on 12 December.

17. By its resolution 1824 (2008), adopted on 18 July, the Security Council extended the terms of office of 7 permanent and 17 ad litem judges of the International Criminal Tribunal for Rwanda until 31 December 2009 and 2 Appeals Chamber judges of the Tribunal until 31 December 2010, or until the completion of the cases to which they are assigned, if sooner.

18. By its resolution 1837 (2008), adopted on 29 September, the Security Council extended the terms of office of 4 Appeals Chamber judges of the International Tribunal for the former Yugoslavia until 31 December 2010 and 10 permanent judges and 27 ad litem judges of the Tribunal until 31 December 2009, or until the completion of the cases to which they are assigned, if sooner.

19. By its resolution 1855 (2008), adopted on 19 December, the Security Council authorized the Secretary-General to appoint ad litem judges to cases at the International Criminal Tribunal for Rwanda in excess of the statutory maximum of 9, up to a maximum of 12 until 31 December 2009, and amended article 11, paragraph 2, of the Statute of the Tribunal so as to allow for a Trial Chamber to be composed of ad litem judges only.

VI. Conclusion

20. Belgium was pleased to be asked to chair the Working Group during 2008, and we believe it has worked effectively under a single, rather than a rotating, chairmanship. Given the number of issues arising in relation to the Tribunals during the completion period, the advanced stage of the discussions on the residual mechanism or mechanisms, and the outstanding questions that remain to be resolved, I recommend strongly that a single chairman be appointed for 2009 to continue this important work.

21. I would also urge the Working Group to continue the other working methods that have served it well during 2008, such as close cooperation with the Office of Legal Affairs; regular dialogue with the Tribunals, whether in writing, by videoconference or face to face; and a willingness to meet regularly with a view to keeping up the momentum on a draft resolution so as to bring it to conclusion within the first few months of 2009. The legal advisers of the new members of the Security Council have been attending the meetings of the Working Group for the past few weeks, which I believe will give them a good start in picking up the outstanding issues. I wish them well in this most important endeavour.

22. A great deal of progress has been made in the drafting of a resolution to establish a residual mechanism or mechanisms to carry out certain essential functions and to preserve the legacy of the International Tribunals for the former Yugoslavia and Rwanda after the completion of their work. The basic structure and main purposes are clear. The outstanding questions, although not yet answered, have been clearly identified. With sufficient common ground and political will among the members, a consensus resolution is well within reach.

I should be grateful if you could circulate this letter as a document of the Security Council.

(Signed) Jan **Grauls**
Ambassador
Permanent Representative of Belgium to the United Nations
