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Streamlining Judgement Drafting: Lessons Learned from *Karemera et al.*

Introduction

Critics often claim that international criminal tribunals can take too long to draft and deliver their judgements. In many instances, unfortunately, this has been a valid concern. Nevertheless, in the last few years, the United Nations International Criminal Tribunal for Rwanda (ICTR) has taken great strides to improve the timeliness and quality of its judgements. Therefore, as the ICTR reaches the end of its mandate, it can perhaps contribute to the work of current and future international criminal tribunals by sharing some of its best practices for streamlining the judgement drafting process.

As part of this effort, this article will set forth a few techniques that were crucial to the timely and successful delivery of the judgement in *The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse (Karemera et al.)*. *Karemera et al.* was a complex, multi-accused case against the highest-ranking civilian architects of the Rwandan genocide. The indictment alleged every mode of liability available under ICTR jurisprudence, including the most expansive joint criminal enterprise (JCE) allegation in the history of the ICTR. Moreover, it contained an unprecedented charge for rapes and sexual assaults under the theory of “extended” JCE (otherwise known as “JCE III”), which required the chamber to tackle this legal question for the first time in the history of international criminal law. Furthermore, the indictment charged the accused with all crimes set forth under the ICTR statute.

On account of circumstances beyond its control, the *Karemera et al.* trial chamber was not able to begin drafting any portion of the judgement until after closing arguments were held.

Despite this considerable challenge, the *Karemera et al.* trial chamber was able to rely on several effective judgement coordination techniques to draft and deliver its judgement in a mere four and a half months. On 29 September 2014, the ICTR Appeals Chamber upheld the *Karemera et al.* trial judgement and sentence, including its conviction for rapes and sexual assaults under extended JCE.

Rather than recite all of the judgement coordination techniques used by the *Karemera et al.* trial chamber, this article will present the practices that the author feels most contributed to the efficient and timely preparation of the trial judgement.

Time Management

Judgement Drafting Calendar

Proper time management is the foundation for successful judgement coordination. As a first step, the drafting team should establish the date on which the chamber intends to deliver its judgement. On average, this date can be six months from the date of closing arguments for a multi-accused case against two individuals. This is particularly feasible if the team has been holding deliberations and working on its factual findings and procedural history throughout the course of the trial. However, as demonstrated in *Karemera et al.*, this is not necessary (although it is certainly preferable) for completing a judgement in six months or less from the date of closing arguments.

In either situation, the key practice is to plot the following threshold dates on a judgement drafting calendar, roughly in this order: end of trial, closing arguments, completion of procedural history, completion of factual findings, completion of legal findings, completion of oral summary, judgement delivery, completion of cite-checking and final edits, and filing of judgement. The amount of time required for each of these stages will depend on the individual circumstances of each case. However, as a rule of thumb, a drafting team should expect to devote at least two-thirds of its available drafting period to the factual findings.

Once the threshold dates are plotted, the team should break down the time between these dates into as many smaller internal deadlines as possible. For example, the period allotted for completing the factual findings can be broken down into internal deadlines for each factual finding. In this manner, the team can break down the considerable task of completing a complex judgement into smaller, more manageable steps. This occurs much in the way that a mountaineer breaks down a high-altitude summit into individual steps towards carefully planned points plotted on a route.

Once the judgement calendar is established, the team must tenaciously and relentlessly adhere to each and every internal deadline. Although unforeseen circumstances will surely challenge many of these deadlines, the team must tackle these challenges and adapt to them in a way that does not sacrifice its methodical, unstoppable pace. Simple adherence to the judgement calendar virtually guarantees timely delivery of a judgement; however, procrastination and lax enforcement of deadlines are a kiss of death.

Deliberation Schedule

In judgement drafting terms, “deliberations” are the practice by which the judges and legal staff for a case meet to discuss the evidence, and arrive at factual or legal conclusions. The judges are in charge of arriving at the conclusions, whereas the legal staff is responsible for facilitating the judges’ thought process through dialogue and preparation of factual and legal finding drafts for consideration. The initial deliberations review facts only, and provide drafters with compass bearings for their factual and legal drafts. As the judgement drafting process progresses,

deliberations begin to focus on the team's factual and legal drafts, honing them into a final product for insertion into the judgement.

If the judgement calendar is the foundation upon which successful judgement drafting rests, the deliberation schedule is the mortar that holds the structure together. The judgement drafting process cannot proceed without the deliberations that result in the judges' conclusions.

Accordingly, it is absolutely crucial to craft a deliberation schedule with the same attention to detail that is applied to the judgement calendar. Moreover, the deliberation schedule should mirror the internal deadlines for particular factual and legal findings. For example, if a factual finding draft must be completed by a certain date, the deliberations on the evidence underpinning that finding must take place prior to the deadline for that draft. The judgement calendar and deliberation schedule work in tandem to ensure that the judgement drafting advances properly.

Owing to the importance of the deliberations, the coordinator must ensure that all team members tasked with a draft are present for relevant deliberations. Even more importantly, successful judgement drafting depends on a motivated bench of judges who are willing and able to abide by a rigorous deliberation schedule. After all, deliberations cannot proceed without the presence and participation of the judges.

Procedural History

Although it can seem like nothing more than a rote task, proper preparation of the procedural history can greatly streamline the judgement drafting process. First, the author recommends that the procedural history be drafted as a chronological list of citations that is appended as an annex to the judgement, rather than a lengthy recitation of decisions and orders in prose form. This greatly reduces the amount of time normally allotted to the procedural history, without eliminating any of the important information. Moreover, it improves the readability of the judgement by allowing it to begin with the facts of the case instead of a lengthy description of the procedural history.

Second, this article suggests that the judgement coordinator be responsible for drafting the procedural history annex. As the judges' primary officer and manager of the judgement drafting team, it is essential for the judgement coordinator to have a "bird's eye" view of the case – in addition to a thorough understanding of the evidence. If the judgement coordinator is tasked with preparing the procedural history annex, he will have to carefully research the procedural history of the case and organize it chronologically. This is excellent training for understanding the case, and gaining that "bird's eye" view.

Furthermore, by learning the procedural history of the case, the judgement coordinator will be more able to assist the judges to tackle the procedural

challenges raised by the parties in their closing briefs. Moreover, this exercise will inevitably remind the coordinator of seminal decisions in the case involving witnesses and admissibility of evidence, including exhibits. Armed with the knowledge gained or refreshed through preparation of the procedural history annex, the judgement coordinator is much more able to assist the judges with their decisionmaking, thereby streamlining the judgement drafting process.

Team Management

Training Judgement Drafters

Owing to the frequent turnover inherent to international postings, judgement drafting teams at the international criminal tribunals seldom maintain the same members throughout the drafting process. In addition, new members must often adjust to the particular writing style of a chamber or, in some cases, adapt to the field of international criminal law generally.

As a result, it is imperative for judgement coordinators to train their drafters at the outset of the drafting process. Trainings should happen early and prepare team members to draft in the style of the chamber. In this regard, it is essential for the team to have an updated, concise, and easily digestible style guide to use as a reference.

Furthermore, the trainings should review any points of law that appear less frequently in tribunal cases. This will ensure that the drafters know what to look for when they review their evidence. For example, it is particularly useful to conduct a refresher session on JCE, if this mode of liability is pleaded in the indictment. This will help drafters keep a long eye on any evidence that may serve to prove or disprove the existence of a JCE.

Regular Team Meetings

It can become difficult to keep track of several drafters who are working on different projects at the same time. Moreover, when faced with long-term drafting assignments, even the most seasoned drafters can lapse into bouts of procrastination. Regular team meetings are a simple tool that can help overcome these obstacles.

By holding team meetings at least once a week without the judges, judgement coordinators can help preserve a sense of team unity while staying abreast of each drafter's progress. The meetings are also a valuable time for the coordinator to share "housekeeping" details with the drafters. In addition, drafters are usually more willing to share issues that they might be confused about if the judges are not present.

Leading by Example

As a judgement coordinator, the best way to lead a team is by example. This is particularly so if the team is under a lot of time pressure, or if sacrifices are sometimes required to meet deadlines (such as working on weekends). Nothing disturbs the cohesion of a team more than a leader who hands out tasks without shouldering the load alongside his team members.

Accordingly, instead of falling into the trap of believing that they only need to manage the production of drafts, coordinators should jump into the trenches with their teams and take on factual and legal findings drafts of their own. Preferably, the coordinator should volunteer to prepare the first draft that will be deliberated upon by the judges. If the coordinator expects drafters to work on weekends or shift leave dates to accommodate the task at hand, then he should also do the same.

Finally, if a judgement coordinator regularly arrives at the office late, leaves early, and merely sends emails as part of his job, the team will inevitably develop a resentment towards him that will only serve to undermine and delay the judgement drafting process.

Empowering Junior Members of the Team to Make Suggestions

It is not uncommon for a judgement coordinator to take a heavy hand when managing a drafting team, frequently shutting down suggestions from more junior team members. This tends to feature most prominently when a coordinator is taking on his first assignment managing a large case. It is an understandable human reaction borne out of the desire to assert oneself in a foreign and challenging environment. Unfortunately, however, this tactic can sometimes create the opposite effect by casting the coordinator as overly authoritarian and insecure. This can ultimately erode his leadership over the team.

Instead, the author would like to suggest that judgement coordinators encourage drafters to speak up and provide suggestions. If this happens in a structured environment, which still preserves the decision-making role of the coordinator, then it is far more likely that the team will overcome ruts in the drafting process. Junior drafters have a valuable perspective because they are working on drafts at the most granular level. As a result, they are frequently able to spot discrete issues that may elude more senior members on the team.

Motivating the Drafting Team

Low morale among drafters can be one of the greatest threats to an efficient judgement drafting process. Conversely, highly motivated drafters are a great asset. If one is not careful, morale can begin to sink during seemingly endless stretches of evidence review and judgement drafting. The following are three simple ways to try to keep team morale high.

Build a sense of pride in the team. During team and individual meetings, one should discuss the importance of the case and the transcendence of the judgement. If a team is tasked with exploring a novel area of the law, or if a case is unique in any way, it is important to convey this to the drafters. Everyone feels more motivated if they are working on something important and special. Moreover, it is essential to empower drafters to make suggestions, as outlined above. This will make them feel like full-fledged members of a team instead of simply turnkey drafters who are meant to labor long hours in silence. One should provide positive feedback sincerely, and often.

Allow drafters to take leave. While it may seem counterintuitive, it is possible, and preferable, to allow drafters to take leave – no matter how tight the deadlines may be. If a coordinator maintains a detailed judgement drafting calendar, and discusses the importance of requesting leave days as early as possible, he can still support team members to take well-deserved leave. In *Karemera et al.*, judgement drafters, including the coordinator, took leave during the thick of the judgement drafting effort. Team members worked remotely during leave, felt empowered by the trust shown in them, and returned to work refreshed and ready to work hard to meet the judgement delivery deadline.

Of course, leave dates must be picked carefully so that they occur on a rotating basis, with no more than one team member absent at any point in time. Furthermore, the coordinator should endeavour to keep his leave periods short.

Try not send drafters down rabbit holes. Only in the most extenuating circumstances should a drafter be asked to present more than one draft option on the same factual or legal issue to the team. Moreover, if he must be asked to do this once, he should not be asked to do this on a regular basis. This practice is frequently used to make up for incomplete deliberations, and when it is employed too often it can demotivate drafters very quickly. Clearly, drafters should expect to rewrite some aspects of their drafts, if not their entire draft in some instances, because decision-making on complex legal issues is a fluid process. Nevertheless, repeated requests to provide multiple options for drafts risk giving the impression that senior members of the team would rather overburden junior drafters than take the time to think through the issues. Motivated drafters work harder and more efficiently than unmotivated drafters.

Knowledge Management

Know the Indictment

The indictment is essentially a map of the prosecution's allegations. Therefore, it is key for judgement coordinators to know the indictment inside and out. If they know the indictment like the palm of their hand, judgement coordinators can streamline the judgement drafting process by refocusing discussions during deliberations on

the allegations contained in the indictment. Armed with his knowledge of the indictment, the coordinator can further streamline the judgement drafting process by suggesting mergers in the judgement of certain allegations in the indictment.

By understanding the indictment, the coordinator can also keep drafters from straying from the allegations, which saves valuable time and energy.

Concise Drafting Style

Drafters frequently fall into the trap of believing that long, wordy sentences are preferable to concise ones. This is not true. A concise drafting style is more direct, easy to digest, and efficient. Moreover, if the drafting team employs a concise drafting style, the judgement will be shorter and require less editing. This greatly streamlines the judgement drafting process.

Legal Findings

It is imperative for the judgement coordinator to take a central role in drafting the legal findings. Although the individual drafters on the team should still produce a first draft of each legal finding, the coordinator must be more involved with editing their content than he was with the factual findings. The reason for this is that the judgement coordinator receives and reviews all factual findings, and as a result is more familiar with the evidentiary landscape for the whole case. Consequently, he is best placed to recall the factual findings that support or disprove each legal allegation in the indictment.

By taking a prominent role in drafting the legal findings, the judgement coordinator can streamline the judgement drafting process by providing the most complete legal findings drafts possible to the judges for their review.

Editing the Judgement Draft

Once the first judgement draft is assembled, the coordinator should perform several read-throughs of the entire document alongside the judges. While this may seem tedious, it is the only way to ensure that the document has a cohesive style and is formatted properly. Moreover, reading through the judgement draft may cause the judges to rethink some of their findings. By reading the judgement word for word alongside the judges, the coordinator will improve his understanding of the judgement and will be better placed to assist them with any changes.

Oral Summary

On account of his “bird’s eye” view of the case, the judgement coordinator should assist the judges by offering to prepare a first draft of the oral summary. This will streamline the process for preparing the oral summary.

Conclusion

Coordinating a judgement at the international criminal tribunals can often seem like an insurmountable task. Broad indictments, copious amounts of evidence, and considerable staff turnover can overwhelm a drafting team and delay the judgement drafting process. In many instances, this can result in judgements that take longer to deliver and file than they should.

However, as the ICTR's experience in recent years demonstrates, it is possible to deliver a solid judgement on time. To achieve this result, it is only necessary to employ some basic time, team, and knowledge management techniques to streamline the judgement drafting process. By discussing the practices that most contributed to the efficient and timely preparation of the *Karemera et al.* trial judgement, the author hopes that he can contribute to the legacy of the tribunal by assisting future drafting teams to streamline their judgement drafting processes.