Guest Lecture Series of the Office of the Prosecutor

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"The OTP-ICTR: ongoing challenges of completion"

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A decade after the genocide in Rwanda, the worst humanitarian tragedy of modern times, the ICTR created by the UN Security Council Resolution 955 (1004) of 8th November 1993, to prosecute those responsible for the serious violations is poised, like its counterpart ICTY at the Hague, to complete its mandate and close down by the end of 2010.

Anxious to bring the work of the two ad hoc tribunals to a close, the Security Council by its Resolution 1503 (2003) of 28th August 2003 approved a Completion Strategy envisaging the conclusion of investigations into new indictments by the end of 2004, the conclusion of trials at first instance by the end of 2008 and the conclusion of appeals – hence closure – by the end of 2010.

The challenges of the early years were numerous and varied – legal, jurisprudential, logistical and political. Over the past decade however, significant experience and expertise has been developed in facing these challenges. The jurisprudence of international criminal law - substantive as well as practice, procedure and evidence has been considerably expanded to create a strong basis for the emerging branch of international criminal law. Much experience has been gathered in the investigation and mounting of a criminal prosecution, in the coordination and handling of witnesses etc. The mounting preparation and conduct of a case at the tribunal is a really huge logistical exercise particularly in terms of location and transportation of witnesses principally from Rwanda. But challenges nevertheless still remain for the proper completion of our work.

The OTP remains the engine of the Tribunal in the efforts to meet the Completion Strategy deadlines. These deadlines presented us with our first challenge: what caseload should we seek to take on and conclude given particularly the call by the Security Council to concentrate on those who held leadership positions or played a leading role in the genocide? What new prosecutorial strategies or organisational/institutional changes did we need to put in place in order to face this challenge?

The point of departure was a review of the Completion Strategy by the OTP in order to determine what targets should be pursued and how. An internal OTP review workshop in early 2004 enabled us to select those targets and determine our workload. The selection process itself was no easy matter, given the vast numbers of people implicated in the Rwanda genocide and the long list of targets originally put together by the OTP. We had to settle on criteria in selecting targets.

How did one determine a leader or a person playing a leading role in the genocide? We settled for a number of criteria and considerations amongst which were the status of the offender in Rwanda – political, military, media, clergy, governmental – the extent of participation in the genocide, the need for geographic spread in the choice of targets, the uniqueness of the potential legal issues involved, the strength and cogency of the evidence, the need to avoid an appearance of impunity, etc.

Based on these criteria, we have at the OTP been able to identify and determine the workload to undertake and what we should deal with in alternative ways such as by transfer to national jurisdictions for prosecution. Thus with the twenty five accused tried over the past decade of which there were three acquittals, the ICTR is today prosecuting 25 accused in ongoing trials; 17 more accused are in detention awaiting trial; 14 indicted accused remain at

large, most of whom are scheduled for trial in Arusha on apprehension; sixteen more targets are currently under investigations which are scheduled to end this year with a determination to be made by October 2005 on possible indictments; five of those awaiting trial will be the subject of OTP requests to Trial Chambers for transfers to national jurisdictions for prosecutions; thirty five other dossiers of unindicted and unapprehended targets are also under consideration for transfer to national jurisdictions for trial.

May I add here that the Prosecutor, in making his request for transfer of a case to a national jurisdiction and the Trial Chamber, I expect in deciding on that request, will be guided by the principal consideration whether the accused will have the benefit of a fair trial and whether he will not be subjected to a more severe penalty than he would have suffered had he been tried and convicted by the Tribunal.

You cannot fail to observe at a glance that the OTP and the Tribunal, thus has more targets for prosecution in the next four years than the number of accused it has prosecuted in the past decade. That is of course a big challenge.

Meeting that challenge required a rethink of strategies. Hence when the senior management of the OTP assembled at Amboselli early in 2004, we devoted some considerable time to re-examining OTP methods of work. Many of our ongoing trials are cases of multiple accused persons, ranging between four and six accused. Prosecuting numerous accused together in a joint trial often occasions delay and should be avoided unless the witnesses are substantially the same. Our experience demonstrates that the single accused cases move much faster and that in fact, the same number of accused tried separately take less time than if they were tried together. On average, our single accused cases have been taking three to four months to conclude. A trial chamber can try a number of single accused cases which if tried jointly would take a considerably longer period to complete. The new strategy is now to concentrate on single accused cases unless this might lead to repetition of witnesses and evidence. Indictments policy has thus now changed from multiple accused to single accused trials. We are now hopefully going through the last of our multiple accused trials. In this regard, the OTP last month closed its case in the Military I trial (four accused) and the Butare trial (six accused). We expect to close our case in the Government II trial (4 accused) by the end of the year. These two measures are designed to enhance expeditious prosecution of cases.

An indictment review committee has been established to review all draft indictments to ensure legal accuracy and consistency before it is submitted to the Prosecutor for approval.

We have also decided as a matter of policy, not to present an indictment for confirmation unless we are ready to prosecute. Thus the new policy requires our trial attorneys to select their witnesses, proof them, and take all steps necessary to ensure that once an indictment is confirmed by a judge, the OTP is ready to proceed forthwith to prosecute.

A Case Review Procedure has also been put in place at the OTP. Under this new process every trial team must at least sixty days prior to commencement of its case submit it to an internal team of STAs (Senior Trial Attorneys) and others for review. The team would present its case theory, the indictment, the evidence in support thereof and outline any pertinent legal issues or challenges it expects to arise. The role of the review team would be to test the strength of the case – both factual and legal – and the state of preparedness of the team with regard to disclosures, etc. It will offer suggestions for improvement where necessary. The

process is meant to better equip the trial team for the task that lies ahead. All our new indictments are now subject to these procedures. We have already submitted three of our new cases to the review process. I believe at the end of the day the review helped us improve on our state of readiness for trial.

The Completion Strategy approved by the Security Council reflects these new revisions on workload and prosecutorial strategy. All the pending cases save those earmarked for transfer are now being prepared for trial. We expect to commence the trial of six more accused early next year, in line with this new indictments policy.

A new resource constraint however poses a serious challenge to the Completion Strategy. As you may be aware, a substantial number of states – including some of the leading contributors – are in arrears in the payment of their assessed contributions. As a result, there has been a freeze on recruitment at the ICTR. This budgetary shortfall has hit the OTP particularly hard. Historically, the OTP has had a high vacancy rate. Since last year, we have been actively making efforts to reduce the rate by recruiting lawyers with practical criminal trial skills and experience. That recruitment drive has now ground to a halt at a time when the OTP critically requires additional manpower to prepare and prosecute the new cases in the pipeline. Critical activities such as the fielding of missions for investigators and proofing of witnesses have also been adversely affected. The attainment of the Completion Strategy deadline is premised on the provision of sufficient support and resources from the international community.

It is however not only the recruitment freeze we have to contend with. As completion and closure draw near, we begin to lose staff. Understandably staff begin to develop and implement their own exit or completion strategies, looking for appointments for longer term employment. It is necessary to put in place incentives for the best ones to stay the course until closure.

But in the absence of additional resources, we cannot succumb to the easier option of reducing our workload. That is tempting. But it is an option which by letting go of high level perpetrators will tend to encourage impunity. The alternative which we have chosen is to retain the workload and further re-examine what measures and strategies, including institutional reorganisation, we need to take to cope with the current caseload. I have commissioned an internal study along these lines and expect a report with recommendations shortly.

Both the current resource constraints as well as the single accused case strategy will probably entail restructuring within the OTP, particularly with regard to our trial teams. We are currently organised along nine trial teams with each one being headed by a Senior Trial Attorney (STA) at P5 level and comprising one or more Trial Attorneys (P4), Assistant Trial Attorneys (P3), Legal Assistants, Legal Researchers and Case Managers (P2). The strength of the teams varies according to the number of accused in a case, the complexity of the issues involved and the overall number of targets being handled by that team. The numbers range between four and a dozen persons to a team. I anticipate that as we move away from the multiple accused to the single accused cases, the big teams will be broken up into smaller sub-teams each headed by a trial attorney assisted by two others. Each such sub-team would be responsible for prosecuting a single accused case. Two or more such sub-teams would be supervised by a Senior Trial Attorney. We do not need big trial teams to handle single accused cases. A Trial Attorney with one or two assistants should really be able to handle such cases.

We would avoid calling an excessive number of witnesses, reducing our witness list to a minimum and the least required to establish the case and within the shortest timeframe.

The trial teams are supported by an IESS (Information, Evidence and Support Section) which processes and maintains our evidence database i.e. witness statements, documentary evidence, electronic evidence in form of tapes, etc. as well as real evidence in the form of other objects. A substantial portion of our witness statements – up to 80% – has now been processed and can be found in a search of the Zy database.

With the creation of the separate office of the Prosecutor for the ICTR last year, the OTP ICTR has had to establish its own Appeals Unit of 11 staff members now headed by an SAC (Senior Appeals Counsel) and with responsibility for preparing and pursuing appeals by the Prosecutor on the one hand and contesting appeals by the convicted persons on the other. It should be noted however, that it is operating well below capacity. I expect that with more appeals arising from more judgements, the Appeals Unit, if not the Common Appeals Chamber itself, will require considerable strengthening.

Although the Registry has been providing administrative support to the OTP as required by the Statute, it was found necessary for the OTP to establish some in-house administrative capacity to act as a focal point for all the administrative concerns of OTP staff members and act as a go-between with the Registry on such matters. Too much of the valuable time of OTP prosecuting staff was being taken up with such matters. Hence an Administrative Unit has now been established within the OTP with such a mandate headed by an Administrative Officer (P4).

The Legal Advisory Section (LAS) headed by a Senior Legal Advisor (SLA-5) has evolved over the last ten years adapting to new and constantly changing challenges. During the early years, LAS focussed on the drafting of indictments. With many of the indictments confirmed by Trial Chambers, LAS turned its attention to responding to Defence Rule 73 motions before Trial and Appeals Chambers. And with many trials commencing, and in some instances, three or more trials conducted simultaneously, legal advisors were assigned to individual trial teams. Each trial team now has a Legal Advisor. The Legal Advisors attached to the various teams are primarily responsible for providing legal opinion on substantive and procedural legal matters, including participating in trials. With the establishment of an Appeals Unit, two legal advisors were assigned to that Unit.

Investigations continue to pose a challenge in a number of ways. The Investigations Division is based in Kigali, Rwanda while the Prosecution Section is based logically in Arusha where the Trial Chambers conduct proceedings. Although investigations into new targets are to be concluded this year, we do not expect this to result in closure of the Division. Its services will be required to provide trial preparation support, trial support and appeal support where new evidence is sought to be presented on appeal by either party. Much of the work of the Division currently is in respect of these areas as opposed to fresh investigation. Indeed, 75% of the work of the Division is currently on trial preparation and support. With the closure of the prosecution case in three major trials by the end of the year involving fourteen accused persons and the opening of their respective defences early in the New Year, we expect the Division to be kept extremely busy with the investigation of alibis, defence witness antecedents, other specific defences, etc. What we are likely to see therefore, in relation to the future of the Section is not a closure but a gradual scaling down and phasing out between now and 2010.

Some level of investigative support will have to be retained until then to assist with the trials as well as the appeals. The division has however been adversely hit by early departures – in view of the completion strategy – of some of its most experienced staff.

You may very well wonder why, 10 years after the genocide, investigations are still continuing into some of the cases. One would reasonably expect these to have been concluded by now. But there are constraining factors. The complexity of the crimes, their magnitude, the challenges posed by the physical environment in Rwanda, security concerns of potential witnesses, the fact that in the early years arrests and detention of suspects often preceded investigations, etc. all contributed to this state of affairs. But we are optimistic that we can conclude the investigations into the new targets by the end of 2004.

The experience of the OTP has highlighted the critical link between an efficient investigation and a successful prosecution. A properly and thoroughly conducted investigation is indispensable to a successful prosecution. For that, you need well trained and competent investigators and dedicated who should know WHAT to look for and HOW to get it. We must bear in mind that investigation is not an end in itself; it has an objective: to support successful prosecution. Thus the investigator and the prosecuting counsel must work closely together, particularly but not limited to trial preparation stage. The physical distance between Kigali and Arusha has created a gap that we have sought to bridge through greater and regular consultation, liaison and coordination between investigators and trial attorneys. As we enter into a more intensive trial phase, some of the shortcomings of the past, in the area of investigations come back to haunt us in the form of multiple statements by the same witness, calling of new additional witnesses, old witnesses saying new things, etc. All these have given rise to issues of timely notice and disclosure by the OTP to the defence resulting in some instances in the exclusion by trial chambers of several witnesses for the prosecution or exclusion of some of their evidence.

The strategy of prosecution as dictated by the Security Council is to concentrate on those bearing the greatest responsibility for the genocide, the leaders of the genocide. It is hardly likely that some leaders would be found at the roadblocks where hundreds of thousands were killed. They are more likely to be found behind the scenes, planning, organising, directing, financing. Evidence of their participation in the genocide often has to come from 'insider' witnesses, people like them who collaborated with them in the genocide and who eventually decide to testify against their former colleagues.

'Insider' evidence, necessary though it is, poses challenges to the prosecution. In the first place it has proved extremely difficult to secure the collaboration of high level 'insider' witnesses. Due partly to the troubled legacy of the Kambanda case. That is however being gradually overcome. In 2004, two high level insiders testified in the ongoing trials. The biggest challenge however posed by such witnesses is of security. Such witnesses testify at great risk to themselves and their families. Unless there are in place adequate security measures for their protection, for the relocation and often support of their families their services do not become available. Not many countries are willing to accept into their territory such high level genocidaires. Protection, relocation and support has turned out to be very expensive for the OTP.

But the issue of coordination is equally germane to the trial teams inter se. Even though there are many separate trials of different accused persons ongoing, scheduled or

completed, the case of the OTP is essentially one: the Rwanda genocide of 1994. All the cases arise from this single great organised and planned humanitarian tragedy which was implemented over a 100 day period. There is thus a real risk of different trial teams advocating conflicting theories of the genocide – given that evidence of the genocide has repeatedly to be presented in each case; of adducing conflicting testimony or evidence; or at best proceeding in total ignorance of relevant evidence available to another trial team in a different case. There is often an overlap of witnesses. The need for coordination between trial teams and the sharing of information is evident. Hence the OTP has had to take steps to evolve an agreed and unified case theory regarding the planning and implementation of the genocide with particular reference to the role of the military, the civilian interim government and the interhamwe. The weekly presentation of trial team reports at the STA meetings presided over by the Prosecutor, exchanges between STAs and also between Case Managers and the efforts of our new Trial Support Unit have all provided an opportunity for more consultation and sharing of information between the Trial teams. And therefore the greater possibility of sharing information and avoid taking conflicting positions.

It is necessary to ensure that one trial team in the prosecution of its case does not inadvertently hurt the case being put forward by another trial team.

The burden of disclosure placed on the prosecution is a heavy and ever growing one which provides many challenges. Essentially, there is a burden of disclosure of the prosecutor's case and of the witnesses it proposes to call to establish its case against the accused. As we said earlier, in a situation of ongoing investigations and discovery of new witnesses, compliance with disclosure obligations within the statutory time frame can, and has proved to be quite challenging. The obligation to disclose exculpatory material continues beyond the conclusion of the trial and thus imposes a responsibility on the prosecution to be on the alert for such material even after trial and appeal. A recent amendment of Rule 68 by the ICTR Plenary has imposed an additional burden of providing access in electronic form to the defence to all relevant collections of material in the custody of the OTP. Although qualified by the provision "where possible", it reflects a growing trend of imposing a more and more burdensome regime of disclosure on the Prosecutor in relation to trials. The discharge of these obligations requires a well organised and easily accessible evidence database – which we can reasonably claim at the OTP – and an electronic disclosure suite (EDS) which can provide defence access to all relevant material other than Rule 70 privileged material. The EDS would have the added advantage of relieving the OTP of search and disclosure on an individual basis. Although by and large the OTP has reasonably lived up to its disclosure obligations, we are not in a position to electronically provide defence access to our collections of relevant material as the resources are not available to set up the EDS fully, as I believe exists at the ICTY.

Witness protection and security remains an area of great concern. You may have heard of reports recently carried in the media in Rwanda, of the murder of witnesses who had testified for the prosecution. Security for prosecution witnesses has been a perennial problem. The vast majority of our witnesses come from Rwanda and return there after their testimony. Whilst their identity is protected and not disclosed, lapses sometimes occur. This in turn discourages many others from making the trip to Arusha to testify. We are currently exploring ways in which together with the Rwandan government witness security and protection can be enhanced within Rwanda. The conclusion of agreements by the ICTR with other countries for witness relocation and protection is also being explored.

A challenge of a different kind confronts us with regard to witnesses for sexual violence cases. The OTP has been subjected to much criticism that despite the advance made by the AKAYESU case in linking rape and genocide jurisprudentially, the OTP failed to seize the opportunity to make sexual offences a central plank of its indictments policy. It is accurate that there have been few rape counts in our indictments since then – except in Muhimana and Butare. WE are now committed to paying greater attention to this area and where the evidence is strong, we will proceed to indict for sexual offences. Despite the existence of evidence that rape and other sexual violence was widespread and was resorted to as part of the strategy of genocide, it has not been easy to secure the attendance of victim witnesses to testify in Arusha. For reasons which are easy to understand. Many such victims are reluctant to reopen such a painful chapter in their lives, to relive the trauma in their testimony and to subject themselves to gruelling cross-examination on some of the most intimate aspects of their lives. Many of them may have moved on in their lives and established families. They would want to forget the past. There are often security concerns as well. Nonetheless, we continue to encourage the victims to come forward to enable the OTP bring to account those responsible for these heinous offences. We salute the courage of those victims who have responded to this call. We equally understand the reluctance of some to come forward.

The most formidable challenges to the OTP lie in the field of international cooperation. Such support and cooperation is indispensable for the proper and effective administration of international criminal justice. Any failure by states to provide the necessary resources for proper completion, reluctance by states to apprehend and surrender fugitives to the tribunal or to prosecute indictees residing in their territory or to accept the transfer of cases to national jurisdictions for prosecution will deal a serious blow to the struggle against impunity. Yet the level of international support in these critical areas has fallen far short of what is required for successful implementation of the Completion Strategy. The success of the ad hoc tribunals will be judged not only by the numbers of accused it has prosecuted but also by the numbers who have been successfully diverted for prosecution at the national level. No completion strategy can in the end be judged successful if at the end several high level fugitives remain at large, unprosecuted by the tribunal and by the member states of the UN due to the reluctance of states to accept to prosecute some of these accused in their national courts. That would be a setback for justice, for the struggle against impunity and a poor legacy for the victims and the survivors.