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PROSECUTION

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ICTY Legacy Conference Sarajevo Keynote Remarks 22 June 2017

I would like to welcome all of you to this Legacy Dialogue. I am very pleased that so many have come to contribute to an important discussion about the ICTY's impact in the former Yugoslavia.

Over the next three days many topics will be raised. We are hoping for an open, constructive and frank dialogue. The ICTY's achievements in the former Yugoslavia should be recognized. But at the same time, we should understand where and why the impact was less than could have been expected. Identifying successes and failures is critical to supporting similar efforts in the future.

Having been the ICTY Prosecutor for almost ten years, I have gained a better appreciation for not only the immensity of our accomplishments, but the areas where we could have done better.

The question that will be asked after the ICTY closes is whether we accomplished our mission. That is not for me to say, and I expect that history will reach its judgment.

But what has become clear to me is that the ICTY's legacy depends on the perspective you adopt. Just to take one example. The ICTY indicted 161 individuals, including many senior- and mid-level officials from all parties to the conflicts. This is far more than any other international criminal tribunal to-date. And yet, there are still 5,000 suspects here in BiH alone who need to be investigated for war crimes. I accept both these perspectives, that the ICTY did so much, and yet not enough.

I am so pleased that many victims, survivors and witnesses are here today, because their perspective must be heard and respected. They have displayed immense resolve and courage over the last two decades, and my Office would never have been able to accomplish our work without their support and willingness to testify.

So let me take this opportunity to publicly thank you - over many years, you never lost your faith in us and the justice process, and that gave us a reason to continue fighting on your behalf.

The victims remind us why the ICTY was created, and why its work is so important. But they also remind us how much more must be done, both here in the former Yugoslavia and globally.

Too many victims around the world do not have any expectation for justice for the crimes they have suffered. Horrific atrocities are being committed in Syria, South Sudan and elsewhere, but accountability initiatives are still not in place.

We see that history is repeating itself, and even growing darker. While the conflict in BiH lasted four years and left 100,000 dead, the conflict in Syria is now in its sixth year, and more than 400,000 are estimated to have died.

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Yet on the positive side, if and when justice mechanisms are established for these conflicts, prosecutors and judges will benefit from the ICTY's immense contributions to the jurisprudence. The law applied by the ICTY and the lessons learned from its work are already today being used by other international tribunals and national courts around the world. Let me give a few examples.

Ideally, prosecutions should focus on the highest-level perpetrators - the common reference today is to those "most responsible" for the crimes. Leadership prosecutions address the root causes of extreme criminality and are likely to have the greatest deterrent effect for the prevention of future crimes. Yet linking crimes on the ground to senior political and military leaders far removed from the crime scenes is one of the most difficult challenges in international justice. The challenge is in part a matter of evidence.

Equally, the challenge is also a matter of law, and having the right legal doctrines that hold senior leaders accountable for the crimes committed on the ground, while also providing legal certainty and correctly distinguishing between lawful and unlawful conduct. The ICTY has made great strides in developing such doctrines for leadership prosecutions.

The first is "joint criminal enterprise", or "JCE". In simple terms, the JCE doctrine is a form of common purpose liability. When there is a group of individuals who joined together to achieve a common criminal purpose - for example, to ethnically cleanse a territory - all these individuals can then be held liable for the crimes that are later committed in the implementation of that criminal purpose.

JCE also reflects the legal principle that when you agree to commit one crime, you can be also held responsible for additional, foreseeable crimes that are committed in the implementation of the criminal plan. These are crimes for which the JCE member accepted the risk. This aspect of JCE doctrine recognises the significant likelihood that international crimes, once started, will escalate—and that the leadership should be accountable for that.

The second is command or superior responsibility. For more than 80 years, international law has recognised that a military commander bears some sort of criminal responsibility for the conduct of the troops under their command. Like JCE, superior responsibility is not a new concept in national jurisdictions. Military commanders commonly have duties under domestic law to control and discipline their subordinates, and thereby prevent and punish their crimes.

The Tribunal has also confirmed that superior responsibility is not just a matter for military commanders but is equally applicable to civilian leaders, provided that the superior-subordinate relationship is proven. This has been a major development that sends a clear message that compliance with the law is the responsibility of all superiors and is not simply a military matter.

I cannot over-state the importance of superior responsibility. In a study called *The Roots of War*, based on a survey of some 15,000 civilians and combatants in 15 war zones, the ICRC concluded that the single most important step to promote compliance with the law of war is influence over the people who are in charge.

At the same time, however, our cases have also led to the identification of a potential gap in the enforcement of compliance with IHL, a gap that has increasing-relevance in contemporary armed conflicts. Simply, while the jurisprudence has confirmed that superiors can be held criminally responsible for the crimes of their subordinates, later cases have limited the application of this doctrine to allied irregular forces that do not fall within the formal chain of command. We have attempted to use JCE to address this situation, although with admittedly mixed results so far.

It is not difficult to understand the relevance of this issue to contemporary armed conflicts. In situations like Syria, Iraq, the Central African Republic and the Ukraine, we see numerous irregular armed groups cooperating to varying degrees in a unity of effort with more established regular forces, both State and non-State. These irregular armed groups have been reported to be responsible for many of the most horrific crimes being committed against civilians and other protected persons.

Indeed, such situations may be intentionally created to avoid criminal liability - letting slip the dogs of war in the form of irregular armed groups may very well achieve military and political gains, while also minimizing the potential criminal exposure of those who ultimately accrue the benefits. We in fact saw just this situation in the Bosnian conflict.

Another area where our jurisprudence will be relevant to other post-conflict justice initiatives is the prosecution of conflict-related sexual violence. This topic will be discussed in more detail in the second panel this afternoon. And I would like to highlight that my Office will launch at a side event the translation of our publication on the prosecution of sexual violence at the ICTY into the Bosnian-Croatian-Serbian language. This translation was generously supported by the Swiss Government and OSCE.

When it comes to prosecuting conflict-related sexual violence, we have learned a lot. And because of all we have learned in these past 20 plus years of the Tribunal's existence concerning the prosecution of sexual violence crimes, we have felt compelled to put this accumulated experience and expertise on paper. We wanted to ensure that this knowledge from the insider perspective was not lost after the Tribunal ceases to exist.

The results of our work are contained in this book. Besides setting out the historical record, this book aims to be a practical resource for our colleagues in international, regional, and national tribunals, and war crimes units. Our hope is that it will positively inform their work and provide useful strategies for their current investigations and prosecutions, as well as for those to come.

A third major development at the ICTY has been our prosecutions of cultural destruction. Today, the issue of cultural destruction has been driven to the forefront by events in Syria, Iraq and Mali, and accountability for these crimes will be critical in any post-conflict justice efforts.

My Office had to address the cultural cleansing campaigns that accompanied ethnic cleansing during the conflicts in the former Yugoslavia. Perpetrators sought not only to clear territories of other ethnic and religious groups, but their cultural heritage as well. The most widespread crime of cultural destruction was the obliteration of houses of worship. Between 1992 and 1995 in Bosnia and Herzegovina, 1,200 mosques, 150 churches, four synagogues and over 1,000 other cultural institutions such as major museums, libraries, archives and manuscript collections were systemically targeted and severely damaged or destroyed.

As the first tribunal to prosecute the crime of attacks against cultural property, ICTY has successfully developed international law criminalizing attacks against cultural property, established important precedents for how to investigate and prosecute these crimes, and demonstrated that senior political and military leaders can be held accountable. Among other notable results, we successfully prosecuted two senior JNA commanders for the 1991 attack on Dubrovnik. We further prosecuted a number of political and military leaders for the destruction of cultural property as part of ethnic cleansing campaigns in Bosnia and Herzegovina and Kosovo.

Unfortunately, cultural cleansing and attacks against cultural property continue to threaten humanity's cultures and heritage. While the ideologies may vary, perpetrators from

two decades ago and today share the desire to violently replace diversity with uniformity. What has changed in the last 20 years, however, is that the international community now has an important tool with which to respond to attacks against cultural property: international criminal law. As the ICTY has shown, the prosecution of attacks against cultural property has become an established reality.

The final issue I would like to highlight is an area where the ICTY could have done more. At the ICTY, given the limits of the mandate we were granted by the Security Council, we did not have scope to prosecute crimes other than war crimes, crimes against humanity and genocide. However, it became apparent in our investigations that other crimes generally characterised as organised crime and corruption were deeply entwined with and facilitated the commission of war crimes. This is a general experience. War crimes prosecutors inevitably uncover information related to organized criminal activities.

Organized criminal networks seek out the most vulnerable societies, and use conflict zones and other fragile state structures as a platform for their activities. Organized crime can also help protect perpetrators of war crimes, and further the financial and political aims of armed groups. One example is the use of drug production and trafficking to purchase arms. In Bosnia, we frequently saw organized crime groups used to evade arms sanctions and to channel funds obtained from corruption.

Similar patterns have emerged in conflicts around the world. In Syria, parties to the conflict are allegedly using armed groups composed of criminals for special operations and for terrorising civilians. Armed groups and organized criminals in West Africa have generated enormous amounts of money in recent years through the illegal extraction, trade and sale of natural resources. A well-known example is the use of diamonds to finance armed conflict, the most notorious example being the RUF in Sierra Leone. In the DRC and Great Lakes region, there are reasons to believe that the conflicts may have been perpetuated in order to ensure that illicit exploitation of conflict minerals could continue.

It is obvious then that organized crime has to be addressed to achieve accountability for war crimes and strengthen the rule of law in post-conflict societies. For societies to successfully transition from armed conflict to a durable peace, war crimes cannot be investigated and prosecuted in isolation. These links with organized crime have to be addressed through a coordinated strategy. There is still room for improvement in implementing successful strategies to make these lessons a reality.

So these are some of the ICTY's important contributions to post-conflict justice, particularly national accountability initiatives today and in the future. Of course, as regards the former Yugoslavia, the fact that there are national prosecutions of war crimes is one of the ICTY's most significant legacies.

As a result of the ICTY's Completion Strategy, we moved from a system of so-called primacy - where it was envisioned that only international courts would pursue accountability for war crimes - to a much more effective system of complementarity, where ICTY and national prosecutors are now collaborating and working together to reduce the impunity gap. Specialized war crimes offices have been established in BiH, Croatia and Serbia. Today, we are providing more evidence and information to national authorities than they are providing to us, a marked change from our early years.

My Office took a number of measures to support complementarity and national war crimes justice, which I will discuss in more detail during the panel discussion tomorrow on the ICTY's Operational Legacy.

This legacy of complementarity has had real impact here in the former Yugoslavia, but it is also shaping accountability efforts around the world.

The reality is that the face of international justice is changing. The ICC is the permanent international justice institution, but the truth is that it will not be the solution for every situation. 12 years of operation have shown the ICC's limitations. And our experience at the ICTY has also shown that justice is best served when it is delivered closer to the people who were affected.

It is clear, then, that the future of post-conflict justice will be at the national level. To reduce the impunity gap and ensure accountability for the most serious international crimes, international justice is becoming increasingly nationalized.

This shift from the international to the national has significant policy implications. As we have seen in the former Yugoslavia, there must be a significant re-orientation to greater support to national jurisdictions and more engagement with the rule of law on a national level.

So the countries of the former Yugoslavia have much to teach the rest of the world. I hope all of you will engage with counterparts in countries emerging from conflict to explain your experiences and pass along your lessons.

At the same time, you are still writing your own legacy for national war crimes justice because an immense amount of work remains ahead of you. Too many victims of all ethnicities are still waiting for justice, and too many perpetrators still have not been held accountable.

As I mentioned before, there are still approximately 5000 war crimes suspects here in BiH alone to be investigated, including more than 300 complex, high-priority cases. In Serbia, it is unfortunately the case that widespread impunity for well-established crimes remains the rule, particularly for senior and mid-level officials, and that war crimes justice has not been moving in the right direction. Croatia also still has many cases remaining to investigate and prosecute, particularly cases involving Croatian nationals suspected of committing crimes in other countries.

So I would like to offer some final thoughts to the key actors who, after the closure of the ICTY, will have the greatest role to play in ensuring that there is meaningful accountability and that victims receive some measure of justice.

My colleague prosecutors, many of whom are in attendance today, must now build on the ICTY's legacy and lead efforts for greater accountability. You and your offices have accomplished a great deal, particularly in the last decade. You have faced and overcome many hurdles.

You must now take even greater responsibility with the closure of the ICTY. As your role and visibility increases, so do the illegitimate criticisms and attacks. As prosecutors, we know that our duty is first and foremost to the victims, and that we must always adhere to our professional obligations. We cannot guarantee successful prosecutions in the courtroom, but what we can guarantee is that we will reject improper influence, fight for our independence and always act impartially. My Office will continue to support your work and help you resist political interference.

In that regard, I urge you to rededicate yourselves to strengthening cooperation between your offices. Justice cannot succeed unless you work closely together and resist attempts to turn you into adversaries rather than friends. There are challenges, but we all know that with good faith they can be overcome.

You can be models for your societies and young people today. Be part of the solution, not an obstacle to progress. Show that you are advocates for all victims, not just those from your country. Demonstrate what the rule of law means and that it can be achieved. You have a chance to leave a legacy even greater than the ICTY's, for the victims, for your communities and for the region as a whole.

Throughout the ICTY's mandate, one of our most important partners has been the international community. With the support of the European Union and countries like the United States, we were able to obtain access to the evidence we needed, and secure the arrests of all of our fugitives, particularly through the policy of conditionality. It was of decisive importance that the international community pursued a single, principled position of support to the ICTY that was put at the top of the diplomatic agenda.

Now, national judiciaries in the countries of the former Yugoslavia need your same support.

Strong, public support to prosecutors and judges is needed now more than ever. In countries developing the rule of law, the international community can play a critical role in protecting justice institutions from improper influence. You can also deploy the full spectrum of diplomatic tools to show the linkage between war crimes justice and economic development.

You will also need to stay vigilant and engaged at the political level. Incentives and sanctions should be continued. Even more than at the technical level, the challenges hindering effective national justice are political. I urge you to maintain a principle position of support for national war crimes accountability, and reject any political deals for geopolitical or other reasons on fundamental issues like justice for war crimes, crimes against humanity and genocide.

Finally, national political authorities have played the most ambiguous role in war crimes justice. At the ICTY, the most serious challenges we faced were due to the non-cooperation of governments in the region. Yet when cooperation was finally provided, fugitives were arrested and justice was achieved.

Today, the political climate is a significant barrier to more effective justice at the national level. While commitments are made, they are often not translated into concrete action. And for every claim of support to war crimes justice, there are many more comments by politicians improperly interfering in the work of the judiciary.

The most troubling element, though, is the increased glorification of war criminals and the widespread denial of crimes.

It is simply inconceivable to me that those responsible for implementing ethnic cleansing campaigns can be seen as heroes. What is heroic about killing civilians, burning places of worship, imprisoning innocents and forcing hundreds of thousands to flee their homes?

And today, denial and revisionism are feeding regional instability and undermining neighborly relations. National identities founded on false histories are inherently sources of tension and distrust. It is difficult to imagine how the facts of the conflicts are taught in classrooms around the world, but not in the countries where the crimes were committed.

The message of denial and revisionism is loud and clear. We recognize our victims, but not yours. Your war criminals are our heroes.

I hope political actors will come to see that accepting the wrongdoings of the past is a sign of strength and maturity, not of weakness. The rhetoric of division leads to conflict and destruction, while reconciliation is the path to integration and prosperity.

In conclusion, let me reiterate that while the ICTY and national judiciaries have achieved together a great deal, a significant amount of work remains to be done. The reality is that war crimes justice for crimes committed in the former Yugoslavia will continue for the foreseeable future. I hope that this conference helps us to reflect on what we have achieved so far, and what more we can achieve moving forward.

Thank you for your attention.

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