



This publication brings together transcripts of the proceedings of a two day conference – *The Global Legacy of the ICTY* - convened in The Hague on 15 and 16 November 2011 and organised by the International Criminal Tribunal for the former Yugoslavia. The Conference brought together leading academics, international judges and practitioners, state representatives, and members of civil society, who explored the impact of the Tribunal’s work on international humanitarian law and international criminal procedure, as well as the potential for ICTY jurisprudence to shape the future of global justice and the advancement of human rights.

Over 350 persons took part in the Conference and the participants and invitees included the Tribunal’s Principals, Judges, senior Tribunal staff, the Security Council Working Group on *ad hoc* Tribunals, the Rule of Law Unit from UNHQ, representatives of the national academic and legal communities from the former Yugoslavia, non-governmental organisations, international organisations, organs of the European Union, legal counsellors of embassies in The Hague and international law scholars, representatives of universities, international law associations and think tanks.



ICTY Global Legacy

Conference Proceedings
The Hague
15-16 November 2011

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Ministry of Foreign Affairs of the Netherlands



UNITED NATIONS
International Criminal Tribunal for the former Yugoslavia
Outreach Programme



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The Hague
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ICTY Outreach Programme
The Hague
2012

ICTY Global Legacy

The ICTY Global Legacy Conference would not have been possible without the generous support of the governments of the Netherlands, Luxembourg, Switzerland and the Republic of Korea, as well as the Municipality of The Hague and the Open Society Justice Initiative.

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Conference Proceedings

The Hague

15-16 November 2011

A Publication of the ICTY Outreach Programme

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Designed and printed by:

Grafika Šaran, Sarajevo, BiH

2012.

Circulation:

2,000

The Outreach Programme is generously supported by the European Union.



The following document is a transcript of a live audio recording of the Global Legacy Conference and as such it may contain minor speech-related errors. The transcript has been carefully edited to ensure clarity for the reader, without infringing upon the original content of recorded speakers.

Table of Contents:

<i>Foreword by Judge Patrick Robinson</i>	<i>7</i>
<i>Welcome and Introductory Remarks</i>	<i>9</i>
<i>Panel 1: The Impact of the Tribunal’s Substantive Jurisprudence on the Elucidation of Customary International Humanitarian Law</i>	<i>21</i>
<i>Panel 2: The Impact of the Tribunal on the Future of Global Justice and Advancement and Enforcement of Human Rights</i>	<i>55</i>
<i>Panel 3: The Interaction of Common and Civil Law Procedures in the Work of the Tribunal: Efficiency and Fairness in Complex International Trials</i>	<i>95</i>
<i>Panel 4: The Tribunal’s Jurisprudential Contribution to the Clarification of the Core Crimes of Genocide, Crimes against Humanity and War Crimes</i>	<i>139</i>
<i>Conclusion of the Conference</i>	<i>169</i>

Foreword

As the former President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), during whose tenure of office the Global Legacy Conference 2011 was held, I am very pleased to endorse this publication by the Office of the President and the Outreach Programme of the transcript of proceedings of the Conference. Given that the Tribunal is scheduled to complete its work shortly, the Conference could not have been more timely. There is no doubt in my mind that this publication will make the public more aware of the living, breathing subject that is international criminal justice.

Undoubtedly, the main purpose of the Global Legacy Conference 2011 - to assess the global impact of the work of the ICTY - was achieved. The ICTY has had a profound impact on the landscape of international criminal justice in ways that were unimaginable at the time of its establishment on 25 May 1993. In fact, following the Nuremberg and Tokyo Trials it has, along with its sister Tribunal, the ICTR, been the main contributor to the development of international criminal justice. The work of the ICTY has led to considerable developments in international humanitarian law and international human rights law, and indeed to the development of transitional justice policies, that begin, of course, with the criminal prosecution of the perpetrators. The Conference examined the Tribunal's legacy in the field of international criminal justice in terms of its contribution to the elimination of the culture of impunity for war crimes, the clarification it has given to the scope and elements of the core crimes, its stress on human rights, customary international law and the development of a body of law on procedure and evidence. All these legal issues, and more, were discussed and explored at the Global Legacy Conference 2011 resulting in an interesting, thought-provoking and informative event.

The stature and expertise of the moderators and panellists and the consistently high quality of all the presentations at the Conference ensure that in this publication the reader has a uniquely valuable statement of the legacy of the Tribunal, and thus of the making of international criminal justice in the modern era.

Judge Patrick Robinson
ICTY
The Hague

Welcome and Introductory Remarks

Day 1: Tuesday, 15 November 2011

Master of Ceremonies:

Christian Chartier, former Chief of the ICTY Public Information Service

Speakers:

- **Judge Patrick Robinson, ICTY President**
- **M. Jean-Marc Hoscheit, Ambassador of the Grand Duchy of Luxemburg to the Netherlands**
- **Philippe Brandt, Minister, Embassy of Switzerland to the Netherlands**
- **Alison Cole, Legal Officer, International Justice, Open Society Justice Initiative**

Master of Ceremonies, Christian Chartier, former Chief of the ICTY Public Information Service

Good morning and a very warm welcome to all of you!

On behalf of the ICTY, it is my pleasure to greet you at the outset of this two-day international conference.

The first such ICTY legacy conference took place, as you may remember, in February 2010. This first follow-up conference also takes place against the background of the Tribunal's Completion Strategy. However, it is going to be more specifically devoted to exploring the actual impact of the Tribunal's judicial work since 1994 on international humanitarian law, substantively, and on international criminal procedure.

Today and tomorrow, leading academics, international judges and international practitioners will take us on an exciting journey: how has the ICTY's groundbreaking jurisprudence impacted on the development of the global justice system; how has the interaction of common law and civil law procedures impacted on the fairness and efficiency of ICTY cases; how does this case law take us further on the road to ending impunity; and finally, how will it shape the future advancement and enforcement of human rights?

Today and tomorrow there are four high-level panels. Discussions will be held before you and they will be introduced in detail in due course.

For now, I would like to extend to you a number of invitations:

The first one, of course, is to make sure - please - that your cell phones are switched off. Another invitation is to bear in mind that this conference is a public event. Media representatives – and the ICTY welcomes them – are present; furthermore, please note that what is going to be said will be recorded and as a result video as well as a written transcription of the conference proceedings will be uploaded in due course onto the ICTY website. The last invitation is, please, to carefully listen to the bell which will ring at the end of each break indicating that the next session is about to begin. That being said, I'm pleased to request your attention for the opening remarks which are going to officially launch this two-day conference and they will be delivered in turn by judge Patrick Robinson, the President of the International Criminal Tribunal for the former Yugoslavia; by his Excellency Jean-Marc Hoscheit, Ambassador of the Grand Duchy of Luxembourg to the Netherlands; by Mr. Philippe Brandt, Minister at the Embassy of Switzerland to the Netherlands, and finally, Miss Alison Cole of the Open Society Justice Initiative.

The ICTY would like to acknowledge the general sponsorship of the conference by the following governments: the Netherlands, Luxembourg, Switzerland, the Republic of Korea, as well as the Municipality of The Hague and the Open Society Justice Initiative.

May I now please ask your attention for his Excellency, Judge Patrick Robinson, President of the ICTY.

Judge Patrick Robinson, President of the ICTY

Excellences, ladies and gentlemen, as President of the International Criminal Tribunal for the former Yugoslavia, I extend to you my warmest welcome.

It is an honour to open this conference today and I am indeed delighted to see how many people are in attendance. We have a full house, or almost a full house, and in that sense, I think we are close to matching the attendance that we had at the first Legacy Conference.

With the line-up of eminent scholars and practitioners we have as our moderators and panellists, and the issues we will discuss over the next two days, I am not surprised that so many of you have found the time to join us. And I encourage you all not to be shy and to actively participate.

During each of the panel sessions the floor will be open and there will be an opportunity for you to make your contribution and I urge you to do so. Once again, do not be shy! The Tribunal is not afraid of criticism. It is through your participation that we will ensure a rich and fruitful debate of the issues on our agenda.

But before I continue, it is fitting at the opening of this conference to pay a tribute to a colleague of tremendous influence, involved in the foundational jurisprudence of the Tribunal, who has recently, very sadly, passed away. And I am, of course, talking of Nino Cassese, a man known to all of you as a giant in international humanitarian law and international criminal law. I think you may have already heard on many occasions, with respect to Nino, the statement that sometimes in history an individual has the opportunity to make a real difference in the world. In the Tribunal's history that individual is, without doubt, its first President, Nino Cassese. I need only remind you of the decision of the Appeals Chamber in the *Tadić* case, concerning the Tribunal's jurisdiction, over which Judge Cassese presided and which laid the blueprint for almost every substantive decision that followed in the jurisprudence of this Tribunal and also of our sister Tribunal, the ICTR.

This decision has also had a significant influence on the jurisprudence of the Special Court for Sierra Leone, as well as the Cambodian tribunal, both which have relied to a great extent on the jurisprudence of the ICTY and the ICTR. In each Tribunal, the intellectual mark of Cassese cuts deep. And I have no doubt that his mark will also be felt at the ICC. But Cassese's work at this Tribunal and his subsequent influence on these other international criminal tribunals represented only a fraction of his contribution to international criminal law. His tenacity and commitment to international justice was equally pivotal at the Special Tribunal for Lebanon, the court to which he was assigned as President and then as an appeals judge, shortly before he left us. I would therefore be grateful if you could all stand for a minute of silence in remembrance of our dear friend, colleague, teacher, and mentor - Judge Nino Cassese.

[a minute of silence]

Thank you very much.

As I've already said, ladies and gentlemen, I expect the next two days to provide a rich and fertile forum for intellectually challenging and stimulating discussion about the global impact of the work of this Tribunal: what has been the impact of the Tribunal on customary international humanitarian law? What has been the impact of the Tribunal on defining the substantive offences of genocide, war crimes and crimes against humanity? What has its impact been on the procedures adopted by international criminal courts and are those procedures fair? And finally - what has been the Tribunal's impact on the global advancement of human rights? These are just some of the questions which we will have the opportunity over the next two days to debate and to reflect on. And I look forward to engaging in that debate with you.

To get the conference started, I would now like to call upon our incredibly benevolent benefactors. Without their generosity, this conference would not have been possible, and we all owe them our thanks.

For clarity, I will name them for you: the governments of the Netherlands, Luxembourg, Switzerland, and the Republic of Korea, as well as the Municipality of The Hague and the Open Society Justice Initiative. Their generosity is particularly appreciated in light of the dire financial circumstances that we currently face. Despite this hardship, they have recognised the importance of the groundbreaking work of this Tribunal and have come out in force and support of this initiative. And for that, I congratulate them.

I now ask the Ambassador of Luxembourg to the Netherlands, his Excellency Jean-Marc Hoscheit, to take the floor for his opening remarks.

Thank you.

Jean-Marc Hoscheit, Ambassador of the Grand Duchy of Luxembourg to the Netherlands

Mr President, Honourable Judges, Mr Prosecutor, Your Excellency, ladies and gentlemen, I would like to pass on the greetings of the Deputy Prime Minister and Minister of Foreign Affairs of Luxembourg, Mister Jean Asselborn, who particularly asked me to let you know how crucial he considers this conference to be.

For those who take an interest in the history and future of Europe, it is only natural to be concerned with the legacy of this judicial institution, created in the aftermath of the bloody wars that tore apart the western Balkans during the early nineties. For even though our work here together will be very much focused on the significant contributions made by the Tribunal's jurisprudence to the development of international standards and international procedural law, it must be noted that the legacy of the Tribunal may also be understood and assessed on a more political level, on the basis of its impact on the peace-building and reconciliation process in the Balkans and its wider systemic influence at the international level. It is indeed important to bear in mind the extent to which the work of the Tribunal, beyond its strictly legal activities, forms part of the broader political context of a region that is trying to face up to the demons of the past in order to pave the way for a peaceful and stable process of reconstruction. In order to achieve this goal, it was crucial to consolidate the peace process and to address the demands of the victims and their families for justice quickly, and in an open and courageous manner.

The Tribunal has never sought to work in isolation or to detach itself from reality. Its work, underpinned by strict requirements to protect the standards of the rule of law and impartiality, has always been relevant to the development of a positive vision of the future of the region and its populations. Passing judgement after judgement, the Tribunal has developed this important and vast jurisprudential legacy, which has been influential and will have a significant impact on the emergence of a truly effective system of international criminal law, for which we all strive. Within this process, it has been established in a clear and indisputable manner that there can be no lasting peace without justice and that this justice must be based on the highest legal and professional standards.

This message is demanding, but fair. It has also been seconded by the international community and, above all, by the European Union, which has always considered that full and unconditional cooperation with the Tribunal is an absolute precondition regarding the prospect of EU membership, to which the countries of the region quite rightfully aspire. Not only does this reflect the longstanding policy of the fight against impunity, but also the common values which must be shared by the European family.

Whilst internationally, and in particular through the International Criminal Court, the fight against impunity goes on and is gaining strength, mainly through the rich jurisprudential legacy of the Tribunal but also through the other international tribunals working in this field, it is possible to take pride in the fact that it was at the Tribunal that for the first time a sitting head of state was prosecuted, creating a significant political and legal precedent. It has now been established beyond doubt that no one, regardless of their rank, can avoid being judged for the most serious crimes.

We can also be proud that, with the arrest of Radovan Karadžić, Ratko Mladić and Goran Hadžić and their transfer to The Hague, it is now obvious that no one is in a position to escape the long reach of international criminal justice. There again, the Tribunal has established undeniable facts, the political and psychological importance of which is obvious to everyone, including, we must hope, those who might seek to commit similar crimes. Finally, it should be underlined that, from the very example it gives, but also through its ongoing interaction with national judiciaries, the Tribunal and its Prosecutor have had a major impact on the institutions of the region and also on the mindset of its people, I would even say on their political and legal culture. This forms another significant and long-lasting dimension of the Tribunal's legacy. These developments, which are part of a strengthening international process of fighting impunity, take on an even greater significance when we put ourselves in the position of the victims and their loved ones. More than anyone else, they are the ones for whom an objective and impartial process of justice represents a crucial step towards the healing of

wounds and the overcoming of traumas. That is why justice is also an essential element in any long-lasting reconciliation process.

Mr. President, ladies and gentlemen, as a victim of the bloodiest fights that have torn Europe apart throughout the centuries, but also an active member of a European project based on the reconciliation of old enemies, my country, Luxembourg, has supported, and still supports with commitment and fervour, the work of the International Tribunal for the former Yugoslavia and wishes to praise its achievements. The legacy of the Tribunal, which we shall discuss today and tomorrow, brings together the experience acquired by the ICTY since its creation in 1993, in a specific historical context. This legacy is also a contribution to the future of an international community that will no longer tolerate impunity for the most serious crimes. It is with this in mind that Luxembourg is proud and honoured to have been able to contribute to the organisation of this conference, the work and the results of which are sure to be positive and fruitful. This is, in any case, my fervent wish. Thank you for your attention.

Master of Ceremonies, Christian Chartier, former Chief of the ICTY Public Information Service

The next speaker will be Mr Philippe Brandt, Minister at the Embassy of Switzerland.

Philippe Brandt, Minister, Embassy of Switzerland to the Netherlands

Excellences, ladies and gentlemen, the International Criminal Tribunal for the former Yugoslavia was established as a measure to restore and maintain peace, and to promote reconciliation in the region. The decision to set up an *ad hoc* criminal tribunal was taken in recognition of the primacy of justice, ensuring the accountability of perpetrators, and in providing redress to victims. Moreover, this decision was taken during the conflict itself in the belief that the threat of prosecution would act as a deterrent to all involved parties - to refrain from committing further atrocities.

With the benefit of hindsight, almost 20 years later, we are in a better position to assess the legacy of the ICTY, both as a legal instrument in investigating and prosecuting violations of international humanitarian law and as a preventative measure.

I will not venture today to speak about the legal legacy of the ICTY as this is the focus of the upcoming conference. Yet it is worthwhile to recall that, although it was the first international criminal court to be established since the

Nuremberg and Tokyo tribunals, the ICTY was not created in a legal and political vacuum. Since the early nineties, the then UN Commission on Human Rights addressed the issue of accountability for gross violations of human rights in both conflict and transition encompassing the right to know, the right to justice, the right to reparation and guarantees of non-recurrence. Needless to say, the ICTY and its fellow Tribunal, the International Criminal Tribunal for Rwanda, provided a much needed frame of reference for the development of the right to justice by demonstrating that persons responsible for war crimes, crimes against humanity and genocide can be brought to trial and thus that international criminal law is enforceable. Experience has shown, however, that justice alone cannot provide full satisfaction to victims, nor can it by itself address the many challenges that societies face in dealing with the legacy of violent conflict.

This is the rationale behind a comprehensive and inclusive approach to dealing with the past that includes the full range of measures as outlined in the aforementioned principles against impunity. This has proven particularly true in the Balkans where the justice approach has been the dominant paradigm, largely due to the influence of the ICTY and its Completion Strategy focusing on domestic war crimes trials. It is only in recent years, in connection with initiatives such as the establishment of a National Missing Persons Institute in Bosnia and Herzegovina and the civil society consultation process to establish an original fact-finding commission called RECOM, that other mechanisms are being explored to address outstanding issues relating to the rights of victims and the duties of the state.

In this regard, I may mention briefly that Switzerland, together with Argentina and Morocco, introduced a resolution at the 18th session of the UN Human Rights Council in September, to create a new mandate for a UN Special Rapporteur on truth, justice, reparation, and guarantees of non-recurrence. The resolution was passed by consensus, including all of the UN member states from the former Yugoslavia.

In this regard, I would like to add a concluding remark. Perhaps the greatest contribution of the ICTY to peace and reconciliation in the region has been to establish the facts of what happened during the conflict and to determine the measure of individual criminal responsibility for the grave crimes committed.

It remains for this and future generations in the region to build upon this legacy and to broaden it with their own experiences in the search for truth and justice in the years to come.

For us who have been following the work of the Tribunal for almost two decades, the legacy of the ICTY may remind us that human rights violations do not take place in the abstract. They affect real people in real situations, in their

homes, among family and friends, in the wider communities. Accordingly, the work of justice in the fundamental sense of righting a wrong must also in some way be made real, that is, visible and understood in concrete terms by people in their daily lives. What that might mean for a victim in the Balkans is not easily answered in The Hague. This is a challenge that touches one of the core issues of international humanitarian law. It is a task that lies before us and that deserves further reflection as we engage in the further elaboration of the legal architecture relating to the right to justice and the struggle against impunity to which the ICTY has added its own measure of justice.

Thank you.

Master of Ceremonies, Christian Chartier, former Chief of the ICTY Public Information Service

And finally, the last opening remark will be delivered by Ms. Alison Cole from the Open Society Justice Initiative.

Alison Cole, Legal Officer, International Justice, Open Society Justice Initiative

Mister President, Your Excellencies, honourable guests, good morning and thank you for the opportunity to join our hosts in welcoming you to this Global Legacy Conference.

Our discussions over the next two days come at an opportune time for considering the contextual and lasting impact made by the international courts and tribunals. We are on the brink of some momentous milestones for international justice and it is useful to recall the broader context within which the ICTY operates.

In 2012, the ICTY and the ICTR will approach their twentieth anniversaries. The International Criminal Court will mark its tenth anniversary. The Special Court for Sierra Leone will complete its trials and the Extraordinary Chambers in the Courts of Cambodia will be in the midst of its second case against senior leaders of the Khmer Rouge regime.

Each institution operates in a very different and unique context. However, there are similar legacy themes, particularly the issue of the strengthening of the rule of law which will be addressed over the course of this conference. And briefly, considering some key legacy achievements of each court or tribunal, which in turn constitutes part of the legacy of the ICTY as the first such tribunal, I would also like to highlight for you some aspects regarding accountability for gender crimes that each court or tribunal has contributed to in achieving the globally applicable legacy of international courts and tribunals. With the respect to the ICTY, the

Tribunal led the way in forging a new path to justice in the 1990s, picking up from the international criminal law precedents established in Nuremberg.

Both the ICTY and the ICTR face the issue of being established outside the country over which they have jurisdiction and both came to appreciate the need to take additional efforts outside the courtroom to ensure the judgements would resonate in the local context. The ICTY for its part pioneered outreach for international justice and peer-to-peer capacity-building with local justice officials. The ICTR in turn also conducted trainings and worked closely with local civil society intermediaries.

Indisputably one of the most far-reaching and landmark achievements of the *ad hoc* Tribunals has been the development of the law regarding gender crimes. Prior to the establishment of the ICTY, the characterisation of rape as a war crime remained debated in some quarters. Now it is fully established that rape may constitute a war crime, a crime against humanity and genocide. The Tribunals have further recognised rape and other forms of sexual violence as a means of torture, forms of persecution and indicia of slavery, in addition to other crimes such as inhumane acts. They have articulated progressive definitions of rape and the heart-wrenching cases before these Tribunals have galvanised a global movement recognising sexual violence as an instrument of war and oppression.

A further critical legacy impact of the ICTY is the role it has played in paving the way for the other international tribunals that followed. One of such subsequent tribunals, the Special Court for Sierra Leone, currently has particularly pressing legacy issues to address. The Special Court will be the first international court to close, with the final judgement concerning Charles Taylor anticipated for early next year. The Special Court has had the advantage of having all but one of their trials held in Sierra Leone itself, with more ready access to the national institutions in order to enhance its legacy impact. However, the Open Society Justice Initiative issued a report last week regarding the legacy of this Special Court, and identified key steps that remain to be taken to secure the legacy of the Court, in particular through ensuring the judgements are analysed to find a way in which they can be utilised in local courts. It is important to highlight that the Special Court has also made valuable contributions to the rule of law regarding gender crimes. Based on the precedents established at the ICTY regarding enslavement, the Special Court was the first court to convict for sexual slavery, as provided for in its inner statute. The Special Court also considered the scope for addressing emerging fact patterns under the so-called “residual category” of crimes against humanity, namely “other inhumane acts”. The Sierra Leone civil war involved militia forcing women to engage in conjugal relationships, which the judges found to constitute a crime against humanity just like another inhumane act: forced marriage. This precedent has been followed

at the Extraordinary Chambers in Cambodia where the co-investigating judges charged the accused with enforced marriage.

It is a similarly critical time for the Khmer Rouge court to consider its legacy. With the largest courtroom in the world, sitting some 500 observers, the court has made remarkable efforts over the course of the first trial against Duch, head of the S-21 Detention Centre, to bring people from all over Cambodia to watch the trials. Over 20,000 people have attended. Now, with the court starting its second trial with nearly 4,000 victims participating and with serious questions over the status of the two remaining investigations, the Khmer Rouge court must ensure its legacy by conducting fair and independent trials and investigations.

Finally, the question of whether the ICC has a legacy impact remains to be considered. The Open Society Justice Initiative is looking into this issue currently and is seeking to determine what steps a permanent institution would need to take in order to enhance its contribution to the local setting in which it operates. There are many questions to be answered, such as the extent to which positive complementarity contributes towards the ICC's legacy and how the Prosecutor can best manage decisions on preliminary analysis situations or investigations that are closed.

It is remarkable to recall that the Rome Statute was being negotiated in 1998, at the very early stages of international awareness of the law regarding gender crimes. Perhaps one of the most tangible legacy impacts of the ICTY are the detailed provisions in the Rome Statute specifying prohibitions against rape and sexual violence. The groundbreaking gender cases before the ICTY lead the ICC to recognise not just rape but also sexual slavery and enforced prostitution, forced pregnancy and enforced sterilisation in the Statute, as well as gender-based persecution and trafficking in women and children. Including these crimes in the Rome Statute is a truly amazing achievement, following the efforts of the ICTY.

There is still much more to be done in reducing gender crimes and the offensive stereotypes surrounding sex crimes, and the groundbreaking jurisprudence of the ICTY will be instrumental in interpreting the Rome Statute and ending impunity.

Indeed, all but one of the situations before the ICC include gender crimes. This conference provides a unique forum to consider many key matters pertaining to the legacy of the ICTY which in turn relates to all other international courts and tribunals. I am very much looking forward to the panel discussions and thank you all for your participation.

Master of Ceremonies, Christian Chartier, former Chief of the ICTY Public Information Service

So, thanks to the first four speakers. I believe their opening remarks have laid down the fundamentals of the conference which is now going to really begin with the first panel. The topic of the panel is – and I quote from your programme – “The impact of the Tribunal’s substantive jurisprudence on the elucidation of customary international law”.

This panel is going to be short and moderated by Judge Theodor Meron. Elected to the ICTY in March 2001, Judge Meron became the President of the ICTY only two years later. The ICTY President until November 2005, Judge Meron has recently been elected to another two-year term of the presidency to start on the 17th of November, which is the day after tomorrow. Judge Meron is the only ICTY judge who has ever been in such a position. A leading scholar of international humanitarian law, criminal law and human rights law, Judge Meron has offered numerous articles and books about international humanitarian law, as well as about Shakespeare, and more specifically about the laws of war and chivalry in Shakespeare’s plays. In addition to being awarded a number of international awards, he is a member of the Institute of International Law and a fellow of the prestigious American Academy of Arts and Sciences.

Therefore, it is my pleasure to hand the floor over to Judge Theodor Meron who will introduce himself and the panellists.

Thank you very much.

Panel 1***The Impact of the Tribunal's Substantive Jurisprudence on the Elucidation of Customary International Humanitarian Law*****Moderator:****Judge Theodor Meron, ICTY Appeals Chamber****Panellists:**

- **Georges Abi-Saab, Professor Emeritus for International Law, Graduate Institute of International Studies, Geneva; Former ICTY Judge**
- **James Crawford, Professor of International Law, University of Cambridge; Research Professor, Latrobe University, Australia**
- **Jean-Marie Henckaerts, Legal Adviser, International Committee of the Red Cross (ICRC)**
- **Mona Rishmawi, Chief of the Rule of Law, Equality and Non-Discrimination Branch, Office of the High Commissioner for Human Rights**

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

May I invite my colleagues to join me for panel number one?

It gives me great pleasure indeed to open this panel on the impact of the Tribunal's substantive jurisprudence on the elucidation of customary international law.

I am greatly thankful to President Robinson and to his staff, in particular to Gabrielle McIntyre and Diane Brown, for all of their efforts in helping to organise this conference and this morning's discussion. I am also very grateful to our distinguished panellists for joining us. Professor Georges Abi-Saab, Professor James Crawford, Dr Jean-Marie Henckaerts and Mona Rishmawi have each made and continue to make very important contributions to the field of international humanitarian law. We are indeed fortunate to have such stellar participants with us here today.

I would like now to offer a few thoughts as to why customary humanitarian law plays a critical role for the ICTY and other international criminal tribunals and why the ICTY in turn has played a critical role in the elucidation of customary international humanitarian law. Only 20 years ago, I would have taken ascribed customary international law primarily as a matter of scholarly enquiry. Today, however, customary law is enjoying a remarkable revival, effectively moving from the domain of academia to the courtroom and beyond.

The roots of this revival, I would suggest, can be traced back to the trials conducted at Nuremberg in the wake of the Second World War. Although the London Charter gave the International Military Tribunal at Nuremberg jurisdiction over crimes against peace, war crimes and crimes against humanity, some suggested that the Charter amounted to an unlawful *ex post facto* law. The Nuremberg Tribunal also could not rely heavily on treaties in construing the ambit of the crimes within its jurisdiction. The Geneva POW Convention of 1929 was not applicable on the Eastern Front as it had not been ratified by the Soviet Union. And the application of the First Hague Convention was challenged because the situation of the belligerents did not conform with its *si omnes* clause since not all of the belligerents were parties. Moreover, while the relevant provisions of both the Geneva and The Hague Conventions defined substantive proscriptions, the Conventions did not explicitly criminalise the violation. As a result, a question arose as to whether the legality principle had been satisfied. In other words, whether the accused had been sufficiently on notice at the time of the alleged offence and that their conduct entailed criminal liability. In answering this question, the Nuremberg Tribunal reasoned that the law of war was to be found, not only in treaties, but also in customary international law and in general principles of justice. In other words, in so far as the acts charged were, in fact, crimes under customary international law, when committed, they could not be said to amount to impermissible *ex post facto* proscriptions. This conclusion received some criticism. Nevertheless, by becoming the first international court to look to customary law underpinning international crimes, the Nuremberg Tribunal opened the way for all that followed. Not surprisingly, the ICTY faced many of the same challenges as the Nuremberg Tribunal which, despite its historical merit was, in effect, an occupation court. Although the ICTY's jurisdiction is defined by a Statute, adopted by the UN Security Council, the Statute did not even exist when some of the relevant crimes were committed and it was unclear whether all the relevant nations were parties to treaties that definitively prohibited those crimes.

Accordingly, in this famous report accompanying the adoption of the Statute, the UN Secretary-General noted that the application of the principle *nullum crimen sine lege*, the legality principle, requires that the International Tribunal should apply rules of international humanitarian law which are beyond any doubt – and I am quoting here – “part of customary law”. It might fairly be asked whether a conviction for violating uncodified customary international law can ever meet the *nullum crimen* standard. I do not believe, however, that the legality principle bars such convictions. Customary humanitarian law largely prohibits acts that everyone would assume to be criminal anyway: rape, murder, torture, attacking civilians and so forth. In keeping with the Secretary-General's report, and to ensure basic fairness to the accused and to forestall some of the same criticisms levelled against

the Nuremberg Tribunal, the ICTY has essentially super-imposed on each statutory crime an additional safeguard. Namely, a requirement that crimes charged under the Statute are crimes also under customary law, at the time they are alleged to have been committed. And we take pains to explain the customary and conventional underpinnings of our rulings. Ours, of course, is not the only international judicial body to have turned to customary law in recent years.

Reference to customary law has helped a wide range of international courts and other bodies address substantive gaps in conventional law, resolved disputes where one or more parties have not ratified the relevant instruments or have ratified them with reservations, and construed the provisions of existing treaties. But if customary law has proven increasingly important in courts addressing civil matters, it has shown itself to be absolutely central to the work of international criminal tribunals. Although less relevant for the new International Criminal Court whose Statute resembles a civil law code, customary law comes up in the *ad hoc* international criminal tribunals in almost every case and frequently has an impact on the outcome.

Indeed, if we have witnessed a resurgence of interest in attention to customary international law in the past two decades, I would suggest that it is in no small part because of the establishment of the ICTY and its jurisprudence. So, how does the ICTY go about identifying customary international law? In cases when the unlawfulness of the conduct at issue would have been clear at the time, the Tribunal need not engage in a laborious enquiry into the question of whether a particular legal principle enjoyed the status of customary law. As the ICTY Appeals Chamber stated in the *Čelebići* case, acts such as murder, torture and rape are obviously unlawful. Some of the ICTY cases however involved conduct of less obvious criminality. In such cases, the relevant customary law must be ascertained; and the Tribunal's Chambers tend to adopt a methodologically conservative approach in this regard, requiring a showing that there is a widespread - though not necessarily perfectly consistent - state practice supported by *opinio juris* at the time of the offence. The Tribunal will not engage in an inquiry into customary law each time, of course. In many cases, the Tribunal has relied on its own precedent instead of revisiting the same issues repetitively, an approach that can hardly be faulted. It has also relied to some extent on proxies, such as the long-standing recognition of the customary status of Common Article 3 of the Geneva Conventions by the International Court of Justice in the Nicaragua case, in place of the comprehensive detailing each and every time of state practice.

And now I would like to attend to the last part of my remarks. Namely, I would like to offer some examples of the ICTY's customary law jurisprudence.

Not surprisingly, much of our jurisprudence on this question has focused on substantive law. The *Galić* case, for example, concerned conviction for terrorisation of the civilian population of Sarajevo. The Trial Chamber based the conviction on Additional Protocol I alone, while the Appeals Chamber followed the Tribunal's self-imposed norms grounded in customary humanitarian law. The Appeals Chamber concluded that the conduct at issue was clearly prohibited by customary international law at the relevant time. In the *Stakić* case, meanwhile, the Appeals Chamber was called upon to assess the cross-border requirement of the crime of deportation. In its 2006 judgement, the Chamber concluded that the crime of deportation requires, as a matter of customary law, a transfer across a *de facto* or a *de jure* state border. The Tribunal has done more than simply identify basic general prohibitions, of course. It has repeatedly delved into and clarified the elements and precise scope of the crimes at issue. In the *Kunarac* case, my first case upon joining the bench, the Appeals Chamber upheld the Trials Chamber's definition of rape as reflecting customary international law, noting in particular that there is no victim resistance requirement under the customary international law definition of rape. The Appeals Chamber also emphasised that the definition of rape under customary law did not require that the victim's lack of consent result from force or threat of force. Lack of consent could be shown, in fact, from coercive circumstances. The Appeals Chamber also considered the definition of the crime of torture in the *Kunarac* case – concluding, as had the Trial Chamber, that the crime of torture does not require the involvement of an individual acting in his or her capacity as a public official. This ruling was notable because it departs from the definition of torture contained in the UN Convention Against Torture. As the Appeals Chamber explained, the definition of torture contained in the Torture Convention is related to the purposes of that Convention which is addressed to states seeking to regulate their conduct. Consequently, the Torture Convention's requirement that the crime of torture be committed by an individual, acting in an official capacity, may be considered a limitation on the obligations of states. However, the Appeals Chamber agreed with the Trial Chamber that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture when that responsibility is assessed outside the framework of the Torture Convention.

The ICTY has also relied on customary law in construing modes of liability. Thus, for example, in the *Tadić* appeal judgement, the Appeals Chamber concluded that the notion of joint criminal enterprise is fairly established in customary international law and articulated its specific forms and elements. In *Čelebići*, which involved the question of responsibility of leaders of a concentration camp in Bosnia and Herzegovina, the Appeals Chamber held that the principle of superior responsibility in customary law encompasses not only senior military officers but also political leaders and other civilian superiors in positions of authority.

The Appeals Chamber also made clear that command responsibility is not a form of strict liability. And in a 2003 interlocutory decision in the *Hadžihasanović* case, the Appeals Chamber confirmed that command responsibility forms part of customary international law in relation to war crimes committed in the course of internal conflicts and not only international conflicts.

Finally, the ICTY has relied on customary international law in interpreting the right of procedure, rights and requirements of fairness and of due processing. In the *Krajišnik* case for instance, the Appeals Chamber concluded that the case law of domestic jurisdictions did not support a distinction between the right of self-representation during trial and on appeal. And in the *Strugar* judgement, the Appeals Chamber relied on general principles of law, recognised by all nations, as exemplified in state practice and the jurisprudence of a range of international tribunals, to elucidate the applicable standards for fitness to stand trial. The customary law jurisprudence of the ICTY has not been without its critics. In my view, however, the Tribunal's Chambers have examined questions of the existence and applicability of customary international law carefully, cogently and for the most part, correctly. And the impact of this jurisprudence has been felt not only in the Tribunal's own cases, as it is to be expected, but also in those of other international criminal courts in the region and in international courts of all sorts and increasingly in national courts, civil society, intergovernmental agencies and a variety of armed forces and military commands around the world. In considering the achievements of the ICTY, one might think first of quantifiable accomplishments: the number of cases tried, the witnesses heard, the rulings rendered. These quantifiable results are, in my view, enormous. But I would urge you also to consider the Tribunal's substantial contributions to customary international law and the impact of the Tribunal's jurisprudence in a variety of different forums.

I would now like to turn the discussion over to our distinguished guests. Since I have focused on the jurisprudence of the ICTY in my remarks, I would suggest that we begin with Professor Georges Abi-Saab, honorary professor of the Graduate Institute of International Studies in Geneva, and past member of the WTO Appeal Panel, who, along with our dear former colleague, friend, and mentor, Judge Nino Cassese, was a mastermind of the seminal 1995 interlocutory decision on jurisdiction in the *Tadić* case.

Georges.

Georges Abi-Saab, Professor Emeritus for International Law, Graduate Institute of International Studies, Geneva; Former ICTY Judge

Thank you, Ted.

Ladies and gentleman, I received from our chairman what in Switzerland they call *l'ordre de marche*, meaning the military order of what I am supposed to address today which is the *Tadić* case, and custom and treaty in international criminal law. I have fifteen minutes; I will divide it into five small parts, three minutes each. In the first part I will talk about nostalgia, in the second about custom in general, and in the three others I will focus on the *Tadić* case.

I feel very nostalgic being here because I was here at the creation of the Tribunal with Nino, who was my friend since we were graduate students, in fact since 1960. And it is the first time I have come to The Hague without having Nino around. It is not only because of his public virtues, but because of his great drive, great conviction, and the fact that he was so driven by his empathy for the human beings rather than for abstract constructs. And this perhaps explains to some extent sometimes his overdrive, his exaggerations in the thrust to advance the law, to increase the scope and the ambit of protection and his impatience with the institutional and bureaucratic limitations that weighed on us when we were in the Tribunal.

I salute my dear friend and colleague Gaby McDonald, who is here and who was with us also at the creation of the Tribunal. It was a very hard task to start something, I would not say from scratch, but almost from scratch. Weighed down also by the terrible and bureaucratic political constraints of the UN – because we were a Tribunal but they were treating us as subsidiary organ of the Security Council, and these are almost two contradictory characters.

Anyway, that was the situation and I was retroactively so pleased that I managed to participate in this first decision of the Chamber; unfortunately, I think I am the only survivor of it with the passing of Nino. So this is why this is nostalgia.

Ted sent us a paper in which he has synthesised what is now called, I think, “International Humanitarian Customary Law from the Classroom to the Courtroom” and where he explained two approaches: one is a strict approach, or conservative approach to establishing custom. And the other is the relaxed one. I never dare to compare or to contradict Ted. He is also a very old friend. We talked together in Geneva, we talked together in NYU, but sometimes I cannot help at least qualifying what he says. We cannot treat custom in the 21st century as it was treated in the 19th century. In fact, in my writings, I have made clear that we are speaking of two different animals, two different species perhaps of the same animal.

In the 19th century, when we were living in the world of voluntarism, international law only derived from the will of the state, and individual custom was implied convention. So every time you want to establish it, you have to establish the practice, establish the *de jure* relation, et cetera. Moreover, it was a wild growth,

heterogeneous; you never know where they will come from - the precedents. There is no continuity between them. They were *ad hoc*, et cetera. When we are speaking of custom here, and particularly in humanitarian law, we are not speaking of that. In fact, even in the 19th century, when we had the Lieber Code, the first instrument which... - what does it do? Every convention we have attempts to codify an explicit pre-existing custom. So, we have a kind of... again, between custom and treaty. There are some practices..., then we try to qualify them and now we have even a standing organ, ICRC, trying to further the practice *et cetera*, and then after a few years we come back and try to put them on paper and so forth and so on. And not only that, but we have also a safeguard of the rules in every one of them which is the famous Martens Clause, which we found already in 1874 in the Brussels Declaration, but particularly in the Geneva Conventions of 1899 and 1907 which says, for example... from The Hague Convention it starts to say what is the purpose of the Convention - to revise the laws and general customs of war, either with a view to defining them more precisely, or of laying down certain limits for the purpose of the modifying their severity as far as possible. What is "as far as possible"? Well, here comes the Martens Clause saying it has not, however, been found possible at present to have regulations covering all the circumstances that arise in practice. On the other hand, high contracting parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgement of military commanders. So, what do they do? - We have a security net. And the security net is the Martens Clause which is: until a complete code of laws of war can be issued, the high contracting parties think it expedient to declare that in cases not concluded in the regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of law of nations, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of public conscience. So, here, public conscience - the values that society secretes, tries to pull the practice upwards and that creates a kind of a direction in the evolution. And the Tribunal here is the - how do you call it - the lady who helps women to deliver children - the midwife. And the tribunals are the midwives here. And the midwife should not be too strict with the wives because maybe they would die. It has to facilitate this coming out to the world. And so, between the strict or conservative approach and what he calls the "relaxed" approach, I think we have to find a mid-way. Not midwife, but mid-way. So, that is what I have to say about custom in general.

Now I come to *Tadić*. Three aspects of *Tadić*, each three minutes as well. The first is the methodology. How would *Tadić* handle custom? Secondly, what it found on substantive law and thirdly, the impact.

First, about the methodology, and this methodology - I have to say - was followed to a great extent also by the ICRC study on customary international law

which Jean-Marie Henckaerts will speak to us about, but as it happened, I was on the Steering Committee, as was said, and so, again, it's kind of a family affair.

The main question was to establish whether war crimes apply in an internal armed conflict. So, obviously, neither the Geneva Conventions, nor the protocols mention criminalisation. Not to speak of an internal armed conflict specifically. Not to speak of The Hague Regulations. So, the question was open and to establish it we had to refer to custom. So, how do we find the substance of practice? There is a great difficulty in humanitarian law in establishing custom, which is that most obligations in humanitarian law are what were, in some way, called "obligations not to do" – meaning: obligations of abstention. How do you establish abstention as an act you do out of obligation, rather than out of an oath or out of remission? That is the difference. When what you want to establish is a positive act - it is easy. Here, with the abstention, you have to depend very much... In civil law they speak as science would speak. It speaks only if it is what in French they call *silence circonstancié* – qualified silence, meaning: silence surrounded by circumstances that give it in parts meaning to it. It is in fact silence where you should have spoken. If somebody stands on your foot and you do not say "Ay!", then here the silence has significance. But, if it just passes by you, even if it is prohibited that he passes there, you don't have to protest. So, that was the first problem which we had to deal with, it is to give what is the legally significant practice that can be taken.

Secondly, we are really speaking here about actions in the battlefield mostly. And in the battlefield there are rarely third party observers, in a way. It is very much in the practice, so you have to figure out what is on the other side. Again, a great problem of proof. So, here you have to look at two things, at least according to *Tadić*. It is what I call "internally induced practice" and "externally induced practice" - and this we took against the background of historical events, particularly two important historical events of civil wars. One was the Spanish Civil War, before the Second World War, and the second was the Biafran war in Nigeria, more recently, and also some references to El Salvador. What do we have there?

In the Spanish Civil War we have a lot of third parties taking positions, particularly on indiscriminate bombarding. I have to tell you that, during that period, there was a great concern about aerial bombardments in general because these aerial bombardments were not covered at all by The Hague Conventions – except for the bombardments from balloons as there was a convention on that, a protocol on bombardments from balloons. So, this is a very interesting thing. So, the positions of the League of Nations saying that indiscriminate bombardments are against the law of nations *et cetera*, did not distinguish between internal and international armed conflict. It was a general problem; say: in armed conflict

you should not do it. States, individual states taking a position, declaring that indiscriminate bombardment is itself... Why do we want so much to refer to that? Because here we have a trend which does not distinguish between internal and international armed conflict. In Biafra it is an internally induced practice. Why? Because the Nigerian tribunals themselves punished those perpetrators of acts which they considered as violations of international humanitarian law, although it was a civil war, it was not an international war. So it was a kind of recognition of history by the party and in those cases - this is a very important point - there was no recognition of divisions. The formal government did not recognise the rebels as combatants but still applied all humanitarian law in practice. So, this is a type of practice. And the second point is that it is not only sufficient to establish that the rule applies both internationally and internally. It was also important to prove that the violation of this rule has been perceived as being a crime.

I think that Ted is looking at me furiously, I have to finish.

Should I mention the second point? I'll forgo the third and come back to it later.

The second point: what did we decide in that case? The Trial Chamber followed the Prosecutor by saying: "Anyway, the Security Council considered this as an international conflict and we don't have to go beyond that; we will go by that." The Appeals Chamber said: "Of course, that was *la solution de facilité*, it was much easier to go this way and that would take care of it." And there were some aspects of the conflict which were international. But there were some aspects which were internal, particularly in Bosnia. And we were speaking of that. What counted was to say that there are certain rules which apply to both. And these rules are so important that their violation has been considered already as constituting crimes, war crimes. And that is what the court found. That certain acts, even when they were basically violations of Article 3 - the acts fell under Article 3 - but Article 3 does not speak of criminalisation. It speaks only of principles which apply in internal armed conflicts. So, in a way, that was a very good quote in the very strong war between internal and international armed conflict. And I am very glad because I have been running around and pleading in all fora against all wars, both wars on the terrain and wars in the minds of people. But this war has been increased. Once you wrench it open, from there on the jurisprudence has increased it and then comes the ICC and really eliminated a very good part of the war. But the rules are really remnants, a little bit what it means from the very involvement. We are very close to a situation where such atrocities in all kind of international armed conflict are criminalised.

Thank you very much.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

Thank you, thank you very much, Georges. Georges, this *Tadić* case, in biblical terms, it really represented the Book of Genesis. And we are extremely grateful to you. I will now turn to Professor James Crawford, who as you know, is the Whewell Professor of International Law at the University of Cambridge. I will ask him to broaden our discussion with his unparalleled experience as a scholar and as an advocate, and speak of the role of custom in criminal and civil international jurisdictions more generally.

James, we are so happy you could join us today.

James Crawford, Professor of International Law, University of Cambridge; Research Professor, Latrobe University, Australia

We are grateful to Judge Meron for setting up what might be described as a theory of custom according to the Yugoslav Tribunal. And he does that in his paper, at page 33. This is taken from the published version of his speeches. You have to be a very great man indeed to have Oxford University Press publish your speeches! But, of course, there is no doubt about that with Ted. He says: “Thus customary law can provide a safe basis for a conviction, but only if genuine care is taken in establishing that the relevant legal principle was sufficiently firmly established as custom at the time of the offence so that the offender could have identified the rule he was expected to obey.” That general proposition which might be thought to be an emanation of the principle of legality, was also adopted by the court, for example by the Tribunal, for example in the *Galić* case, where the Tribunal said, and I quote: “The judges have consistently endeavoured to satisfy themselves that the crimes charged in the indictments before them were – I stress “were” – crimes under customary international law at the time of their commission.” This is because in most cases treaty provisions will only provide for prohibition of certain conduct and for its criminalisation, while a treaty provision itself would not sufficiently define the elements of the prohibition they criminalise, and customary international law must be looked at for the definition of those elements. There was a certain contradiction in that dictum. The first paragraph says that we have to satisfy ourselves that the crimes charged were crimes under customary international law. The second part says this is because we have to have customary international law because the treaties are inadequate. They only provide for the prohibition of certain conduct by others, not self-executing. They do not sufficiently define the elements of the prohibition. So, customary international law becomes a necessity. Even if it is a necessity, how certain can we be that it exists independent of our necessity? An element of the definition of the *opinio juris*, and I stress, as far as we can say, we can see that the concept of the *opinio juris* is a

20th century concept, not a 19th century concept, still less an 18th century concept. *Opinio juris sive necessitatus*: “an opinion or a view or a belief as to the requirement being one of law, or being necessary”. There are three provisions to these legality criteria of custom, which were formulated by Judge Meron in the *Galić* case.

The first proviso comes from *Čelebići*, which can be described as the obvious illegality requirement, or exception. You do not have to look very hard at custom if the conduct is so obviously illegal that anyone must have known that it was illegal. One can understand that the moral repugnancy at the conduct that is involved in many of these cases is such that you search for some criteria of that sort. The problem is obviously: illegal - according to what law? There is much conduct in the world which is obviously illegal, but which international law has not criminalised - an ordinary murder, for example. Somewhat paradoxically, international law criminalises what might be described as an ordinary official torture, but not an ordinary official execution, at least not in all circumstances. So there is the obvious illegality requirement and it seems that the defendant has to have a lawyer to be able to say according to what law. Perhaps we need to face the reality that what we are doing here is moulding a set of moral imperatives in the exercise of a mandate given, which we have accepted. Will that be consistent with the orthodox views of custom is a question to which I will return. It comes to the point where the material with which we are working cannot bear the weight of the classical requirements of custom.

The second exception might be described as “the development and clarification exception”. It is not a violation of the principle of legality to develop and tease out the implications of a rule, if the facts require it. So a certain rule might be somewhat embryonic. It has to be teased out in a given situation and it crystallises in that situation without necessarily the lineaments of the rule having themselves been established through custom. *Aleksovski* is an example of that principle.

The third exception, if it is an exception, is that you do not have to go into the rather tedious requirements of examining State practice and the mysterious *opinio juris*, if you have a precedent which has done it for you. So, whereas the common law moves from precedent to precedent, in what was said by Tennyson to be a glorious progression, the progression of international criminal law is from practice to precedent and then precedent can take over. And you can see this methodology being applied in the *Hadžihasanović* case, in respect of the principle of command responsibility.

Now, according to Judge Meron, there are two elements which underpin this theory of custom. The first is that it is conservative in harking back to the classic conceptions of custom in general international law. The academy from

which this classical conception is said to have been drawn, one might say extracted, as one extracts teeth, has spent most of its time since the extraction trying to trash custom. And it is now the function of the courts and tribunals to indicate custom against the academy. The second element is the principle of legality which Judge Meron identifies as a pre-emptory norm, another modern concept, it should be pointed out, although the term *jus cogens* does go back rather further than had been thought. Now what are the virtues of this conception of custom? There are a number of virtues which have been identified. First of all, it solves the problem created by international law or the problems created by international law for a tribunal in the position of the Yugoslav Tribunal. What are those problems? The problems are the complete, or virtually complete, indeterminacy of the rules of succession. Bosnia – which, if ever a state needed succession, needed it - acceded to relevant treaties. Of course, one does not always have a legal adviser to hand when one is the government, let alone when one is a potential defendant. It solves the problem of reservations, because if customary international law is there, you can ignore the manifest problems and reservations which took Professor Pillay 15 years and I think possibly 15 million words to resolve. It resolves the problem of agreements between belligerents because those agreements are of dubious relevance in this situation when we have custom. And above all, it solves the problem of retrospectivity. And by definition, the sorts of crimes we are talking about are liable to being committed in states of instability - states, both in the physical sense, and also in the legal sense because the states themselves will be in such a shindig or at least in a state of transition from one situation to another, with situations of continuity unresolved. The international court, I think, with great wisdom tried to maintain an equivocal status for the former Yugoslavia throughout the 1990s only to have it crash in ruins in 2004. In the exercise of this conservative conception of custom, the “Meron conception” as I call it, the Tribunal has actually done remarkable things. I was able to count, on a fairly crude estimate, ten examples of significant law-making which were presented under the rubric of custom in the form of substance alone. I am not going to go into them in detail, but I will mention them briefly: the definition of armed conflict in *Tadić*; the question of nationality of protected persons in *Aleksovski*; the distinction between international and internal armed conflict, again in *Tadić*. And I would mention here, if I may with a slight sense of paternal pride, the book by someone called Emily Crawford in which she argues for the complete destruction of the Berlin wall. Fortunately, these views of international law are not transmitted from one generation to another. Individual criminal responsibility in internal armed conflict - again *Tadić*. Superior or command responsibility - *Delalić, Čelebići*. Joint criminal enterprise, and it is a remarkable achievement of custom in the distinction into three categories of joint criminal enterprise - never has custom been so finely grained - *Tadić*, and later cases. And slavery as a crime against humanity; sexual slavery and cognate crimes - *Furundžija*. The cross-border element in deportation - *Stakić*.

Again, a conservative case because quite correctly they said that deportation across the changing ceasefire line is not sufficient. And the official capacity requirement in torture which is incorporated in the Torture Convention by consensus at the last gasp in circumstances in which no one understood what was going on, and no one subsequently has been able to understand why that limitation should exist. I have only mentioned the substantive elements; there are many more in the field of procedure. I said this against the approach to custom in general international law.

It is often said that the Yugoslav Tribunal is more or less in the position of the Nuremberg Tribunal, having to do something for the first time. And the academy which has made much of the logical problem, of how you can have custom when you are doing something for the first time, and how you can believe that something is required when no one has ever done it before... - there is a different paradox here actually, because I think that the position of the Yugoslav Tribunal was not the same as at the Nuremberg Tribunal. The Nuremberg Tribunal was an occupation tribunal mandated to do a certain thing which was better than the alternative – the famous alternative was shooting the top hundred which was said to be advocated by Churchill and opposed by that great lawyer Stalin.

The problem is the paradox of custom amidst the plenty of rules. And the way national courts reacted to that is to say: “We give up custom because we have an active legislature which can make rules if we need them.” Therefore, you get decisions like the House of Lords in the *Queen against Jones (Margaret)* accepting that aggression is a customary international law prohibition, but saying it cannot be incorporated in English law because it simply lacks that power now. So what national courts have stopped doing, international courts have to do. It is a curious example of history repeating itself.

When we were confronted in the 1990s with the issue of how to go about constructing an international criminal court, the first question was whether you took advantage of the *acquis*, the *acquis* built up over 30 years of treaty-making from the Genocide Convention on. And what happened? The *acquis* was practically ignored, especially in fields such as terrorism. And instead we had the reinvention of custom in the form of the Rome Statute. This is not a criticism. It may be an existential element about the transition from an inter-state system of rules to a system of rules which is brought to bear on the individual and has to be brought to bear with the requisite determinacy.

Since I was asked to talk about civil jurisdictions as well as criminal jurisdictions, and since I will at least briefly comply with my mandate, I should say a word about international crimes of state. When we did not have much of international criminal law except an aspiration which was a residue of the Nuremberg trials and the feeling that we should at least prospectively try to justify this even

if we could not do so retrospectively, there was a great deal made of international crimes of state, not least by Judge Cassese. Just at the time this was going on - this massive development under the rubric of custom of general international law - at the same time, the International Law Commission was struggling to get rid of the notion of “crimes of state” and to replace it by something more operational. The Yugoslav Tribunal itself contributed to that in no small extent in its *Blaškić* ruling. I should say by way of anecdote that I lost the opportunity to plead before one of the “lords of life” - if I can use D.H. Lawrence’s description - because I was supposed to argue the second day of the *Blaškić* case before the Yugoslav Tribunal, presided over by Judge Cassese. Unfortunately, Judge Cassese had made up his mind on the first day. And the second day was cancelled. The International Court of Justice in the *Bosnia* case adopted the same view. We do not have international criminal liability of states. Not because it is inconceivable, but because we do not in fact have it. We should not pretend we have it. That means we do not have subpoenas for states any more than we have jails for states.

I finally point about the distinction between civil and criminal responsibility, which is a real distinction. I spent quite a bit of time over this period of the last 10 years arguing about international humanitarian law in a civil context in the Eritrea-Ethiopia Claims Commission, Compensation Commission. The Compensation Commission, which had a bilateral mandate, had to apply customary international law for most of the period because Eritrea, amidst many other things that it neglected to do, had neglected to ratify the 1949 Conventions and the Commission worked on the assumption that if it was in the 1949 Conventions, in particular if it was reinforced in 1977, it was presumed to be customary international law, and you had to prove otherwise. From the point of view of an advocate, this meant that you were in a desperate situation because you had very little time - you had facts to argue. And if you stood up and said: “I am now going to argue with such and such rule in 1949 as not being customary international law,” that could be taken as admission of responsibility. In most circumstances there was very little argument that rules were not rules of customary international law. So, maybe there we see a different standard of proof being applied to the demonstration of custom in civil and criminal jurisdictions.

We need to look at the whole process that has occurred since the early 1990s, both with a sceptical eye and with a sense of the values involved, and it is very difficult to do both things at the same time. There was a great cry at the time when the atrocities in Yugoslavia occurred: “Don’t just sit there, do something!” And a sceptic would say that what the international community did through the Security Council was to say: “We are not going to do anything, but we are going to get a tribunal to sit here.” I think that is an excessively sceptical view. International law is moving away from its purely inter-state foundations and there is a new world

struggling to be born – with or without the aid of Georges’s midwife. But we have to be realistic. International humanitarian law, which one of my predecessors described as the vanishing point of law, has always had a Martens’ clause attached to it – not because there was custom, but perhaps because there was not.

Thank you.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

Thank you so much, James, for this fascinating discussion. I turn to Dr Henckaerts, Coordinator for the ICRC customary humanitarian law project. Georges and I spent years working with him when we were on the Steering Committee of the ICRC project on that subject and I expect that he will provide us with an insider’s view on the ICRC customary humanitarian law project and the special synergy between that project and the jurisprudence of the ICTY.

Jean-Marie!

Jean-Marie Henckaerts, Legal Adviser, International Committee of the Red Cross (ICRC)

Thank you, Ted. It is a great honour for me to be part of this panel. I am very pleased to be here, and of course slightly intimidated by the stellar composition of this panel. So, I will share with you some thoughts about the synergies between ICTY case law and the ICRC customary IHL studies. I will address first the parallels in the mandate and then talk about the synergies in content, and also talk about the synergies or parallels in methodology before making some conclusions.

So, first of all, the parallels in mandate... Of course, the ICTY was mandated by the Security Council and the Secretary-General’s report, as you all know, provided already, set forth that the Tribunal should apply rules of IHL which are beyond any doubt part of customary international law. So, in May 1993, when the Statute was then proclaimed and adopted, Article 3 of the Statute said that the court could apply the laws and customs of war. So, you had customary law from the start explicitly spelled out in the Statute of the court. At about the same time - this is the first time I really looked at the dates so clearly - part of the world was also doing other things in Geneva, against the background of the conflict in the former Yugoslavia. There was International Conference for the Protection of War Victims in August, September 1993. So, you had the ICTY established in May 1993 with Article 3 in the Statute, and at the same time there was this process of the International Conference for the Protection of War Victims, which eventually led to the mandate for the ICRC to carry out the study on customary IHL, applicable

in international and non-international armed conflicts. So, on the one hand you had the ICTY just being set up, and on the other hand you have the International Conference of the Red Cross and Red Crescent. States, in other words, mandated the ICRC to carry out a study on customary international humanitarian law.

There were clearly very significant parallels, very important parallels in the mandate in terms of assessing and clarifying content of custom. Because that is how we have perceived: our mandate is on behalf of states to clarify the content of customary international law, because we all know it is there, it exists, but the exercise of capturing custom, of taking a photograph of the moment of what custom is today is actually very time consuming if you want to follow a traditionalist approach and look for a general practice accepted as law, which is what we set out to do. So, our methodology was very much inductive, which also explained why it took 10 years to complete the study, because we had to collect practice, to examine practice, and inductively assess whether customary law existed. To this subject, of course, we could devote another two-day conference.

I have been involved in many discussions on the concept of customary international law. We have discussed what it means to have a general practice, how widespread representative and uniform the practice has to be. And generally, we then said, there is no mathematical formula, it differs, it depends on the subject matter. Secondly, practice, what does it mean “practice”? Is it verbal and physical practice? Is it only physical practice? In that respect we were able to rely on the *Tadić* decision which also indicated that for IHL practice very often has to be looked at in the substance, in the content of military manuals, official pronouncements, national legislations, because information of actual battlefield practice may not be available or may not be correct. In addition, I would say, military manuals also at the same time reflect, very often, the *opinio juris* of the state concerned. So, we have also relied on military manuals, national legislation and official pronouncements. And thirdly, the third element of the definition of customary general practice, accepted as law - the so called *opinio juris* - and there we have very often been criticised to say that we have taken statements from military manuals out of context and that it does not necessarily reflect the *opinio juris* of states whenever they put certain statements in the military manual. Of course, it is difficult to argue with that because no one can actually read the mind of a state, if such a thing existed. But our methodology has been, and our argument has been, to say that we do not look at each and every individual piece of practice, each and every individual resolution or military manual, but we look at the totality of the practice. And the totality of the practice, I think, for each of the rules that we identified, indicates that we are talking about rules of law in so far as the customary rules are concerned and identified. In other words, *opinio juris* would say that what made the difference between the rules of law and practices which are followed is

a matter of convenience, a military convenience or political convenience. And so, when one looks at the totality of practice, let's say on the subject of pillage, it is clear that the statements, the resolutions, the combinations, the pronouncements, the military manuals prohibiting pillage, clearly indicate that this is a rule of law, and not a rule of military convenience or political convenience. So, we look at the totality of the practice.

The outcome of the study, which was published in 2005, was that we assessed 161 rules to be the part of customary IHL, 13 of which applied to only international conflicts. Just two applied to only non-international armed conflict - on reprisals and amnesties. The large majority of the rules, 146, applied in both international and non-international conflicts. So, this was 2005, 10 years after the famous *Tadić* decision. Of course, this conclusion, to some extent or to a large extent, was possible also because of the evolution set in motion and the precedent created by the *Tadić* decision. So, synergies in content and methodology... obviously, in 2005 we were able to rely on the case law of the Tribunal as it had developed up until then.

There is a difference between the study and the case law. It was easier for us, in other words, to assess the custom and nature of some rules in 2005 because by that time practice had significantly developed. And I think today, while we continue to collect practice, we see that the rules that we assessed in 2005 are actually reinforced. Practice continues to reinforce the existence of these rules, whereas the Tribunal had, I would say, a more difficult task: to assess if the custom existed at the time the acts were committed, in 1991, 1992 or 1993. Another difference is that we looked at the primary rules: pillage is prohibited - whereas the court had to take one step further. Pillage is not only prohibited, but pillage is also a war crime; and established criminal liability attached to such an act under customary international law.

The case law of the ICTY was specifically relevant to our study of the rules dealing with the conduct of hostilities, Rules 1 to 24. This includes the prohibition of indiscriminate attacks, the principle of proportionality, and also rules related to precautions in attack, including Rule 2 - prohibiting the terrorisation of the civilian population, to which I will turn in a minute; Rules 38 and 40 on the destruction of cultural property; Rules 50 and 52 on the destruction of property without military necessity, and pillage; several of the fundamental guarantees, and particularly violence to life, torture, cruel and inhuman degrading treatment, rape and other forms of sexual violence and slavery, the rule on forced displacement; several rules on criminal responsibility, including command responsibility, including in non-international conflicts; and also the definition of war crimes, again including war crimes in non-international conflicts. These rules reflect also, of course, to a large extent, the facts that occurred in the former Yugoslavia, the violations that

occurred. Our study covers other subjects, but for those subjects - for example, treatment of the dead, the missing, or the treatment of the detainees - we found less support in the case law of the ICTY, simply because the court did not deal to a large extent with these rules.

Just a few highlights from these rules and the cases that dealt with them... What strikes me and what I think is part of the global legacy of the ICTY is that a court, in applying these rules, has applied rules that so far have not been applied in court. Rules related to the conduct of hostilities, for example the prohibition against terrorising the civilian population, had existed, but as they existed, the specific wording and additional protocol had not been in practice, had not been tested. I think that is very important. The value added of the case law, therefore, is also examining the contours or the definition of those crimes or those acts. Definition of rape has been mentioned, definition of torture, deportation, the law on command responsibility and in the *Galić* case, on the terrorisation of the civilian population. Exactly what it means? What this violation entails? And so the court, for example, found that the actual terrorisation of the civilian population is not an element of the crime; that the *mens rea* of the crime consists of the intention, the specific intent to spread terror among the civilian population. This intent can be materialised by direct attacks, but also by indiscriminate attacks or by launching disproportionate attacks. And the fact that other purposes of those attacks may have existed does not mean that the intent to terrorise did not exist. The intent to terrorise can be inferred from the circumstances of the acts or the threats of violence. So, I think it is extremely important. Part of the legacy of the Tribunal is to have applied these norms, to give life to them, to show that they are actually all relevant, and also to define the contours, the definition which, from the practitioner's point of view, I think, is extremely important. It is actually bringing the law of the books to reality or from the classroom to the courtroom. The same with the law on command responsibility - and *Hadžihasanović* has been mentioned.

In this respect, there are clear synergies between the ICRC study and ICTY case law, because some of these cases were decided after the publication of the study, and the court was thereby able to actually refer to a practice in reality. This had already happened also by the Darfur Commission, for example, which later led to the referral of the Darfur situation to the ICC. So, what I think is remarkable in this respect is that, unlike some other national tribunals or commissions which have referred to the ICRC study's conclusions, the ICTY has actually relied on the practice underlying the study.

The rules are in that sense tip of the iceberg, but underneath those rules, underneath those conclusions, is this massive amount of practice to which the court has been able to turn. And that explains why today we are continuing to update Volume Two of this ICRC study, this collection of practice, because we

think it will continue to be relevant for practitioners to be able to assess customary international humanitarian law. So we make this collection available online on the website of the ICRC. We have, in that respect, the project based at Cambridge University which is continuing and next Monday we are launching a new update of national state practice on that database. These launches go by instalments and next spring we will then launch practice from Spanish-speaking countries. So, this is just to underline that the ICRC study in customary international law is not only about the conclusions, the rules of customary international law, but it is also about collecting, analysing and cataloguing practice on international humanitarian law. Because, without a collection or practice, one cannot use traditional approach and examine whether widespread practice exists underlying customary rules.

I will wrap up now to say that the conclusion that we reached, I think, and the synergies, in particular between the case law of the ICTY and the ICRC study, is of course in the field of non-international conflicts. In particular, applying the concept of war crimes to serious violations in non-international conflicts and applying the rules on the conduct of hostilities in non-international conflicts; and also the rules on command responsibility.

I can understand that criticisms have been raised against ICTY case law because we have also been criticised: "How could you reach so many conclusions on non-international conflicts, how could suddenly so many rules on non-international conflict became part of customary international law?" Of course, one has to look at the practice, examine each rule in detail, but I would say – to be general and brief – that this evolution is part of the evolution of international law in general.

We see that starting with the CCW, Protocol 4, which in October 1995 was still limited to international conflict, the year after, in May 1996, Protocol 2 was amended to cover international and non-international conflicts. And every treaty since then, the ICC Statute, the Hague Protocol and Cultural Property in 1999, the amendment of Article 1 of the CCW, the Chemical Weapons Convention, the Custom Conventions, the Special Court for Sierra Leone's Statute - all of them have been applied in international and non-international conflicts. So we see that starting from 1995 there is also willingness on behalf of states to apply and to basically tear down the wall between the law on international and non-international conflicts; and we see it also reflected in Security Council and General Assembly resolutions. Remember what they deal with! These resolutions dealt with conflicts in Afghanistan, Angola, Bosnia, Burundi, the DRC, Liberia, Rwanda, Sierra Leone, Russia for Chechnya, Somalia, Sudan, Darfur, Tajikistan, and Yemen - so, all situations of non-international conflicts. So, state practice basically caught up with reality and realised that these rules on the conduct of hostilities, command

responsibility, war crimes, had to apply to non-international conflicts. But it was still, I would submit, through state practice that these transformations took place.

I will conclude by saying that we have bridged the gap between international and non-international conflicts, but, of course, the gap is not closed. Still differences continue to exist. The wall has been torn down, as Georges said, but remnants are left. There are still specific rules on combatants and combatants' status, occupied territory that differentiate the law of international and non-international conflicts, but overall the fundamental rules, the basic rules that govern the conduct of hostilities and the treatment of victims, today are the same, and that to a large extent is also due to the legacy of ICTY.

Thank you.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

I will now invite Mona Rishmawi who is a very old friend of mine and Chief of the Rule of Law Division of the Office of High Commissioner for Human Rights to share with us her perspective on the influence and impact of the ICTY jurisprudence on customary law in the work of the UN on human rights. I would like to use this occasion, since I mentioned this organisation, to acknowledge the presence here of Judge Navi Pillay, the High Commissioner.

Mona.

Mona Rishmawi, Chief of the Rule of Law, Equality and Non-Discrimination Branch, Office of the High Commissioner for Human Rights

Thank you very much. Thank you, Judge Meron, and thank you all. It is a big honour and a pleasure to be here. I must say it is very difficult to be on this panel without Nino Cassese who was supposed to be on this panel with us. His premature departure has left a huge vacuum that I think we felt already through the way he was mentioned here, a vacuum that will be very difficult to fill. I, frankly, was very much looking forward not only to hearing him, but also teasing him, because a number of things that I will mention, that I will say about human rights law and customs, are inspired by him. Nino and I worked together on the Commission of Inquiry on Darfur. He was the President and I was the Executive Director of that Commission, and we developed a long friendship before and after the Commission. This Commission was one opportunity that Nino, as he liked to be called and we liked to call him, used to shape the minds and approach of international law and lawyers, and, as I say, some of what I will say today was inspired by him.

The impact of the record of the ICTY on international law, particularly customary and international human rights law and criminal law, has been already discussed a lot. Now I will focus on human rights law. I will talk about two dimensions. I will talk first about the correlation between the ICTY and human rights law in the legal sense and then I will try to show some operational axes between OHCHR and ICTY.

Human rights law has developed a lot since the conflict in the Balkans. Today much of the human rights law is codified in treaties. All countries in the world are party to these treaties; they have ratified one or more. Actually, an average of two to three human rights treaties are ratified per country. The implementation of human rights obligations is discussed very regularly in open fora through the participation of members of the international community, States, NGOs, in different situations such as by treaty bodies and so on, but most importantly, in a process called Universal Periodic Review, which takes place in the context of the work of the Human Rights Council. Yet, I think there is a lot to be said about correlation and the issue of customs. I would like to mention three issues that I think are quite important. Judge Meron wrote about the conversion of international human rights and humanitarian law; humanitarian law - as you called it - being humanised by human rights law. And he noted that there are multiple laws in which human rights law has shaped the provisions of the international humanitarian law. This process has been clearly visible in the jurisprudence of the ICTY where chambers have looked at international human rights law to assist them in crystallising humanitarian law norms.

I would like to mention particularly two issues here: unlawful confinement is the first one, and then I will go into genocide.

With regard to unlawful confinement, the Chambers at the ICTY have contributed significantly to the elaboration of the legal regime applicable to internment of protected persons during conflict, particularly through filling some of the protection gaps that existed through the incorporation of the human rights law into the humanitarian law framework. Together with this establishment of clear standards for detention of persons, generally the ICTY has assisted in strengthening the reserve as well as the legal protection against unlawful forms of detention. Two dimensions of detention are important: treatment of detainees and lawfulness of the detention itself. With regard to treatment, we heard this morning, several times, mention of the ICTY jurisprudence with regard to the definition of torture and how the ICTY dropped the requirement of a public official or other persons acting in public capacity from the definition of torture. This was a very important contribution that was carried through during the drafting of the Rome Statute, and this phrase which exists in the Torture Convention was also dropped from the ICC Statute in the definition of torture, a very important ICTY contribution in this regard.

If I may respectfully say, however, the ICTY is yet to address head-on the important diversion of rules between human rights and IHL with regard to the legality of detention, legality of confinement, and imprisonment during conflict.

With regard to the crime of unlawful confinement, the trial and appeal chambers have limited themselves to restricted provisions in the Geneva Conventions, although there has been a greater acknowledgement of the important contribution of human rights law in relation to imprisonment as a crime against humanity. Human rights law provides a rich source of norms and principles that would serve to bolster the protection of those placed in confinement or custody. Under Human Rights Law Article 1 of ICCPR, arbitrary arrest or detention is prohibited. The same article establishes the minimum procedures of safeguard that must be conducted accordingly to all detainees, including the right of everyone who is deprived of his liberty, by arrest or detention, to take proceedings before a court in order that that court may decide without delay on the lawfulness of the detention. In other words, Article 94 establishes a right of judicial review of detention. This right of judicial review has been particularly contested in the last few years, particularly in the context of the Guantanamo detainees and the rest of other individuals in the so-called “War on Terror”.

While the review of requirement is required in the Geneva Convention in the context of international armed conflict, only the bare minimum is provided. Such a basic system is open to abuse and there are multiple instances of such abuse. Moreover, in internal armed conflict, Additional Protocol II is completely silent on the question of review. There is no obligation on the detaining party to instigate any form of administrative or judicial oversight of detention. In light of the fact that there is no clear obligation to release detainees at the end of hostilities, this places detainees in a vacant legal vacuum. I saw first-hand the impact of this only recently when I visited Libya, only a few weeks ago. There are thousands of detainees that are being held in makeshift prisons, in makeshift detention centres, already subjected in some instances to torture and other forms of ill-treatment, and without any effective recourse to legal processes or to legal remedies. The application of human rights law, particularly the prohibition of arbitrary detention, and the simple system of screening, would have elevated a lot of the difficulties that we saw recently in Libya. Human rights law in such strenuous situations provides an important legal remedy and protection against abuse.

There is now some thinking about looking at the Convention on Detention, and that could be one of the gaps this correlation between human rights and IHL can look into.

I would like now to turn, just for brevity's sake, to the other area that I think it is very important to touch on. It is the ICTY's contribution in the context

of genocide. OHCHR has to... - many times my Office – the Office of the High Commissioner, who is present here - has to look at whether in particular cases particular criminal acts of certain gravity may amount to genocide or crimes against humanity. Here, the jurisprudence of the tribunals has had to do that several times. The last one was in the context of DRC, in the situation of the DRC. Here the jurisprudence of the International Tribunal has become extremely important to how we look at these questions. But maybe I should start with an important case at the ICTR, in *Akayesu* which was decided in 1998, and was the first case in which an international tribunal was called upon to interpret and apply the definition of the crime of genocide. The panel of judges which included our own High Commissioner, Navi Pillay, when she was with ICTR, considered the meaning of "ethnic group" and also the important judgement of rape and sexual violence as it contributed to genocide. There is also the important media case on incitement. The ICTY built on this case law and in *Krstić* with regard to the Srebrenica massacre, in this case familiar to many - the court considered what contributed an element of part of national or ethnic or religious group. This particular part of the population definition is extremely helpful in a practical sense when we look at the application of the Genocide Convention.

I would like now to move into what I call the "operationalisation" of human rights law. And I would like to mention five areas in which basically the ICTY's and OHCHR's work in practice has actually overlapped, and how the OHCHR has been enriched by the work of the tribunals in general. First let me say that two out of the five high commissioners so far come from the tribunals. The influence of the Tribunal is also clear in the method of work that we have. Our two institutions have complementary mandates of combating impunity, undertaking fact-finding - although in different ways - and establishing facts with regard to events, enhancing accountability and supporting victims.

Let me start with the first issue that I want to talk about, which is the importance of a pattern. Cooperation with the ICTY from our side and other independent substantive applicable rules established by the Tribunal led OHCHR to be much more aware of the importance of establishing the pattern of violation. The High Commissioner for Human Rights, as well as the country and domestic special rapporteurs, issued public reports seeking to establish the facts with regard to specific violations. These reports have become an important source of information for the tribunals, first the ICTY and later the ICC. Fact-finding is undertaken in many forms, including through the mandate of the High Commissioner, the special rapporteurs, the treaty bodies and so on. OHCHR staff, on occasion, special rapporteurs sometimes, have cooperated with the tribunals, when the request was made to us. The High Commissioner has always been systematically cooperative, allowing the sharing of documents with the tribunals, documents that OHCHR

has gathered. We have witnesses who actually testified before the tribunals. In all those instances, contextual information and information that has enabled the finding of the pattern of the violation has been provided to the tribunals. Often our staff has been used for background purposes. Also important are commissions of inquiry and fact-finding missions. These are increasingly used tools by the Security Council, the General Assembly, the Human Rights Council, the Secretary-General and the High Commissioner to respond to international peace and security issues and to promote and protect human rights and ensure accountability for serious violations of human rights and IHL. The OHCHR to date has supported more than 30 commissions of inquiry and investigative bodies. In fact, the OHCHR work goes back to the Commission of the Experts on the former Yugoslavia in 1993, which we actually supported, as well as the one in Rwanda in 1994. Right now we are supporting, actually this year we have supported five such bodies, including working on situations such as in Sri Lanka, Cote d'Ivoire, Libya, Syria and Yemen.

The common mandate of these Commissions is to examine if human rights and IHL violations are taking place. A question typically asked is whether such violations constitute a pattern of violations which indicate gravity and whether the threshold for international crimes has been met. Determining the pattern of violations is also important in assessing whether or not a state has responsibility, and not only state responsibility but also individual responsibility has been established.

Recently, the International Commission of Inquiry in Libya and the fact-finding mission in Syria uncovered patterns of human rights violations which led them to conclude that there have been widespread and systematic attacks against the civilian population and consequently that crimes against humanity may have been committed. This has led to the calls for the referrals of the situations, certainly of Syria, to the International Criminal Court and in the case of Libya there were simultaneous processes between the Security Council and the Human Rights Council in terms of fact-finding and referral to the ICC.

I would like to mention two important issues. The other issue that I want to mention is identifying perpetrators. It is not uncommon for commissions of inquiry to ask to identify perpetrators. Here I would like to mention three issues with regard to the commissions of inquiry and how they actually worked on identifying perpetrators. The first one regards the standard of truth. Here the commissions of inquiry rely a lot on the jurisprudence of the tribunals to look at the standards of truth. In the famous Darfur Commission, Nino Cassese actually wrote that the commission could not comply with the standards normally adopted by criminal courts or those used by international prosecutors and judges for the purpose of confirming an indictment, and so adapted the standard of proof to the needs of specific commission of inquiry which became the standard that we use in all other commissions of inquiries that were mentioned. The second one is the

method to identify perpetrators and the third is naming perpetrators. But I will not mention those for now.

I am going very quickly because I want to get to my last point which I think is very important to mention – it's the issue of reparations. Historically, the focus on the fight against the impunity has been focused on trying perpetrators. This has not been balanced with an effort to restore the victims' sense of dignity. The right of remedy and reparations to victims has become firmly enshrined and elaborated in the corpus of the international human rights and humanitarian law. The GA in 1926 adopted some guidelines in this regard. It is clear that the ICTY is aware of this framework. In its report to the Security Council and its latest report to the General Assembly, delivered on 11th November actually, President Robinson called for a reparation fund to be established for the victims, acknowledging that failure to address the issue of compensation constitutes a serious failing in the administration of justice of victims. We very, very much welcome this and we think this is extremely important.

I would have liked to elaborate a bit more on this issue, but I just want to stop here and thank you very much for your attention.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

Thank you very much, Mona, this was extremely interesting and I am glad that you raised a number of issues on which we have not really focused on this morning.

With regard to detention, if I may also add, as a little commercial for the Tribunal, treatment of POWs in the *Vukovar* case is the first ever judicial determination with regards to authoritative interpretations of the Third Geneva Conventions where we confirmed the rule which already appears in the Third Geneva Conventions that if an army takes custody of POWs they may not pass custody of those POWs except to an entity which is capable of properly exercising protection and giving protection to those POWs. This was a very, very important normative ruling which was not made before by judicial institutions. And the second point which I find very interesting was the role of the *ad hoc* Tribunals with regards to human rights protection. Actually, in one of the post-war issues of the British Yearbook of International Law, a scholar by the name of Joyce Gutteridge, who also worked in the Foreign Ministry in London, wrote an article about the history of the Geneva Conventions and analysed in that context Common Article 3 of the Geneva Conventions, and asked if this Common Article 3 does not really state some very fundamental principles of human rights. Of course we, as a tribunal, apply humanitarian law, but if we take Common Article 3 or the various rules stated in the provisions on crimes against humanity, we see that there

is a very considerable substantial overlap between things normally portrayed or presented as humanitarian law and the human rights content - and this applies to Common Article 3, to crimes against humanity. For example, the prohibition of persecution - how to distinguish between that really except apart from the context between those prohibitions in humanitarian law and in human rights. And with regard to gender, there is a tremendous overlap between the prohibition of rape and humanitarian human rights law. And finally, when it comes to the provisions on fairness and due process, I do not believe, apart from the European Court of Human Rights and the American Court of Human Rights, that there has been any tribunal, which devoted so much attention to elaborating and giving proper foundation to due process and fairness and that again is not only a provision of humanitarian law clearly stated in the protocols in the Geneva Conventions, but also it is a fundamental rule of human rights.

Now there is very little time so I will turn the microphone over to others. We have room for a few questions. We have some microphones in the back, so if you would like to speak, please raise your hand and you will be given the microphone.

Question from the audience: Harmen van der Wilt, University of Amsterdam

Thank you. My name is Harmen van der Wilt, University of Amsterdam. I would like to ask the whole panel: what makes the ICTY and the ICTR so special; what is the greater authority of their decisions for the establishment of international criminal law when compared to national courts? I would like to shortly elucidate my remark - as we all know, the complementarity principle will trigger lots of decisions by national courts, and, in the near future, they will inevitably contribute to the development of international criminal law. Do you foresee a very productive cross-fertilisation between international criminal tribunals and national courts, what is your opinion on this issue?

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

James, would you like to say something about the authority that we have in terms of stating the law in comparison to national courts? This is really something on which you have so much authority, and then I would like Georges to fill in on that.

James Crawford, Professor of International Law, University of Cambridge; Research Professor, Latrobe University, Australia

Well, authority in this field... it is not generic, it is specific, and specific to institutions and it has to be earned by them, and that is true of national courts as well

as international courts. National courts oversee it and consider it a disadvantage in terms of stating what international law is, because of their own situational and constitutional constraints which means it is all more remarkable when they do it, as has happened recently in the House of Lords in a number of cases.

As to the ICTY, and what you heard what I said, the Tribunal has contributed very substantially to the development of international law, and once you have done that, you can turn around and say: "Well, that's the way it always was" - and it is obviously not true - there is a historic process going on, which is necessary and because of the situation the Tribunal is in, we can only appreciate what they have done in the light of its ultimate wisdom or lack of wisdom. So, it is one of the peculiarities of international law that although there are bodies like, for example, the International Court where there is inherent authority, of course the court has been in business for 90 years or the best part of it. For most tribunals and for all individuals, authority is very hard won and possibly more easily lost than this one.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

Maybe you would like to add something to the legitimacy of reasons, for the legitimacy and the credibility of the ICTY?

Georges Abi-Saab, Professor Emeritus for International Law, Graduate Institute of International Studies, Geneva; Former ICTY Judge

I would not say the ICTY as such, but in general.

First of all, let me say that a national judge is more the natural judge in criminal law, because he is much closer to the fact, et cetera. But the national judge acts on the national law and unless we have a perfect match between international law and national law that what is criminalised in both is reflected peacefully on the national level and is administered in an unbiased manner, we may not need international tribunals. But unfortunately, if we speak of what we are speaking about here and in the recent future - we are speaking of situations where national courts are infected for different reasons, whether because a state is a failed state, or because of bias, or because of very strong feelings, et cetera.

So, if we are looking at international crimes, obviously international tribunals have greater significance, because as James has just said, what a national judge does - you do not know if he is really speaking of international crime... Most international crimes constitute regular crimes in every country plus they contain an element which makes them international. And in order to find this plus, international courts and tribunals are directly more habilitated to explain it. Moreover, they are

reachable, while when we speak of a national judge - James has mentioned the House of Lords, et cetera - but for the vast majority of national judges, what they do is not known to the rest of the world. So, in every way that I mentioned, the international tribunals have greater significance than national tribunals, as far as international crimes - we are speaking of international criminal law.

Thank you.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

Thank you very much, Georges. If I could add to what my distinguished colleagues said...

First I must say that I could not agree more with a comment made by James a moment ago. International courts, like national courts, have to earn the trust and the confidence of the international community, of governments, of scholars, and jurists. We were greatly helped by the fact that the very first seminal judgement which was so important for our subsequent history, the *Tadić* case, was produced by a very, very impressive panel of judges. This does not go without saying and it is something on which we all have to work very hard and to do our very best - to produce judgements which are not only fair but well based on the law and expressed in a way that will be persuasive to jurists and to colleagues. But I would like to add to this discussion one other element - the importance and the greater added value of international judicial precedents. Take again the *Tadić* judgement. The *Tadić* judgement pronounces something which at that time was not necessarily accepted. The applicability of most rules of humanitarian law, previously, considered as applicable mostly within international contexts, is applicable also to internal contexts. The fascinating thing about that interlocutory appeal of 1995, I now believe, was how quickly its authority proved to be accepted by governments. And the governments, just a few years earlier, in 1977, voted down in Geneva, in the contexts of Additional Protocol II, terms to incorporate international rules so as to make them applicable to domestic conflicts. Yet, the *Tadić* precedent was not challenged and was quickly accepted. This is something that again adds to this problem of the legitimacy of the Tribunal and its credibility.

Question from the audience: Luckshan Abeysuriya, Lancaster University, United Kingdom

Thank you. Luckshan Abeysuriya, Lancaster University, United Kingdom. I have written a book on the Srebrenica tragedy and I am currently writing another book on the ICTY and its effectiveness.

I would like to address this question to the new President, Judge Meron: It is what was said by the first President, the late Antonio Cassese. He said that justice leads to national reconciliation, hopefully in the West Balkans. According to my research, some of the victims or many of the victims have not had adequate compensation or restitution. I know that the retiring President, Patrick Robinson, has been lobbying very hard to get a trust fund, a suitably financed trust fund, so that adequate compensation may be secured.

Do you think this UN trust fund is likely to come about?

Thank you.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

Thank you very much. Let me make it very clear that not only I, but all the judges of the Tribunal, are extremely grateful to Judge Robinson for courageously and without hesitation pushing for the implementation of this initiative for the fund for compensation, along the lines of what has been established for the ICC and so on. States have been supportive of his efforts on rhetorical plan, and there have been some positive developments in the sense that, I believe, the International Migration Organisation is now doing a feasibility study. But, this is not an easy concept to realise at times of grave economic crisis. However, I think that if something is right, as this project is, we should push for that even if it takes time to accomplish.

We will take one more question.

Question from the audience: Sanja Bahun, University of Essex and Director of the Essex Transitional Justice Network

I am Dr Sanja Bahun from the University of Essex and Director of the Essex Transitional Justice Network. This question actually follows up on the previous one, and is in particular to Mona Rishmawi. You mentioned the importance of reparations and restoration of dignity to victims. There are many more modes of doing that other than just establishing a restoration fund. I wonder what would be your advice to the ICTY as to what it could possibly do for the remainder of its mandate in terms of reparations, what would be the steps forward in addition to lobbying for this fund, that is, as Judge Meron has just mentioned, very difficult to lobby for in the current climate.

Mona Rishmawi, Chief of the Rule of Law, Equality and Non-Discrimination Branch, Office of the High Commissioner for Human Rights

Well, first I wish to acknowledge that the first step has been made and I think that it is very significant that President Robinson has actually put it on the

table. Putting on the table the initiative the way he put it in the General Assembly and the Security Council actually is extremely important. I think member states now know exactly what needs to be done. As you have mentioned correctly, the concept of reparation is actually multi-faceted; it includes not only monetary compensation, it also includes things like memorials, apologies and restitution and rehabilitation in the sense of psychological and physical issues, so it is a very multi-faceted notion that I think can be explored in all its forms. I think that what IOM is doing - a feasibility study - is the first step, but also I think much more can be done in the region with regard to monuments, documentation and so on. I think we can look at the role of the Tribunal, but also what can be done in the respective countries, and what the victims' groups and states can do to enhance the right of victims to reparation in this regard.

Thank you.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

Thank you, Mona. We are going to take just one more question, as someone is already waiting with the microphone.

Yes, please.

Question from the audience: unknown speaker

I would like to ask two questions, which are actually linked. Ms Mona has talked about the impact of the work of the International Criminal Tribunal for the former Yugoslavia on the development of human rights and Judge Meron has touched only briefly on that issue. I would like to know in what way the International Criminal Tribunal for the former Yugoslavia has contributed in concrete terms to the development of human rights, as discussed here, let's say regarding the indictees prosecuted by this Tribunal. And my next question is: To what extent can an international jurisdiction such as the Tribunal for the former Yugoslavia apply the laws of the home countries of the indictees? This is, after all, the legal system with which they are familiar. Thank you.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

I believe we have answered the question of the contribution of the Tribunal to human rights. I just spoke of the application of Common Article 3, about the application of various prohibitions listed as crimes against humanity; of our record of jurisprudence in human rights in due process, and due process and fairness.

Mona Rishmawi, Chief of the Rule of Law, Equality and Non-Discrimination Branch, Office of the High Commissioner for Human Rights

If I may say something?

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

Please do.

Mona Rishmawi, Chief of the Rule of Law, Equality and Non-Discrimination Branch, Office of the High Commissioner for Human Rights

I think there are a few things to keep in mind. I think there is of course a very important and very significant contribution to the formulation of legal standards. We saw this recently in a way - I actually wanted to talk about it a bit, but due to the time limitation I did not - how disappearances were considered in the context of the formulation of the convention on disappearances; how the crime of enforced disappearances was actually looked at in the human rights context. I think that the formulation of the legal principles is very important in terms of how the tribunals look at the practical application of them. But in my view, perhaps the most important aspect in terms of human rights work lies really in the methods of investigation. I think this is really significant, because the tribunals dealt with them and a lot of very important issues about witness protection, about how to deal, although there is no victims' fund, but how to deal with victims. About how to name the perpetrators in a very responsible way, because people, of course, have the presumption of innocence, have the right to due process, have a lot of issues to be considered. So, for me, what the tribunals have been doing, and particularly with our work, is really adding this important dimension to actually operationalising - as I call it - the fight on impunity. So it's not just an empty fight, it has elements and these elements are important to take on, and we in the Office take it very seriously. We work very closely with colleagues in all the tribunals, the three of them that are operating, and also work in Sierra Leone, ICC, ICTR, ICTY, those who have human rights mandates and it is very, very useful and very enriching.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

Thank you.

Jean-Marie!

Jean-Marie Henckaerts, Legal Adviser, International Committee of the Red Cross (ICRC)

Thank you. I just want to come back to the question of national courts because I think we should nevertheless underline the importance of national courts. The complementarity principle means that, in fact, what we see coming through research is actually a wave of national case law... - so, it was mentioned that, before, national judges were ineffective and it was not a national case law or humanitarian law, so international judges set in the primary legislation that's on the books and courts. And on top of this that is exactly going to be in break of international case law. I want to underline that this national case law in the view of humanitarian law is actually state practice. Because state practice comprises the practice of the executive, the legislative, and the judiciary, whereas international case law is not state practice. International case law gains its value, as has been mentioned, has persuasive evidence that custom exists and by the precedential value of the precedents that it serves - it can then influence the development of practice. So I think the importance of national case law will keep growing and we have to, of course, keep looking at it and collect it and assess it as a contribution to state practice and the development of humanitarian law.

Thank you.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

Thank you. Before giving the floor to Judge Abi-Saab, let me just add one comment on the question of national laws.

Of course, we are a tribunal applying international law, applying international humanitarian law and all its aspects. We are not applying a general national law of this or that country. Perhaps with a certain caveat here with regard to sentencing where directed by the Statute and taking into the account the sentencing practices in the former Yugoslavia. But one thing which in our work we have to constantly bear in mind is something which pertains to comparative criminal law, general principles of justice and criminal law because this is part and parcel of the normative universe in which we operate and this we have to take and we do take into account.

Georges?

Georges Abi-Saab, Professor Emeritus for International Law, Graduate Institute of International Studies, Geneva; Former ICTY Judge

I just want to mention one small example of how international justice has energised national justice. The first time the obligation under the Geneva Conventions

of 1949 which is now accepted by all the countries of the world... the first time the obligation to prosecute or extradite was officially mentioned in a judgement of a court, of a national court – came, in Denmark I think, after the creation of the ICTY. So the fact that the ICTY came, et cetera, awakened the dormant obligation, obligation which everybody in the world has accepted as a state, and that shows the dialectics between national and international justice in this field.

Thank you.

Moderator, Judge Theodor Meron, ICTY Appeals Chamber

I know we could go on with this discussion for a long time, but we are being instructed by our masters that our time is up, I would like to thank my co-panellists very, very warmly for their brilliant performance and their great contributions and I thank you for your attention and presence here. The meeting is adjourned.

Master of Ceremonies, Christian Chartier, former Chief of the ICTY Public Information Service

Please, can I have your attention for Judge Robinson?

Judge Patrick Robinson, President of the ICTY

Mr Chairman, I was trying to get your attention to say something. I have a principle that if my name is mentioned three times I should intervene. It is in relation to what I have been advocating in the United Nations and elsewhere for the establishment of a system for assistance to the victims of the Yugoslav conflict. I have not even called it “reparations” as I believe as a matter of law reparations are definitely due, but I know that reparations is something of a bad word in the United Nations system. So I have been calling for a “system of assistance” as I am being very pragmatic about it. In the ICC, they have in their Statute a trust fund established. The victims of the Yugoslav conflict are no less worthy of assistance than the victims of the conflicts that give rise to trials in the ICC. So I want to use this occasion to appeal to everyone here, in particular to the States that are represented by their ambassadors, to support the idea which I believe is now taking root, because the IOM has been assisting us and been giving us a very, very practical and very good advice. What they said to us was: “You need to know what the needs of the victims are, do not assume that you know”. So it is a bottoms-up project. And they have raised funds of 30,000 dollars to do this appraisal and that is the very first step, so we are on the road, and I appeal to everyone here to give it their resounding support.

Thank you.

Panel 2***The Impact of the Tribunal on the Future of Global Justice and the Advancement and Enforcement of Human Rights*****Moderator:****Navy Pillay, UN High Commissioner for Human Rights****Panellists:**

- **Richard Dicker, Director, International Justice Program, Human Rights Watch**
- **Diane Orentlicher, Deputy, Office of War Crimes Issues, United States Department of State; Professor of International Law, American University**
- **Stephen Rapp, United States Ambassador-at-Large for War Crimes Issues**
- **William Schabas, Professor of International Law, Middlesex University, London**
- **Patricia Viseur Sellers, Visiting Fellow, Kellogg College, University of Oxford**

Master of Ceremonies, Christian Chartier, former Chief of the ICTY Public Information Service

This panel will focus at the impact of the Tribunal on the future of global justice and the advancement and enforcement of human rights. The discussion will be moderated by nobody other than her Excellency Ms Navi Pillay, the United Nations High Commissioner for Human Rights, from South Africa. Ms Pillay has been in the crucial position of High Commissioner since September of 2008. Prior to that, she has been serving as a judge at the International Criminal Court since 2003. Before that she had served as a judge at the International Tribunal for Rwanda, including a two-fold term as the ICTR President between 1999 and 2003. High Commissioner Pillay will lead the discussion between the following panel members:

First, Mr Richard Dicker has been directing the International Justice Program of Human Rights Watch since it was created in 2001, 10 years ago, and we know that Richard Dicker has done this with exemplary energy.

Another panel member is Ms Diane Orentlicher, who is one of the world's leading authorities on international law and war crimes tribunals. She is now the Deputy of the Office of War Crimes Issues in the US Department of State. She was

appointed by Secretary of State, Hillary Clinton, from her position as a professor of international law at the Washington College of Law.

His Excellency, Stephen Rapp, the United States Ambassador-at-Large for War Crimes Issues, a position to which he was appointed by President Obama in 2009. This crowned a career in international justice - at the ICTR, and also at the Special Court for Sierra Leone where he laid the case against the former president of Liberia, Charles Taylor.

Professor William Schabas, who has inspired so many students in international law, human rights and international human rights law in London, Galway and Paris. In addition, Professor Schabas was a member of the Sierra Leone Truth and Reconciliation Commission.

And finally, Ms Patricia Viseur Sellers, the former legal advisor for gender-related crimes at the ICTY, where she served as a prosecution attorney from 1994 until 1997. Currently a visiting fellow at the University of Oxford, where she teaches international criminal law, Ms Viseur Sellers has brought her knowledge on gender-related crimes to Spanish courts, as well as to the UN Commission for Human Rights and the UN Special Representative for Children in Armed Conflict.

I understand from Ms Pillay that the panel is going to discuss the issue for the coming hour, and the second hour will be devoted to engaging in a dialogue with you - much as we did this morning.

Please, may I request your attention to be given to the panel under the leadership of Ms Pillay.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Well, thank you very much for that kind introduction, and dear colleagues, I want to say that the panellists and I are very happy to be on the panel, that we will focus on the impact of the Tribunal on global justice and human rights.

As I observed, and you must have done the same, as we walked into the hall, we passed a large number of protesters who called themselves the victims of Croatia. So, I hope this panel will very honestly address what the ICTY means to people like them, and to the human rights of ordinary people all over the world. Now, the ICTY and the ICTR delivered on the promise of Nuremberg to have a global rule of law where no one commits crimes that shock the conscience of humanity, and that means no immunity even for the heads of state. The ICTY established that with its indictment of Milošević while he was still president. The beachhead of international law afforded by these normative legal and political adjustments emboldened forward movement to a point where international law

no longer recognises functional immunities in relation to international crimes. Even personal immunities can no longer be invoked in front of tribunals of an international character. In addition to the indictment of Milošević which I mentioned, those of Charles Taylor, Omar al-Bashir, and Muammar Gaddafi confirm this.

The tribunals helped pave the way for the ideal of an additional layer of justice operating in the global sphere to be invoked in substitution or complementarity for the efforts or the failures of states in one of their core sovereign functions - the dispensation of criminal justice. The high-profile symbol of this new order is the International Criminal Court, but we also saw humbler efforts in Timor Leste, Sierra Leone and Cambodia. States are now more willing than ever before to entertain ideas of establishing justice mechanisms that will permit foreigners to participate in varying permutations in their internal justice systems aimed at addressing gross human rights violations. And as I sit before you as High Commissioner for Human Rights, I assure you that there is a great deal of interest within national states to have the international input, whether it is commissions of inquiry, investigation commissions, or even justice systems. Right now we are helping in the DRC with their transitional justice system.

But perhaps the most evolutionary feature of the Rome Statute, the principle that the Security Council by way of referral can impose the ICC's jurisdiction on states, also finds its precedents in Resolutions 828 and 955 of the Security Council.

Now, on providing definitional clarity, while delivering on the promise of Nuremberg, the ICTY also freed us from some of the jurisprudential baggage of the Nuremberg Charter and judgements. To date, it is clear that crimes against humanity can be committed in peacetime and war crimes in internal armed conflicts, as was discussed by the first panel this morning.

What I would like to emphasise is that the definitional clarity provided by the tribunals has transformed human rights advocacy. Today, human rights advocates can revert with confidence to the concepts of crimes against humanity, war crimes and genocide when drawing attention to situations of extraordinary concern. Indeed, the application of the responsibility to protect would be unthinkable without the definitional clarity on which it is based. This and other matters will be addressed by Bill Schabas who will be focusing on minority rights and the relationship with the European Court.

On the ICTY and gender justice: where the Nuremberg and Tokyo tribunals treated rape and sexual exploitation as an inevitable and somewhat negligible side effect of war, the ICTY and ICTR recognised the centrality of these crimes and helped shed light of women's experience of war. In the *Furundžija* judgement handed down shortly after the ICTR had held in *Akayesu* that rape can

be a constituent element of genocide, the ICTY affirmed that rape can amount to torture. This rape-is-torture finding is not just a legal finesse, but has very real implication for victims. A little while ago, a human rights defender, who had been raped by the henchmen of a military dictatorship, told me how important it was for her to be able to present herself as a victim of state torture, given the stigma that rape, unfortunately, still carries in her country of origin. I will leave it at this anecdote as I am certain that Patricia Sellers will provide us with a much more comprehensive review of the ICTY and ICTR advances, and also of our failings in the field of gender justice.

Now, on execution of arrest warrants, perhaps one of the most remarkable achievements of the ICTY is the fact that every single arrest warrant that the Tribunal ever issued was eventually executed. Not even Mladić and Karadžić have escaped the long arm of international justice. And Ambassador Stephen Rapp and perhaps Richard Dicker from Human Rights Watch will shed more light on the complex issues linked to this aspect of the ICTY's legacy.

Let me just mention that one key factor undeniably was that the member states of the European Union placed justice over narrow trade and investment interests in dealing with accession candidates from the former Yugoslavia. Conversely, I find myself time and again in a position of publicly upbraiding states, some small, some very large, that have refused efforts aimed at arresting or diplomatically isolating subjects of ICC arrest warrants. I can only hope that the rapid changes brought about by the Arab Spring will give leaders an occasion to pause, look at their trade relations and political alliances, and revisit their priorities vis-à-vis regimes that manifestly fail to uphold human rights.

Global justice with local impacts... - we are not here to present laudatory speeches for a venerable institution approaching retirement. Discussing a legacy also means acknowledging shortcomings, and the ICTY had a few notable ones. Global justice has to have a local impact in this context; in this context it has often been a criticism that the ICTY and ICTR failed to bridge the gap between themselves and the people who lived through the crimes under their jurisdiction. This was more than a geographical divide.

So, I do look forward to Diane Orentlicher presenting to us her research on public perceptions of the ICTY's work in the former Yugoslavia. From my own experience, I can say that we waited too long to systematically reach out and explain our work while local perceptions on the ground were gradually crystallising into firm convictions.

Now, on victim participation and reparations, the two Tribunals, I must confess, did not provide much room for victim participation in the proceedings: victims could not join proceedings as civil parties, let alone claim reparations

directly from the ICTY or ICTR. And in this regard I must acknowledge the consciousness of all the judges on the Tribunals to this gap in their Statutes, that justice was not fully rendered until assistance to victims, both in participation and in the proceedings and reparations are addressed. And I must join the voices this morning and also credit judge... - I was thinking whether he is retiring or outgoing... he is still the President of ICTY - President Robinson, who confronted the powers at the UN a few weeks ago speaking for all the victims who suffered as a consequence of the crimes tried by his court, and demanding that those victims be assisted; and I really wish you well and support your endeavours to raise funds for this trust fund.

The Tribunal's experience shows that retributive justice without reparation is not enough. But this does not answer the question of how to provide reparation where hundreds of thousands of victims and their families could present claims and many perpetrators are indigent. Clearly, the experience of the interplay between the findings of the ICTY and the subsequent judgement of the International Court of Justice in the Bosnian genocide case does not provide much of a response.

A small word on early release and rehabilitation, which was also discussed in this morning's panel. The ICTY has triggered a lot of negative reactions among victimised communities who felt that it released convicts like Biljana Plavšić too early, especially since the ICTR has refused to agree to the early release of any of its convicts. So - although I was one of those who signed the five sentences of imprisonment "for the remainder of your life" - as High Commissioner, the huge conscience about that sentence... - I truly think that the question of parole and early release should be addressed. This is another gap in the Statute. In fact, human rights law recognises rehabilitation as an essential aim of imprisonment which logically implies that even those sentenced to life imprisonment should have a chance to be considered for early release.

However, I feel that we should think a bit harder about ways in which sentencing and early release practices can contribute to reconciliation in the society concerned; the paradigm of articulated administration of justice: the Tribunals were exclusively international tribunals and their jurisdiction enjoyed primacy over that of concurrent national jurisdictions. Developments since have entailed a steady movement away from this model to a paradigm where the international is articulated just enough to ensure an effective and fair administration of justice. This paradigm is driven by concerns that international tribunals are too remote from local communities. Financial constraints are undoubtedly also at play, given that the ICTY and ICTR are expensive endeavours. In light of the many competing demands for international justice, it will not be realistic to lightly brush such pecuniary considerations aside.

The first expression of the articulated model of administration of justice can be found in the complementarity principle set out in the Rome Statute. The ICC only comes in where national mechanisms are unwilling or unable to investigate or prosecute. The model arouses mixed feelings. On the one hand, it can create very divisive debates when some states clamour for the right and opportunity to try suspects themselves without necessarily being ready to do so. On the other hand, complementarity has had many positive effects: it has spurred states to integrate international crimes into their domestic law, and launch prosecutions on this basis. Many even expand the basis for the exercise of jurisdiction in relations to crimes committed abroad which has meant *de facto* travel sanctions for many perpetrators. I think what is often little understood is the fact that the fewer the number of the cases that make it to the International Criminal Court, the better the Rome Statute regime works.

A second aspect of the articulated administration of justice paradigm has been the setting up of hybrid tribunals in the affected country, either international tribunals integrating national judges or national courts that also have international judges on the bench. Hybrid courts may appear to be financially and politically more palatable alternatives to the classic kind of international tribunals in the model of the ICTY. However, we have also seen the drawbacks for the independence and impartiality of the process where national judges and prosecutors remain under the sway of national executives or strong local opinions. Perhaps we have to consider whether the pendulum needs to swing back a little towards more international justice.

So, with these remarks I have great pleasure to hand over to the panellists who will each take about 10 minutes, and I think I was below my 10 minutes. So, good example, then.

So, Diane Orentlicher will be speaking on the experience of justice on the ground in the region.

Diane Orentlicher, Deputy, Office of War Crimes Issues, United States Department of State; Professor of International Law, American University

It is such an honour, as well as a pleasure, to participate in this conference which provides a very special opportunity to explore the historic, and indeed transformational legacy of the ICTY. As we reflected, this conference covers what the ICTY has achieved in the past 18 years, and I find it instructive to recall early reports of its somewhat inauspicious opening. A press report wire service account of its first day in business, published on November 18th 1993, proverbially says it all: “The first war crimes tribunal since World War II opened today amid doubt that it had enough documented proof of power to punish those guilty in the former Yugoslavia”.

So, against these rather low expectations and daunting challenges confronting the Tribunal, its subsequent achievements have been nothing less than remarkable. Before I say more, I have to say that although I am for two more weeks a US government official, I will be speaking today in a personal capacity, and my views do not necessarily reflect those of the US Department of State. When I say I am speaking in a personal capacity, I actually mean that in more ways than one: The opportunity to reflect with this distinguished group about what the Tribunal has achieved really could not be more meaningful for me personally. Lecturers already saw I am feeling a bit nostalgic about the early years of the Tribunal. I have had the very good fortune to be involved with this Tribunal as an outsider from even before it was created; I was among a group that our Ambassador of the United States, Ambassador to the UN at the time, Madeleine Albright, invited to advise her on, what was then the draft Statute of the ICTY. So, I go back a long time with this Tribunal.

More important, when Richard Goldstone was appointed the first Prosecutor in 1994, the first effective Prosecutor, he asked me if he could, as he put it then “call on me from time to time for legal analysis”. And of course, I said “of course”, having no idea then what I was signing on for, because that began a deep involvement in the work of the ICTY, working with the Prosecutor’s Office in its early years.

When I reflect back on that period, much of my work in those early years was very much in the nature - and I had the sense at the time - of legal archaeology. My students and I often felt we were excavating the law of Nuremberg and other post-war prosecutions, much of which had not been directly applied for roughly half a century. And we were then trying to rapidly fast-forward and apply that law to contemporary issues. In rather stunning contrast, as people have remarked throughout the day, the jurisprudence of the ICTY and the other tribunals that followed in its wake are now very much a living, growing contemporary law, hardly in need of dusting off; it has been applied and interpreted in national courts across the world in a very positive development.

Although I worked primarily with the Office of the Prosecutor in those early years, I soon came to know the Tribunal’s first President Nino Cassese and with others who have spoken today, I have to acknowledge that his passing is a terrible loss, but of course he leaves an extraordinary legacy. One of the reasons the ICTY has had such a global impact, and I think Judge Meron alluded to it earlier, is that it benefited from really exceptional talent, a very important factor in its leadership, judges and prosecutors, among whom Nino Cassese was a towering judgement.

But I also want to acknowledge that there have been so many other important contributions. Judge McDonald deserves extraordinary credit for her

genius in recognising the importance of developing an Outreach Programme several years into the Tribunal's work. Madame High Commissioner Pillay, as we all know, played a pivotal role in ensuring that the justice of these international tribunals also provided justice for the victims of rape. I did not go back and refresh my memory, but my recollection is that there was a dramatic moment in Akayesu trial when witnesses were bringing up evidence of rape, which had not been included in the charges, and as judge she said: "Wait a minute, wait a minute, wait a minute! Why isn't this in the indictment?" And the indictments went back and were refreshed. That was a really... I may have gotten some of the details off, but it was an electrifying moment and a turning point in the attention paid to gender violence.

So, I want to fast-forward to roughly 2006, which was 10 years from the time I was last on the ground in Bosnia in my work for the ICTY. At that point, I was struck by the fact that there was a rich academic literature about the jurisprudential development of the ICTY, but at that point – and this has changed – very little reflection on what its impact was in the region that was most directly affected by its work. So, I undertook a study that tried to begin to get my arms around the question of what this Tribunal's work meant for people in the region. So, I undertook a sort of an initial cut of discussion from my point of view, looking at the Tribunal's impact in Bosnia and Serbia, trying to understand what the work of this Tribunal had meant for people in the region, and also what they would consider to be 'success' on the part of the Tribunal. So, when I started in Serbia where, of course, public opinion had long been overwhelmingly hostile to the Tribunal, one striking point that I think had not been obvious to me until I began this research was that the work of the Tribunal was deeply valued on principal grounds by a relatively small... - the very committed minority of citizens which I think across time had been roughly 15 per cent of the population, who supported the ICTY on principled grounds rather than pragmatic grounds. And, quite importantly, I think, the ICTY became a focus of their efforts, of their moral efforts to insist that their country comes to terms with and then acknowledge the role of its leaders in the violence in the Balkans conflicts.

When I asked people in that category, the committed 15 per cent, why they supported the ICTY, what they thought it could accomplish, they mentioned several things, but they often emphasised in particular, I think perhaps most often, the role that they thought the ICTY's judgements would make in advancing Serbia's process of reckoning with the responsibility of Serbian officials for wartime atrocities. And when I asked why the ICTY, aren't there other ways to do this, including the domestic prosecutions, the answer most commonly was: "There is no other". And that is a quote from one individual. There was no other institution that at that time, in the early years after the war, could have played this role in Serbia, particularly during the Milošević years.

Now, it is challenging to try to capture how these expectations of the role of the ICTY by those individuals will have been met. But public opinion surveys that have been undertaken periodically since 2001 suggest that, at least for now, it is difficult to claim without significant caveats that the ICTY has had the kind of transformative impact its supporters in Serbia hoped for, and I think in many ways still hope will come to pass, when it comes to altering widespread perceptions of wartime responsibility.

At the risk of oversimplifying the results of these surveys, perceptions of the Tribunal and the crimes it has prosecuted still correlate very strongly with the ethnic group to which one belongs. There have been some subtle shifts over time on the specific issue of whether the Tribunal could help Serb citizens, of Serbian nationality, come to terms of the atrocities committed by Serbs. As of 2009, only eight per cent of Serbian Serbs who participated in the poll believed that ethnic Serbs committed the most war crimes. This contrasts with roughly two-thirds of the suspects indicted by the ICTY being ethnic Serbs. In a similar vein, 83 per cent of Serb citizens of Serbian ethnicity believed that the group that had experienced the largest number of casualties during the 1990s conflicts were Serbians. At the time the most reliable data indicated that a little over 10 per cent of the wartime victims were Serbs, with almost 83 per cent being Bosnians. So, that is one example of a continuing gap between the survey results and what one might expect perceptions to be if they were following the ICTY's judgements.

There are a number of factors that can contribute to the persistent perceptions that these surveys reflect, and we obviously do not know now the ICTY's longer-term impact, which I think will be quite different than now. But for now, we will simply note that despite these survey results which do give us a lot to think about, many Serbians who closely followed this issue believe strongly that the Tribunal's work has, to paraphrase one Serbian lawyer, shrunk the public space in which leaders credibly denied key facts about notorious atrocities. As another Serb lawyer observed, there is incomparably less distortion of the past as a result of the ICTY's judgements.

The ICTY's – sorry, apologies, I'm editing myself in light of time as I go along -the ICTY's supporters in Serbia also noted another achievement that they thought was fundamental, an achievement that can, I think, be impossible to capture in the public opinion surveys I mentioned. And that is, quite simply, the ICTY prevented impunity for the terrible atrocities that Serbian authorities had sponsored. Again, in the words of a Serbian whom I interviewed, a journalist: "It is simple. If not for the Hague Tribunal, no one would ever actually bring to trial anyone who committed these crimes". Another person said the message that this would have sent "...would be disastrous. The ICTY prevented that from happening".

A final dimension of the ICTY's impact in Serbia that I would like to briefly note - but I believe Richard Dicker will expand on this - is the Tribunal's somewhat ironic and perhaps unintended role in initially inspiring the establishment of a dedicated War Crimes Chamber in Belgrade. In contrast to the Tribunal's direct and deliberate role and helping to establish a War Crimes Chamber in Bosnia, the ICTY did not play the same kind of formal role in the establishment of Serbia's Chamber which began operating eight years ago.

Yet the ICTY had a strong impact. It provided a positive example of prosecuting atrocities in a specialised war crimes tribunal. And then a somewhat negative but effective incentive for the development of the domestic war crimes processes. Nationalists who oppose the ICTY in Serbia thought it would be better to try war crimes in local courts than in the much-reviled and distrusted Hague. Put differently, ironically, anti-Hague sentiment appears to have helped foster a more receptive attitude toward domestic war crimes prosecutions in Serbia than would otherwise have been the case. I do want to acknowledge that the democratic opening in Serbia following the end of the Milošević regime was also a critical factor in the establishment of the War Crimes Chamber. Several individuals serving in the Đinđić government said that they believe they had to address the country's role in the conflict of the 1990s. As one of them told me: "The Đinđić government saw the ICTY as very useful in helping to create a political space for Serbia to deal with," as he put it, "the burden of war crimes in all its dimensions". So, again, there was a confluence of factors where the ICTY's role was very important in creating a greater political space.

None of this is to say that the process of domestic prosecutions has gone flawlessly in Serbia or in most countries that have undertaken this. But, again, I want to quote the views of a senior official in the War Crimes Chamber. He said: "It was exactly through the Hague Tribunal that the process of facing the past was initiated in the states of the former Yugoslavia". And, so, the Tribunal, I think, has - although the landscape is complicated - it has clearly played a critical role in helping to advance the process of reckoning valued by the 15 per cent of supporters of the Tribunal in Serbia that I mentioned earlier.

One final point on that: in the 2009 public opinion survey in this series that I mentioned, a majority of all those surveyed, including the majority ethnic group, said they thought that domestic courts reached the just result in cases finding Serbs guilty, and hence accepted what the domestic court had determined in those cases. And so, in an indirect way, I think the suggestion from this latest poll data is that the ICTY indirectly helped lead to a process that lead to greater acceptance of responsibility in a critical way.

How am I doing on time?

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Well over time.

Diane Orentlicher, Deputy, Office of War Crimes Issues, United States Department of State; Professor of International Law, American University (on leave)

Well over time... Hmm... Should I talk about Bosnia later?

Let me say one thing about Bosnia then which was... – I'm sorry, time flies when you are trying to cover a lot of ground.

What I want to say about Bosnia, I am going just to try to reduce to two sentences. Victims in Bosnia, as I think Judge Pillay alluded to, have a fairly long list of grievances when you ask them what their experience of justice with the ICTY has been. They say sentences are too short; perpetrators are given early release and are out on the streets again, sometimes in their neighbourhood after getting short sentences, and so on. And that is very real, and I think we need to come to terms with the lessons of those experiences. But what virtually everyone, if not everyone, that I interviewed in Bosnia said, either spontaneously or when I pressed them on how they felt about the ICTY in retrospect given these concerns, to a person they said that the most important thing the ICTY did was that it provided justice. This was something they desperately needed. And people, when I ask them about this if they did not bring it up, and I asked in as neutral way as I could, how they felt about the Tribunal, they were passionate, and sometimes even offended that I asked the question whether in light of their concerns they thought in retrospect it was the right thing to do. So, I want to emphasise this because in the academic literature there has often been just an extraordinary recognition of a wide array of goals that the ICTY should achieve, numerous academic works about the purposes of justice, and what has often been obscured in the literature and what is most important to the people I interviewed in Bosnia is that without the Tribunal they would not have received justice.

Thank you.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Thank you, Diane. I just did not want to interrupt you because what you were saying brings such deep insights from the ground to our discussion. I really thank you.

So, Stephen, on some of your success stories, maybe?

Stephen Rapp, the United States Ambassador-at-Large for War Crimes Issues

Well, the success stories of my colleagues at the ICTY.

First of all I want to thank you for the opportunity to be here, and particularly to be here and follow my Deputy. As you may know, at the Office of War Crimes Issues, the Ambassador and the Deputy do a lot of travelling. I think last year was 220 days on the road for me and almost as many for Diane. So, it is only when we have conferences where we are both invited that we actually have a chance to get together and discuss the business of the office. So, I thank you President Robinson for including us both on the invitation list and on this panel.

As has been mentioned, one of the great successes of the ICTY was bringing every one of the individuals that have been issued arrest warrants to justice. It was finalised in the last six months. On the 26th of May 2011, Ratko Mladić was arrested, and in a few days was transferred to the detention facility, about two kilometres from here on Pompstationsweg, and on the 20th of July, the last, the 161st individual charged by this Tribunal, Goran Hadžić, was also arrested and transferred here to face justice. That is a remarkable record.

If you looked at my biography, I was a prosecutor in my home country, a federal prosecutor in Iowa, now a state known for its high crime rate, though I was very rigorous in maintaining public safety there. But I do not remember ever putting together a roster of 161 cases, and actually having all 161 people brought to justice. There were always those that managed to flee and to escape.

And for this institution to do this is remarkable and to do it at the international level without having the power of the arrest, requiring state cooperation it is indeed a remarkable record. I think it sends an enormous signal around the world as we look at similar crimes committed in other places. Then individuals who commit these crimes want to escape. It may not happen the next week or the next year, or even within a decade. But the day will come when they will face arrest if the lessons that have been taught here are learned elsewhere.

On the other side is, of course, the ICC where there are now 14 living individuals that have been subjected to arrest warrants. Only five of them are in custody, and nine on the run. But I think if the lessons are learned there, the day will arrive, just as it did for Slobodan Milošević, at the door of the detention facility. Omar al-Bashir or Joseph Kony or Saif al-Islam Gaddafi. That day can arrive if the lessons are learned.

This whole project of international criminal justice, of which I think for everyone in this room is a vital part, is one of the most remarkable developments of our era. There is a book, recently published in the United States, a very academic

book, a sort of a non-fiction book-of-the-month featured on the front pages of book reviews in the *Washington Post*, called The Justice Cascade. It is by an academic, a political scientist who looked at what has happened across the world in the last few years. The subtitle is "How human rights prosecutions are changing our world", and it describes the waves in which this has happened, beginning with Nuremberg; then spends a fair amount of time talking about what happened with Latin America with the prosecutions in the 1980s, but also then the creation of these tribunals, and what that has meant. And the expectations that have risen in the world are that these waves have broken over the rocks, and indeed we have a cascade. My office is involved in some 26 different countries; I mean - some of these crimes were committed 40 years ago, like Bangladesh; others like Syria would have been committed today. And people are saying: "Why not justice for us, like it happened with the ICTY?" And so, the question is: how was it so successful here?

First of all, I would like to salute my colleagues in the Prosecutors' offices, and the Prosecutors that have served here at the ICTY: Richard Goldstone, Louise Arbour, Carla Del Ponte and Serge Brammertz. I never had the honour to serve here, and I will say that for three of my six years at the ICTR I was under Carla Del Ponte who was prosecutor of both courts at that time, and as I think everyone knows, she was a challenging person to work for, but extremely courageous and dogged when it came to this issue of bringing these fugitives to justice. And when these calls were made, they were not popular and they were not well received.

If you read her book, *Madame Prosecutor*, she describes and includes a copy of a letter written to her by Kofi Annan in March of 2001 in which he says: "This business of trying to argue that the countries in the former Yugoslavia should not receive foreign aid or some kind of trade benefit because of non-cooperation with the ICTY - that is none of your business; that is politics. You should not be involved in that". And she describes an encounter, a couple of months later, when she actually says: "Well, how can everybody else be wrong, and you are right?" Well, she was right and they were wrong. And Kofi Annan later admitted that in a congratulatory letter that he wrote her. Perhaps a small personal anecdote: I joined the ICTR about a month before the arrest of Milošević, and I was thrown into the media trial, into the Presidency of Judge Pillay, and had to work very quickly trying to change the witness list, to move to expand the witness list, to put in 21 new witnesses and exclude some others. And it was a very contentious thing. But Carla was very committed that we should also be indicting some people that were in Europe, that had allegedly committed the genocide in Rwanda. Since I was in charge of the media trial that included Simon Bikindi, who was living in refugee housing in Leiden, not 15 kilometres from here and she wanted to have all these arrests done on the 12th of July, and we did not have even a Deputy Prosecutor in Arusha at that time - she said: "You need to come to The Hague and show me

the indictment, and I need to sign this.” And I said: “Well, we are just going in the media trial or fighting this motion.” She said: “You need to come to The Hague.” I said: “Well, I can come on the 1st of July.” She said: “That is too late. I have to go to Belgrade, to the donors conference and insist on the arrest of Milošević on the 29th of June. And I am going to head over there at noon of the 27th, so you have to be in my office by 10 a.m. on the morning of June 27th.”

Well, on the evening of June 26th, Judge Pillay was reading out the decision granting our 17 additional witnesses, and I could hardly wait to get out of the courtroom and make it to the airplane to fly to The Hague to shave at the airport, to rush up here and to bring the Bikindi indictment before Madame Del Ponte.

And I said: “Well, I am glad I made it before you’re headed to Belgrade!”

She says: “I am not going to Belgrade.”

“You are not?”

“I do not go to Milošević; he comes to me.”

And the following day, the 28th of June the helicopter could be heard overhead, bringing Milošević from the Eindhoven base to the jail on Pompstationsweg. Indeed, what had happened is that countries that would have come to the donors conference and donated funds were persuaded by Carla, and by the strategy followed here, not to contribute, not to participate if there was not cooperation by Serbia.

But it, of course, went beyond that issue of aid and became critically tied into the issue of the European Union accession. And the Prosecutors, both Del Ponte and Brammertz, have continued to work with the countries of the European Union; and, as the Ambassador from Luxemburg told us earlier today, about the standard that there needed to be established for a complete cooperation before a country could be admitted to even the accession process, the stabilisation phase of the European Union. And it was through that conditionality enforced by those member states of the European Union that it was possible to get indeed dozens of individuals here to The Hague, including Ratko Mladić and Goran Hadžić. It took that kind of effort.

A lot of people will note that this Tribunal, like others, has Chapter VII powers that the Security Council has given it - the ability that makes its orders binding on states. But it is not through those legal mechanisms, though at the end of the day they may provide the basis for cooperation, though sometimes that also requires national law. It is through diplomacy and political pressures, through making the demand for justice and cooperation that it is possible to actually bring people to justice.

Just a couple more things to say because it also needs to be said that it is not, as Carla said in responding to Kofi Annan's letter of congratulation... - she said: "It is not me, the Prosecutor that deserves the congratulations. It is the Prime Minister Đinđić who made the decision to make that transfer." And so much of what has happened, also in terms of cooperation from the Tribunal indeed; all around the world we have sanctions and threats of sanctions and various techniques to use to raise the cost of non-cooperation with particular international priorities. But it was the way in which this Tribunal also did its work and presented that work to the region: the importance of outreach, the importance of people knowing that justice was being done here, and the efforts that made sure that what was happening in court reached the region, remembering well the broadcast that followed the presentation of the Scorpions video here on June 1st 2005. The last copy of that video obtained by Nataša Kandić and delivered up to the Office of the Prosecutor, shown in court and shown in the region, really developed the attitude that what was happening, what these individuals had done, needed to be brought to justice before this Tribunal.

And finally, and judicially, and we talked this morning about Nino Cassese, and others have, but the very concept of individual criminal responsibility is, of course, the core at the end of the day to state cooperation, and to the cooperation of the people. What happened in the former Yugoslavia was not the acts of great communities of individuals - we have great communities; it was the acts of individuals, people that made the decision to attack, to murder, to rape their neighbours; individuals who did not stand for the values of those countries or any countries. And the way in which this Tribunal has clearly established the rule, and the individual cases, case after case, held that individuals against whom justice is brought - it is individuals that are responsible for these crimes; not their neighbours, not their fellow citizens; that has, I think, made it possible for people within these countries to cooperate.

And finally, and importantly, this has been an institution that has shown that justice can work in which few tough presidential leaderships via series of presidents. This institution has shown that you can try these complex cases, even if that meant sitting morning shifts and afternoon shifts, that you can bring these cases forward, that you could even order the Prosecutor over her objections to cut the indictments and to reduce their size if that was appropriate, to show that justice could be delivered. So, it is through the prosecution, through the judges, through the process that happened here, that in the end was possible to have the influence, use the tools to bring people to justice.

Mr Crawford spelled it out this morning, saying that "Respect needs to be earned." Respect does not come down just from a blue flag or from red robes; it comes from the way in which the people working in an institution do their jobs.

And here at the ICTY, that work, I think, has earned the respect of the victims, has earned the respect of the entire world, and it has taught lessons that other tribunals should take to heart.

Thank you very much.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Thank you very much, Stephen.

I do recall that it was also very hard to stop you in the courtroom. But we cannot blame you because there is so much effort going into delivering on the caseload. So, thank you very much.

Patricia Sellers will now talk to us about gender jurisprudence.

Patricia Viseur Sellers, Visiting Fellow, Kellogg College, University of Oxford

I think I will remain here and speak because it must be something about holding onto the sides of the podium that makes the 10 minutes go by much quicker. I hope I am in a slower time zone.

I would like to speak about the gender jurisprudence. But if you would forgive me, I am not going to recount things that you might know. Rape is a war crime, sexual violence is part of genocide, and sexual violence is part of torture. That sexual violence happens to men and boys, as well as to girls and women. What I would like to talk about is something a bit more subtle, something that has not really reached either the academic literature or the judgements, and that is the content of analysing the crimes. And that is what I would call the heart of the international law, be it international criminal law, humanitarian law and human rights law.

When prosecutions went forward at the ICTY and there was a huge outcry in terms of what you were doing, in terms of justice for women. Much of that outcry was centred on “make way for war crime”, although it had been already a war crime recognised then. And a lot of the outcry was kind of demeaningly referred to as being “PC” - politically correct. I would like to say it was “JC”, it was *jus cogens*. The sexual violence and the addressing of crimes that were committed against females, girls and women, was part of the endeavour to address what were just *jus cogens* crimes, war crimes, crimes against humanity, genocide that had to have the highest ranking in any of our legal orders. If one wants to look at the international human rights law, we might look at those human rights from which there can be no derogation in times of war or in times of peace. Not only do they

include slavery, of which the gender jurisprudence filled out the contours; they include torture of which the gender jurisprudence also filled out the contours. They include war crimes, crimes against humanity, and genocide as types of human rights violations. Now, what do I mean by that? Since the jurisprudence of the ICTY reached human rights courts and particularly the courts from Latin America, to a much lesser extent the European human rights courts, but also to the regional instruments coming out of Africa, of recognising that the violation of that bundle of human rights can be termed “crimes against humanity”. Another word for that bundle of violations is “genocide”. These are crimes that are to be pursued irrespective of where they occur, and they are to be pursued by states irrespective of whom, either the victims or the perpetrators are.

So, what does the gender jurisprudence do to that? It allows us to understand that within the war crimes notions of protected persons there is no extracting of the females out of any protected group under Geneva. The Geneva Conventions might offer for women and children more protection, no adverse discrimination, but they certainly never divide the protection that is to be given to the group. The same way with crimes against humanity: the attack against the civilian populations by its very terminology, “civilian population”, includes both men and women, both boys and girls; it is gendered from its very root. And I would repeat the same analogy with genocide. Even though you cannot commit genocide against a gendered group who are women per se or another genocide group, there is not one of the genocide groups, national, racial, religious or ethnic, of which women or females can be extracted. Now, maybe this is so obvious, so subtle, as if we do not perceive what we are looking straight at.

What the gender jurisprudence of the Yugoslav Tribunal has done is to kind of feather out the contours of *jus cogens* of our understanding of those crimes. And I would add – that might be a bit controversial - but I want to recall that one of the first controversial articles I read back in the late 1980s, 1990, by Professor Orentlicher, about the duty to prosecute. Once *jus cogens* violation is discovered, acknowledged, you have obligations, *erga omnes* - these are binding obligations on the state, and, one might add, on the jurisdiction that can prosecute, possibly in ad hoc tribunals or the ICC.

What are those obligations? Usually they mention “prosecute or extradite”. But in order to prosecute one has to investigate, prosecute and adjudicate. There is the ICTY gender jurisprudence to assist us in understanding what is a ‘true investigation’ of what might have happened to the gendered groups when you look at genocide and crimes against humanity. The ICTY has spurred almost a way to look back and understand the Holocaust by seeing what happened to men, women, girls and boys, and what happened to each of them in terms of sexual violence. Right now, I know that states such as Guatemala are looking back at the

Guatemalan genocide. To look at what only happened to the men is not to really look at the full genocide or pro forma *jus cogens* obligations of true investigation, prosecution and then for the judges through adjudication.

I would say that what the gender jurisprudence has done and is continuing to do is better prequel. It is the runner that before he goes forward, he takes that step back. And it is an understanding backward: what is a holocaust as gendered, what do the Geneva Conventions cover? Crimes against humanity - how does one attack a civilian population, its composition; and acts that can attack the different persons in that composition; and the same with genocide - gives that legal strength of that runner to dash forward. The gender crimes were not supposed to have worked so well at the ICTY. They were supposed to have been present, on duty when called, but never to have developed to the extent that they actually filled out international law itself, and allowed international criminal law, and now international human rights law to be much broader.

For example, whether one looks at the review of Article 31 by the International Covenant for Civil and Political Rights, General Commentary 31 – When you say "what is a right to a remedy?", even what should be remedied is fuller because of the gender jurisprudence. And who has a right to a remedy? Depends on our understanding what the violation is so that we can understand who has the right to the remedy.

This is just among the impacts of the gender jurisprudence of the ICTY. It was an imperfect success. There should have been many more investigations, prosecutions, possibly different ways of seeing adjudications, but I want to emphasise success as much as I want to emphasise the imperfectness. It was the beginning of a long journey where the runner got her footing and could allow all of us to dash forward.

Thank you very much.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Thank you so much, Patricia.

Now we have Richard Dicker, a new "old" speaker on the legacy with regard to state cooperation and the impact on national proceedings. Thank you, Richard.

Richard Dicker, Director, International Justice Program, Human Rights Watch

As others have said, I feel very privileged to be here on this occasion of really trying to assess the legacy of the Tribunal, and even moreso mindful of the

untimely passing of Nino Cassese who was a great friend to the human rights movement and to my organisation in particular. In my remarks I will speak of two issues, some of which have been touched on. Where the Tribunal's legacy for global justice is particularly instructive, these are first insuring recalcitrant state cooperation with judicial orders, particularly arrest and surrender, and second, spearheading prosecutions of these same kinds of crimes by national authorities.

First: cooperation. The success of the International Tribunal is directly linked to the will of states and inter-governmental organisations to support the judicial mission. That is a truism that bears frequent repetition. Cooperation in the form, in particular, of arrest and surrender is obviously the precondition for judicial proceedings, trials and ultimately justice for victims. There is a long history of trying to compel cooperation between the Tribunal and the governments in the Western Balkans, and that goes back before the Dayton peace talks.

A word of history here, first. In 1997, a Foreign Affairs Council meeting at the European Union specified that among the Copenhagen criteria for European Union accession that had been adopted in 1993, full cooperation with the ICTY was a requirement. Then, two years later, building on these conclusions, the European Commission included ICTY conditionality in the stabilisation and association process it adopted for the Balkan states.

Meanwhile, the United States government had used its economic support funds as linchpins for its conditionality approach to the Western Balkans. I recall March 2002 - I believe 40 million dollars of US economic assistance was withheld from Serbia because of lack of cooperation with the Tribunal. This linkage with EU accession and US economic support not only was an unprecedented development, it was also a proactive, smart use of diplomatic economic cloud on behalf of justice and accountability. I believe it changed the game and created a new standard in looking at justice and other objectives important to recalcitrant states. The ICTY has a stunningly successful record of arrest and surrender which is, I contend, one of its most important but hardly sole legacies.

This linkage, of course, was no silver bullet - I want to add some of my own commentary to the facts that the Ambassador Rapp mentioned - that linkage cooperation did not proceed in a straight line - even in terms of its effect on the recalcitrant government or in its implementation by the state actors that conceived and adopted the very policy. I want to look at two snapshots in relation to Serbia to help flesh out what I see as the important step forward - albeit of inconsistent and wavering quality - of state support for the Tribunal's mandate at various moments. We saw in March 2004 again, the United States government cut off economic funds after a period of particular obstruction by the government in Belgrade. This contributed to a dramatic increase in the phenomena of voluntary surrenders in

early 2005. Nonetheless, some of the most senior indictees remained at liberty. The Belgrade authorities promised to arrest Ratko Mladić, but took no demonstrable action to execute that commitment, and on the basis of that failure in early May 2006, the European Union suspended the stabilisation talks bringing prospects for Serbia's accession to the EU to a halt.

Significantly, at this time, other political factors began to loom larger in the picture. In May 2006, Montenegro voted to secede from Serbia. At the same time, independence for Kosovo loomed more likely. By the end of that same year, these concerns began to influence the implementation of the conditionality policy. Even though no progress had been made in arresting Ratko Mladić at the time, NATO offered Belgrade the prospect of joining the Partnership for Peace. The European Union, increasingly feeling a need to placate Belgrade, proposed resuming SAA talks if the Serbian authorities developed a plan for arresting Ratko Mladić. The EU then announced that talks about resuming SAA would begin, but did not set a date for such resumption.

Perhaps in the interest of time I will skip my second snapshot. But the point I want to convey here is that the decision to make the linkage and maintain it from 1997 until 2010 approximately, played a key role in realising the demands of victims to see senior indictees brought to justice. But from the snapshots we see justice being dialled down, if you will, to accommodate the perceived need for political stability and democratic transition. Consistent pressure for arrest and surrender of key ICTY indictees was increasingly deemed to be an obstacle to these important but non-judicial objectives of states.

Of course, there can be tension between strong diplomatic political economic support to enforce arrest warrants on the one hand, and competing political demands of states on the other. This tension, however, leads to inconsistent support that waxes and wanes as non-judicial objectives come into play. I believe what is called for, on the part of states, is persistence in formally wielding pressure, along with smart incentives. It is to the European Union's credit that it maintained its conditionality for so long, but the lesson learned here, I would argue, is that to be effective on behalf of the justice norm, a state has to be prepared to keep at it. Taking a longer view, of course, diplomatic support for justice is a new trend that arose with the work of the ICTY; accountability and commitment coexist in a fragile interface, rhetoric notwithstanding from various capitals, with many more traditional interests of sovereignty that came to be given a greater weight. When competing objectives come into play, all too often political actors waver in their support for justice. It is a long term struggle to push state actors to adhere to their commitment to the judicial norm, making justice as prominent as it should be in the sphere of policy objectives.

But this is the terrain we work on. EU conditionality, US government cuts, and economic support were important steps. The work of the ICTY was essential in bringing all of this to the fore as state practice. And while it is in an uphill climb, more consistent unflinching support for the Tribunal, for the International Criminal Court, that is the direction the international community has to go.

I want to say a word before I conclude about national trials, because I believe that it is another very important legacy of this Tribunal. As the fight against impunity has advanced, there is correctly a deepening understanding of the fundamental importance and inherent difficulty in conducting national trials as the first line of accountability for serious international crimes. The ICTY has an interesting and distinctive legacy. This Tribunal spurred war crimes proceedings, as has been referred to, across the Western Balkans, and this impact, I contend, is more important, more timely now, given the current attention on what has come to be known as “positive complementarity” in the context of the International Criminal Court.

I think it is understandable that the ICTY came late to the wall of strengthening national courts’ prosecutions in the Western Balkans. That has a lot, I believe, to do with the nature of the Security Council resolution creating the Tribunal, the nature of the conflict in the Balkans – and, I would add, the sheer novelty of the first ever international tribunal since Nuremberg. I say that not to apologise to the organisers of this event and the President of the ICTY, but I think fairness requires some understanding of the comprehension of the time. But the Tribunal did a lot. I will not go into the role of the Rule 11 *bis* transfer of cases and Category 2 cases, et cetera. But I do want to pose a couple of questions that I think are important, and I will stop there.

First, given the ICTY’s late but extensive efforts on behalf of strengthening national prosecutions - what can be learned in this area of judicial capacity-building, to what extent can international judicial mechanisms with differences between them actually catalyse national proceedings?

Two, to what extent did its work with national authorities contribute substantively to the budding respect for the broader rule of law in the states of the Western Balkans? I raise this because a question has emerged about whether assistance specifically designated for war crimes proceedings has a spill-over effect on the broader legal system. This is an intensely debated question currently in the development community, heightened again by the consideration of positive complementarity.

Three, what can be learned from the ICTY’s experience in capacity-building about the dynamism, if any, in advancing political will on the part of states to prosecute? We know that overcoming unwillingness is much more difficult than

addressing technical or capacity issues. I believe thoughtful reflection on these questions will add to the ICTY's legacy.

In conclusion, through its work, actually the work of individuals committed to a lofty objective in a unique judicial institution, the ICTY in these two areas is leaving a rich legacy that needs to be mined further so that everything that can be gleaned from 20 years practice will be extracted to make trials more fair, efficient and meaningful in the communities most affected by the crimes.

Thank you very much.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Thank you, Richard.

Bill Schabas will address us on issues concerning minority rights and the relationship with the European Court.

William Schabas, Professor of International Law, Middlesex University, London

Thank you very much, and now, I think I will also stay put at this end of the stage.

When the Tribunal was established in 1993, it found itself situated in a way with two other much larger international judicial institutions, one of them quite close by, and one a bit further away. I am referring to the International Court of Justice just up the road, and the European Court of Human Rights. Really, I should be precise and mention also the European Commission which existed at the time, and I pay homage to Judge Trechsel who was the last President of the European Commission of Human Rights. With respect to the International Court of Justice, much has been written of some little skirmishes in a way, but in retrospect they look more like lovers' quarrels between the International Criminal Tribunal for the former Yugoslavia and the International Court of Justice. And ultimately, I think that the two institutions have developed a common coherent narrative of the conflict in decisions. It is not over yet, but it seems to be fairly consistent, and the old fears of division in the case law have not really proven to be very well-founded.

With respect to the European Court of Human Rights, I think the story is a little different. I believe that many defence lawyers probably thought in the early days that the cases, the unsatisfactory results in the Appeals Chamber, here at the International Criminal Tribunal for the former Yugoslavia, would ultimately end up in Strasbourg, and that really has not proven to be the case. I do not think any of the defence lawyers figured out the way to unlock Strasbourg, to make it accessible to

challenge decisions of the Tribunal. Perhaps there is still more to come. I sense that there is a little matter concerning the book published in Paris that may be working its way towards Strasbourg. But I do not know if that case will prosper either.

The Tribunal has often sided with the case law, but it is not automatic - the case law of Strasbourg. There was a very early case - I think actually one of the very first judicial decisions: Judge McDonald was involved in the Trial Chamber in *Tadić* where they dealt with anonymous witnesses and the defence lawyer, I think, came with a great case from the European Court of Human Rights against the Netherlands and thought that this was going to be a simple victory and, of course, learned that it was not exactly automatic that the case law of Strasbourg would apply at the International Criminal Tribunal for the former Yugoslavia. In those early times it was not even obvious - the place that human rights was going to find in the International Criminal Tribunal. Some of the personnel came from a human rights background, more on them in a minute, but they also came from various other backgrounds, and it was not as it is today where we can draw upon a huge body of experienced professionals from the field of international criminal law, international criminal justice.

And so, there were military lawyers who came here, there were some of the war crimes lawyers and prosecutors from national jurisdictions, and a group - and I do not think they were at all predominant - of people from the human rights stream. First and foremost among them is our dear departed friend Nino Cassese. And there were others: Theo Van Boven was here to begin with, the great Dutch international human rights lawyer, and a Canadian - I feel compelled to mention the Canadian - the only North American on the panel, Jules Deschênes. Some of you will remember him. Jules Deschênes also sat with Nino in the Appeals Chamber along with Georges Abi-Saab in the *Tadić* case, in the famous decision. Since we are all reminiscing a little bit... I remember the morning of the decision, or the afternoon, I suppose - but it was the morning in Quebec (I was living in Montreal then) - the fax machine started roaring... it was the 2nd of October 1995... My fax machine started roaring. I was one of Jules Deschênes' friends and colleagues back in Canada, and he was giving us a heads-up on this important decision. We all know that the fax machine is to younger people what we had in the previous century; it's sort of a primitive kind of PDF. And, lo and behold, Jules Deschênes was sending us a message about the decision. But it had nothing to do with crimes against humanity or with serious violations of the laws and customs of war. It was about the fact that the decision was coming out in English only, and not in French. So, a little three page decision - some of you will remember it... - that was the principle message that we got. It took us several more days before we got the whole decision and realised that something rather earth-shaking had happened in international law.

At the time, there were also interesting things going on in international human rights law, and I think this did influence the Tribunal. There had been a great deal of research in that field since interest in the law concerning national minorities started probably with the Copenhagen document of the Organisation for Security and Cooperation in Europe, the Council of Europe that adopted the Framework Convention... There was the famous General Assembly Resolution that was as far as the General Assembly and the United Nations were able to take the issue of minority rights protection, except that it also established this Tribunal. And I think it is interesting to think about the International Criminal Tribunal for the former Yugoslavia as being a tribunal for the protection of minorities, as being an instrument for the protection of national minorities from the great threat, the great attack upon their existence.

Minorities, of course, have an uneven history even within the field of human rights law. They were, back at the time, in the years following the First World War, in the League of Nations, in many ways quite central to what was going on in human rights. But that was eclipsed at the time of the Second World War. In our current understanding of the Nuremberg trials, we think that the trials were also about minorities and about the Holocaust. But of course, on close scrutiny, it was really mainly about that. The issue of human rights and the protection of minorities played a small role in the Nuremberg judgement which was essentially about crimes against peace, and the commission of crimes against peace by the Nazis engaging in an aggressive war.

But, over time, human rights came to be more and more central to international criminal justice. I would say it was not even obvious when the Statute was adopted because if one looks at the crimes under the Statute of the International Criminal Tribunal for former Yugoslavia, we started with grave breaches of the Geneva Conventions. That has proven to be a bit of a dud, really, nothing of any great significance in the case law. Then we moved on to the laws and customs of war, and one of Nino Cassese's interesting contributions, or the judges of the Appeals Chamber, I should say, in the *Tadić* decision, was to remind us that international humanitarian law was a modern formulation of the laws and customs of war that had been, in a sense, imbued with modern human rights law.

But with respect to minorities - of course, the real form that this took on the case law of the International Criminal Tribunal for the former Yugoslavia was with what we might call the criminalisation of ethnic cleansing: it does not say "ethnic cleansing" in the Statute, there is no reference to it in the Statute, but it has been frequently used throughout the case law of the Tribunal from the earliest days. I suppose that today we can almost call it a technical term because it is used in the General Assembly resolution on the Responsibility to Protect, of 2005. But it is not in the Statute, and it is not in any of the previous treaties. The term began to be

used really rather generally in the early 1990s to describe the attacks, persecution and the driving out of minorities from their historic homeland.

In the case law – and I know others will speak about it tomorrow, so I do not want to encroach upon this too much – but in the case law on genocide much of the debate has been tracing the line between genocide and crimes against humanity to the extent that we can trace one. And frequent reference was made to the fact that when the Genocide Convention was adopted in 1948, there were attempts to include a very precise provision dealing with ethnic cleansing in the Genocide Convention. I think there is a reference to this in the *Tadić* Appeals Decision. I think it is also in Judge Shahabuddeen’s dissenting opinion, and it is certainly in the International Court of Justice decision between Bosnia and Serbia.

The famous proposal from 1948 came from Syria and it was to have a sixth act of genocide which was driving people out of their ancestral homeland. At the time, Syria was obviously referring to the creation of Israel and the attacks on the Palestinians that were involved at that time. But they were quite reluctant to include this, I think, because there was no consensus at all that those types of acts were even forbidden by international law, and certainly not that they were criminal. There was a famous debate or discussion in the *Institut de droit international* in 1952 about whether the expulsion of minorities or the transfer of minorities, or the forced displacement of minorities would be considered unlawful under public international law, and most of the members at the time - the great names in public international law - said “no”, that states were always entitled to push minorities around if they felt they were dangerous or subversive and that they can move them around. Only one member of the *Institut* on that committee, Georges Scelle, the French international lawyer, had the courage or the foresight to say that this was now forbidden by international law, and the example, the reference that he gave was the Universal Declaration of Human Rights.

And even in the 1970s, not that far away from the Balkans, we had examples of ethnic cleansing – I am thinking of the island of Cyprus which became essentially ethnically cleansed in both directions in 1974 with the assistance of the United Nations whose buses transferred populations from one end to the other of the island. And of course, when the wars broke out in the Balkans, there were many public figures in international affairs who suggested that maybe this was the solution as well to the ethnic conflicts there.

What the Tribunal has done is clarified the fact that ethnic cleansing fits within a broad umbrella of crimes against humanity - where exactly, there has been some debate, as with deportation - “other inhumane acts”. I do not know that it is necessary to resolve this once we have acknowledged that this is now criminalised. This is a great achievement in international law. It shows the

dynamism of international law, the progressive development of international law, and we should all welcome the fact that now it is our human right which is entrenched in the Universal Declaration of Human Rights, to remain in our country, to remain where we were born if we so wish, and to return to it. It is now protected at another level: by the mechanisms of international criminal justice and the concept of crimes against humanity.

Thank you.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Thank you very much, Bill.

There you are, a very thought-provoking presentation.

I am sorry, we've encroached a bit on discussion time, but the floor is open.

Question from the audience: Unknown speaker

I shall speak in French.

My first question is: where is the defence? I heard talk of arrests, I heard talk of convictions, I heard talk of the judges and the prosecutor, as being the founders of the legacy of this Tribunal...where is the defence? I think that there have been, in this Tribunal, significant contributions from the defence. A few years ago, in this very room, Prosecutor Goldstone addressed all the lawyers of the International Criminal Court. Talking about the early days of the Tribunal, he declared: "There can be no international criminal justice without a strong defence". I therefore would like to appeal to you, as I often do, honourable judges of these tribunals: please, you the judges, you are not here to fight against impunity. The only person who is here to fight against impunity is the Prosecutor. After hearing the Prosecutor, after hearing the defence, the judges are mandated to pronounce on justice, the law and whether the person in the dock is guilty or not. Such is the mission of the judges. If, while fulfilling their mission, the judges contribute to the fight against impunity, that is all well and good, but this is not their primary mission. In the same way, judges are not responsible for reconciliation. Reconciliation is the fruit of justice, not its primary mission. And, Ms Pillay, I would like to thank you, you have spoken about the accused, about those accused who are sentenced to life and, as High Commissioner, you have addressed these issues. I would like to offer up the following quote for further thought, from the French Ambassador for Human Rights, who often states that "Human rights are established for victims, but they only take on their full meaning when it comes to defending those accused." A fair trial, as described in Article 14 of the pact, is

precisely about defending the rights of the accused. Before the Tribunal for the former Yugoslavia or before the ICTR, lawyers have taken the stand to defend those accused and in doing so they have helped justice. Let us not forget that some of those who have stood trial before the ICTY have been acquitted. Were those acquittals in the interests of justice or not? I assume that they served the purpose of justice, since they proved that a judge's mission is to administer the law. These are the few thoughts I wanted to share with you.

I would like to make two further remarks, in particular about the victims: I was among those who actively fought to make the international tribunals more accessible to victims, and I continue this struggle. But I also believe that we do not really know how to achieve this. We have a long way to go in this area of access for victims. How should we proceed, especially when it comes to mass crimes? I represented Duch in Cambodia and we have been able to gauge the difficulties linked to the presence of the victims at trials for mass crimes. Although they must be present, we still need to reflect further on this issue and must use our creativity to give the victims their rightful place within international trials.

And finally, a last thought I would like to share with you, Ms Pillay, about the international criminal courts, the mixed tribunals, I would like to tell you something of what happened in Cambodia. The tribunal judging the Khmer Rouge in Cambodia is, indeed, a difficult one. It is said that it is not mixed, but "internationalised", working within the very country in which it was established. And yet 30,000 Cambodians attended the first trial. This is a huge success for internationalised criminal justice - 30,000 Cambodians. This has not been mirrored in other tribunals. Therefore, I do not have a definitive answer as to whether the tribunals should be outside or within the countries concerned. I am simply saying that this deserves further thought ... When this process takes place within a country, allowing its citizens to come and see how justice works, this is also extremely important for what we are trying to achieve. Thank you.

Stephen Rapp, the United States Ambassador-at-Large for War Crimes Issues

Let me jump in as a person who, before I became an ambassador, was a Prosecutor for 18 years. But after 20 years of being a defence attorney, and I was intending in my remarks... - if I had few more minutes to talk about - part of this success is the way in which the trials have been conducted and which the defence has been able to challenge the charges, examine the witnesses, and in many cases acquittals result on certain counts or entirely. And I think one of the successes of the ICTY and the other institutions has been the provision of defence for each of the accused persons. And I hope the defence has the opportunity to participate on panels to discuss these issues.

In regard to your victim issue, I think it is important to... – I mean, I tend to share your view - maybe it is because of the system that I belong to - that the victims need to be recognised, the suffering that they experience. They need to... - as it has been said this morning the right of reparation needs to be recognised. But I do see that the process of them working with the prosecution to present such evidence as they have on the question of culpability, and then to participate in the question of reparation in another part of the proceeding... It does bother me, frankly, when I see cases were... you know, one prosecutor gets up and then multiple prosecutors sort of rise, et cetera. And I think that to some extent that makes these trials more difficult.

I understand the concerns of the victims, but I believe that the appropriate place for them to work is with the prosecution on the issue of culpability, and that they really have an interest when it comes to the reparation at the end of the day. But we will see how this works in Cambodia now with almost 4,000 victims certified in Case 2, and we will see how it works as the ICC finishes trials that have become, I think, longer, even for relatively brief, small events to some extent, or limited cases have ended up being very long trials, in part because of this experiment, and whether in the end it serves the interest of justice or the victims themselves.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Judge McDonald.

Judge Gabrielle Kirk McDonald, Iran-United States Claims Tribunal, former ICTY President

Thank you. I would like to take the challenge from you, Mr Dicker. I think when you suggested that we explored the question to what extent the ICTY can, if I understand it correctly, import or export the rule of law to the region of the former Yugoslavia, through supporting or by supporting its national prosecutions?

Did I understand that that was kind of your mandate to us? And if so, I would like to comment on that. If that was not your question, I will just pass the microphone to someone else.

Richard Dicker, Director, International Justice Program, Human Rights Watch

It was a little bit different, Judge, in the sense that there is, as I alluded to, quite a debate about the overall impact of support for proceedings at the national level against more serious crimes. What positive spill-over effect does that have in

strengthening the overall rule of law system? In a word, we get a lot of pushback from development agencies who say: “Do not ask us as a development agency to support a war crimes tribunal proceeding in Congo. We have to build the whole system of the rule of law in the country. And there is no spill-over. This is too specific an area for us to support in a country where there is an ordinary murder. There is no access to a criminal forum.”

Judge Gabrielle Kirk McDonald, Iran-United States Claims Tribunal, former ICTY President

I do not know that I can answer the specific question about the spill-over effect. I did visit the former Yugoslavia, Sarajevo, in 2003, as a civilian, after I left the Tribunal and met with a number of individuals. Really as a result of the Outreach Programme to get their view of what success, if any, the Outreach Programme had been. But let me comment on this, though, because there may be an assumption in your question and you referenced the late involvement of the ICTY in helping to build the national courts. And the reason that that was so is that there is a difference of opinion as to the role of courts, even at the international courts. There were many who disagreed with any effort to do anything, other than try individuals. That is what courts are designed to do, and hopefully do well.

But I believed – we mentioned the Outreach Programme – that there was more to it, primarily because of the mandate that the ICTY has, that was given to it by the Security Council to help to bring about and maintain international peace and security. That is an extraordinary mandate, which I may talk about tomorrow. I think that the Security Council had to give us that mandate because it was building up, so to speak, support for the exercise of its Chapter VII powers. So, if it did not conclude that a court of law would help to bring about and maintain international security, then the establishment was suspect. So, I do not know what came first. I do not know if the mandate came as a justification of the establishment or whether it was in fact a factor in the establishment. It came late though, and if I may put a plug for my Chef de Cabinet, David Tolbert... - he wrote an article – Diane, you may know better than me when the article was, but, in the article – it may have appeared in the American University long ago now...

Diane Orentlicher, Deputy, Office of War Crimes Issues, United States Department of State; Professor of International Law, American University

I think it may be Fletcher, but anyway, go ahead...

Judge Gabrielle Kirk McDonald, Iran-United States Claims Tribunal, former ICTY President

Anyway, in any case, he wrote an article in which he proposed this: the assistance of the ICTY to build up the national courts. It was late in coming, as I said, because even the Outreach Programme was late in coming in my estimation.

Now, perhaps since I have been away so long, maybe another judge wants to fast forward it and bring it into this century. But that is, kind of my thought about it. Yes, there is a role; yes, it helps to bring the rule of law; yes, tribunals should do it. The ICC itself has been given the mandate; at least they wished that states will incorporate its procedures.

So, let's continue.

Question from the audience: Elinor Fry, University of Amsterdam, Researcher/Lecturer

My name is Elinor Fry from the University of Amsterdam. One little comment and one question. A comment about the following - which refers a little bit to the first intervention by the audience: in 2004, the Journal of International Criminal Justice under the editorship of Professor Cassese, came out with the view on the first 10 years of the ICTY with the contributions from, I think, 30 people from within the institution, from academics. Very interesting, but I sent a little note to Professor Cassese and said: "What happened to the voices in the region? And why there was not one voice from the region included in those reflections on the ICTY?" And he responded to me and he said: "We forgot." My same question to you: "Who forgot the voices from the region in the panel?" My other question is: would there be... I do not know to whom I would pose the question, but, is there any reflection or evaluation or lessons for a future global justice on the selection process within the ICTY, and I mean the selection of the 161 defendants? Are there any reflections on that, in my view, important topic?

Thank you.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Well, that is a salient point about the voices of the people for whom this justice is being rendered. And that is my mandate as High Commissioner for Human Rights. That is why I allowed Diane to speak over time because she brought to us the voices from the ground. I think it's very important research that you did. With regard to the question, I will leave it to Diane and Stephen to comment on that.

Diane Orentlicher, Deputy, Office of War Crimes Issues, United States Department of State, Professor of International Law, American University (on leave)

Maybe I will make a general observation, and since Stephen has been in a position as an international prosecutor dealing with this issue directly, I will yield to him. I think it is one of the most important questions that will establish the credibility of the Tribunal in the region affected by its work. It is particularly true for the ICTY, but I think elsewhere too. There is a huge burden on the prosecutor of an international tribunal that can only select a handful of cases to prosecute out of thousands of potential defendants. And this is in some ways even more true for the ICC which has potentially the whole world and... not the entire world, but a vast part of the globe that is potentially a focus area of its prosecutions, which means typically that the Prosecutor brings charges only against a handful of people. And the symbolism of the selection becomes hugely important in establishing the moral message of the tribunal's work in an ethnically divided society, and in addressing perceptions of bias on the part of the court.

I think I am sort of stating the obvious, but I really want to just agree with the premise of your question - that I think nothing could be more important. I should not say that; there are a lot of important things, but it is a very important consideration as well, clearly, people in the region in the Balkans are hugely attentive to the question of quality; it comes down to minute things like the quality of the prosecutors assigned to particular cases and so forth. And so, again I think we have to be aware of just how keenly attentive some audiences are to the selection processes.

Steve, do you want to say something?

Stephen Rapp, Ambassador-at-Large for War Crimes Issues, United States Department of State

Let me just add to this: I think we have seen a transition in this discussion about what international justice can do, what international justice should do in the life of the ICTY and ICTR and then in the courts that have followed. If you looked at the Statutes of both the ICTY and ICTR in early 1993, 1994, they speak of prosecuting those responsible for genocide and other serious violations of international humanitarian law committed in whatever place and time. Later, after this court had begun and was charging individuals; and initially charging those people that they could get their hands on, and then eventually taking a more focused approach, you had it in the Completion Strategy direction given by the Security Council most firmly. The Security Council had version 1503 in August of 2003 - this direction to basically transfer cases of middle-level and lower-level

offenders to the region, and to focus on the higher-level. As someone then involved in the process with the ICTR... I remember just becoming Chief of Prosecutions having to deal with a list that had once said more than 200 names on it... Eventually when you are down to eight more people that we would indict and then try to figure out how justice could be done in these other cases... - the Tribunals were forced, as they closed, to limit their mandate and to make transfers either through the 11 *bis* process that the judges established, or through what was called here the Category 2 process of transferring files to the region.

But then when other courts were established in that same era, you had, as I experienced in Sierra Leone, the mandate of only trying those with the greatest responsibility. And in Cambodia the leaders of Democratic Kampuchea were those most responsible. So, the perception clearly became, when it came to the international justice, wanting to focus on higher-level individuals. Now, of course that has been challenging sometimes to define, and that is an issue that is still being confronted in Cambodia.

Then, of course with the ICC, with the Prosecutor having to deal with the whole world, and other cases that may come this way from the Security Council, clearly you cannot prosecute more than a handful in any situation. So, how do you deal with this? Prosecutors need to prioritise, which comes hard for people who come out of the civil law tradition where there is a responsibility to prosecute everything. But you basically have to seek, to focus on cases that are representative of the conduct that occurred during the atrocities, and reflect the basic priority to take on those that are at the highest level, but the highest level against which responsibility can be shown through the evidence. And so, that is, I think, the approach that we take.

Now, obviously, this leads to a lot of dissatisfaction. In Sierra Leone we had this great Outreach Programme, I and my predecessors went to every town where they were always saying: "Why didn't you prosecute the person who killed the thousand people down the road?" And we'd say: "Well, we've got this narrow mandate." But I think we then recognised that justice for the rest of the trials needs to be done on a national level or through some other mechanism. The key element of this, I think - the ICC Prosecutor recognises this in the policies that he has adopted - these people need to know, they need to understand why you made the decisions that you did. You cannot just sit in your office and say: "I made the decisions. I know." You basically have to go out and answer the question on the hill, and in the town of the child that comes out to you and said: "I read your statement. Why isn't this guy most responsible?" You have to publish the standards by which you make these decisions. But that, I think is the direction international justice must go in the future.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

I'll just give the floor to Bill Schabas and then Judge Robinson.

William Schabas, Professor of International Law, Middlesex University, London

I sense the clock ticking, so I will be very brief, but I wanted to just add a comment on this question of the selection of defendants which is, of course, even more acute at the International Criminal Court where we have the problem of the selection of the situations, as well as the individual defendants.

I think it is one of the great unresolved problems of international criminal law, and I do not think we have got an adequate model, or an adequate explanation for it. We have cases where prosecutors are essentially left at all of these tribunals with total independence and no oversight whatsoever. We want it that way because we want to have an independent prosecutor because this is the only way to have justice that is properly independent and impartial, but at the same time it is a total mystery how these decisions are made finally.

And, Steve, you mentioned the prosecutor of the ICC going out and explaining the decisions. I hear reports on these explanations, and I hear people who hear them explain the decisions. And it is usually one word: gravity. Or sometimes it's "recount". And that does not tell me why you are prosecuting the Lords Resistance Army only rather than the government forces in Uganda, why you are going into Côte d'Ivoire rather than Iraq or Afghanistan. I do not think we have adequate answers to these questions.

At the Yugoslavia Tribunal we have a prosecutor who has a relatively short term and who is also accountable - although we have never had a recall, although I dare say that, had del Ponte in 2007 said: "You know, we've investigated the bombing of Yugoslavia in 1999 and I've decided I'm going to stop going after the Serbs and the Croats and Bosniaks, and I'm going to concentrate on NATO", I expect there would have been a rather quick Security Council meeting and sparks would have flown, and we would have seen what happens to a prosecutor who makes a legitimate choice that is not quite within the parameters of the political mandate. But, at the ICC we cannot even do that; and it has been nine years... And I think that we probably have not yet solved that problem in international criminal law. We do not have an adequate answer to this problem.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

So, I think there are two dimensions: selectivity and politicisation. Recently I delivered an address before the retreat of the ICC on the Security

Council referrals. Should not there be objective criteria in the referrals to avoid politicisation and selectivity?

So, I have Judge Robinson and I noted you, you are next.

Judge Patrick Robinson, President of the ICTY

Thank you very much, Madame Chairman.

I do not wish to be overly defensive in relation to the representation of the voices from the region, but the first Legacy Conference which we had last year in February was devoted precisely to the region, and the region was fully represented in all panels and particularly on the floor. Those of you who were here will recall the very dramatic presentations that we had from the voices from the region, which does not mean, of course, that there need be no voice from the region at this conference; we welcome that voice at all times.

Thank you.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Thank you.

Question from the audience: unknown speaker

I think I do appreciate the importance of the defence, but my appeal is to the organisers. I did actually concur with many issues on the defence. I was of the view that if it were possible, if it is not too late, I said, that we can probably have somebody from the defence section, just to tell us the difficulties they go through. We are talking about international issues, people coming from Yugoslavia to hear; and as most of you are aware of the situation over the ICTR, the problems they have been having with the governments, the defence lawyers have been having with the government. What about the ICTY? Are there no problems that the defence layers normally face? If it were possible that we could probably have some time just to run us through and see what difficulties they normally incur. Probably it will complete the issue of justice, because the justice we have been hearing about is the justice from the prosecution. We have not heard the justice from the defence. Because to me justice means the two sides have been heard on a fair and level ground. Only then could I probably come up and say: "Yes, there was some good justice in this issue."

Thank you very much.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Well, there is an important point: the voice of defence is missing here. Let me say for myself, 14 years of service as an international judge, all that we have, the quality of justice, we have to be headed towards not being for the defence counsel who challenge and confront us into addressing all issues and just advancing jurisprudence. I always notice how the quality of defence made a difference to the fertile rights of the accused persons. So, I want to acknowledge the two defence counsels here, and your role; and I do encourage you, Judge Robinson to have not just prosecution on the podium here, but defence as well.

I thought I saw two men in the back. So just hold on; let me take the two in the back first.

Question from the audience: unknown speaker

I think Ambassador Rapp made a very interesting comment because as I just saw this last minute, it is as if we had a soccer match or a baseball match between prosecutor and defence. And, of course, if we think too much in justice for the victims, if we are thinking about this sort of individualized reparation, I mean the task will not be performed because very often you have mass violations of human rights. So, I think what has to be stressed more, and I did not see it enough here, is that justice, the rule of law and public order are common goods, public goods, and this is a rule in itself. I mean to the extent you get to form reparations to the victims – that is great, but the idea is that overall impunity will not prevail. I think that is a basic thing when we are overcoming these situations of civil war and so on.

There is one question which no one brought here. What comment can you present about the situation in Kosovo where, as you know, there are charges of very serious violations of human rights, hundreds of murders; some cases with the extraction of organs for transplant? There is a report by the Swiss Senator Dick Marty about that which was considered by the Security Council. That would be part of reconciliation in the region as well. So - justice as a public good - and Kosovo. Could I have comments on that?

Thank you.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Thank you.

We have the contribution in the back, and one here, and then we will close with the panel's responses.

Question from the audience: Judge Shireen Avis Fisher, Justice of Appeal at the Special Court for Sierra Leone

My name is Shireen Fisher. I am a Justice of Appeal at the Special Court for Sierra Leone. I wanted to get back to the point that was made a few moments ago about the voice of the courts in the region and the people in the region. What I wanted to was, first of all, to thank the ICTY for its conference last February where that was a specific topic. But I would suggest that it cannot be isolated to one conference. Your legacy are those courts because they will continue after the ICTY is over. And you do have that voice in this room. There are several members of the court of BiH that are here, and many of them at their own expense. You have the President of the Court, you have the Registrar of the Court, you have the head of the defence support team, you have the previous president of the Appeals Chamber, you have several judges and several prosecutors from that Court that are here to celebrate the ICTY legacy. I suggest that you use those people to get the voice of the region because I have to agree that that voice needs to be heard not just once, but every time the issues of the legacy of the ICTY are discussed. Thank you.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

Thank you.

Question from the audience: Jon Kamanda, President of the Special Court for Sierra Leone

Our distinguished honoraries, my name is Jon Kamanda. I am the current President of the Special Court for Sierra Leone. What I want to really say is thanks to the ICTY. I appreciate the fact that we are dependent on its jurisprudence, as we have in our Statute Rule 34 said that we would depend on the jurisprudence of the ICTY, of ICTR until we were in a situation to be confident enough to build up our own jurisprudence, which I must say we have now built up and there are no comparisons between the situation which we have reached in terms of gender crimes, forced marriage, peace keepers who are arrested, and such things.

But then, I go to this point about the fact that we are also in our current stages. I know the ICTY is now in its completion stage, but I can say that that we will be the first to go. And there is so much yet between us that we have to discuss in times of how these matters might be handled. One particular point I wish to raise is the situation that pertains to witnesses, witness protection. This has been handled very well in the Special Court's Review and I know it's been handled also at the ICTY.

But then, the difference between ICTY and our Court is the fact that we are based in the country where the crimes themselves were committed. And this suddenly exposes not only witnesses, but the principles to whatever harm we are protected if this is against. I was asking you a question simply to be told or to have the view of the panel what about the situation in a country where the legacy does not take care of the principles, and they are the ones who might, just because the evidence has found them incomparable to say: “your time imprisonment is so many years, or you are free and so on”.

My point is that: these precedents are themselves lines of protection.

Stephen Rapp, Ambassador-at-Large for War Crimes Issues, United States Department of State

As I think people know, the ICTY Prosecutor brought cases of the crimes committed by those groups in the Balkans, including crimes committed against Serbs by ethnic Kosovars. Obviously, there have not been a lot of convictions in that area and then there is recently the *Haradinaj* case where the acquittal was set aside, and it is being retried. The witness raised specifically the evidence developed by the Swiss Senator and former investigating magistrate Dick Marty for the Council of Europe with regard to crimes against ethnic Serbs in Kosovo, and potential organ trafficking. And the international community has supported an effort to investigate that, and a special mission has been established in Brussels under EULEX, the European Union actually appointed my predecessor, Ambassador for War Crimes, Clint Williamson - panel that includes people from multiple nationalities, and they are working with Senator Marty and with the authorities in the region to get all of the evidence, and to develop the cases that are there, to proceed with them without fear or favour. And we are supporting that effort. I think we see in all sorts of situations places where justice needs to be done, where it cannot necessarily be done in a Tribunal which is closing its doors in the Completion Strategy, and we have to come up with mechanisms for doing that. And that is being done in the case of these alleged crimes in Kosovo.

Diane Orentlicher, Deputy, Office of War Crimes Issues, United States Department of State; Professor of International Law, American University

If I can add one response on that question, selection of defendants, two points. I really think there is one justification for selection that is important, and it is tricky in application. There have been a number of situations where countries genuinely cannot handle in domestic courts certain high profile perpetrators whose prosecution locally would be destabilising. And I can strike that. Even local prosecutors who have a good deal of tact in their own capacity to prosecute

war crimes domestically, have acknowledged that there were certain people like that, for example in Serbia, but also in other countries. So, I think that is one fully important and legitimate ground for selection.

The question about reparations is a huge topic, and I think we have not begun to tackle that in an appropriate way for victims. But I wanted to use your question and opportunity to say that in my interviews in Bosnia, when I talked to victims about what they thought the ICTY had achieved, they were not disappointed. I did not put the question that way, but that's how the answer sort of showed out.

Bosniak victims always mentioned the judgment that what happened in Srebrenica was genocide, as a source of deep moral satisfaction. And I think that is in the nature of... the kind of moral reparation you were talking about. I also want to just briefly mention that I was struck, and happily struck, to see that victims of gender violence in Bosnia had a similar sense of moral vindication in the judgments that Patty Sellers was talking about earlier.

The contributions of the ICTY to gender justice have been widely hailed and rightly so. I was not sure how impertinent in overall it would be on the ground to victims, and I am going to quote one person I interviewed, who tried to capture the importance of those judgments. The way she put it was that these judgments "created a new kind of awareness that women had been used as weapons of war." They became visible, personalised and recognised as one kind of victim. And clearly there was an element of moral satisfaction in those judgments.

Moderator, Navi Pillay, UN High Commissioner for Human Rights

So, may I as a last word say that the ICTY's legacy continues in every line written into the Rome Statute? All human rights protections, protection of witnesses, the right of victims to participate in the proceedings, the right to victim assistance - the gaps that you pointed out are in there, and now we have to continue to have the process because it is indeed a huge challenge to deliver justice in the ICC when you have, I was just told earlier today, 2,000 victims wishing to participate in the trial.

So, I do not know what you started, but this is the legacy that is going to move on.

I want to thank the panel for the extremely interesting contributions. Thank you very much. I hand over to MC.

Thank you.

Master of Ceremonies, Christian Chartier, former Chief of the ICTY Public Information Service

Thank you very much. This discussion concludes the first day of the conference, and we are confident that you have heard many challenging contributions and that you have a lot to reflect upon tonight.

The conference will resume tomorrow morning at 9:30, and we are looking forward to seeing you back.

Thank you very much.

Panel 3***The Interaction of Common and Civil Law Procedures in the Work of the Tribunal: Efficiency and Fairness in Complex International Trials*****Day 2: 16 November 2011****Moderator:****Judge Patrick Robinson, President of the ICTY****Panellists:**

- **Claus Kress, Professor of Criminal Law and Public International Law, Cologne University**
- **Judge Gabrielle Kirk McDonald, Iran-United States Claims Tribunal, former ICTY President**
- **Judge Alphons Orié, ICTY Trial Chamber**
- **Michele Papa, Professor, Faculty of Law, University of Florence, Italy; Visiting Professor, Columbia University School of Law**

Master of Ceremonies, Christian Chartier, former Chief of the ICTY Public Information Service

A very good morning and welcome back to this meeting and to the final day of the ICTY Global Legacy Conference.

It will be yet another enriching and long day, and I am pleased to request your immediate attention for the discussion of today's first panel which will consider the interaction of common law and civil law procedures in the work of the Tribunal, efficiency and fairness in complex international trials. This panel will be moderated by His Excellency Patrick Robinson, President of the ICTY where he has been serving since 1998 and where he has presided over many first instance trials. He now presides over a number of appeals proceedings in cases before both the ICTY and the ICTR.

I am also pleased to introduce the following panellists. First - Professor Claus Kress, who is teaching criminal law and public international law at the University of Cologne in Germany, which he represented in the negotiations concerning the International Criminal Court. Then, Judge Gabrielle Kirk McDonald, one of the initial 11 judges elected at the ICTY in 1993. Judge McDonald became the Tribunal's President in 1997 after she had completed the Tribunal's very first trial in the case of Duško Tadić. She is holding a number of prestigious awards, and she is now serving as a judge in the Iran-US Claims Tribunal.

Then we have Judge Alphonse Orié who has been a permanent judge at the ICTY since 2001, where he first appeared as a defence lawyer, also in the case of Duško Tadić. Judge Orié is also a former justice of the Dutch Supreme Court.

And finally, Professor Michele Papa, the Vice President of the University of Florence, Italy, where he has also served as a Dean of the Law School. Professor Papa is currently Visiting Professor at the Columbia Law School University in New York.

Thank you for listening to the panellists under the guidance of His Excellency President Robinson.

Moderator, Judge Patrick Robinson, President of the ICTY

I thank you very much. As you heard, this morning's proceedings will be devoted to the consideration of the interaction of the common law and civil law procedures in the Tribunal's work, and the question of efficiency and fairness in our proceedings. The Tribunal has made a significant contribution to the development of international criminal law, international humanitarian law and international human rights law at both the substantive and the procedural level. This Conference is examining this contribution, but this panel is primarily devoted to a consideration of the Tribunal's contribution at the procedural level. It will be merely concerned with the strategies the Tribunal has devised through amendments to its Rules of Procedure and Evidence to achieve efficiency and fairness in its proceedings, and with whether the interaction of features from the common law and the civil law systems have contributed to or have impeded that achievement.

In 1945 the Nuremberg Tribunal completed the trial of 22 accused persons in about 11 months, after hearing 130 witnesses and admitting some 100,000 documents. In contrast, trials at the Tribunal usually last for years with the longest lasting almost five years. The main reason for the difference is the larger number of witnesses in trials at the Tribunal where, on average, hundreds of witnesses testify at the trial. For example, in the *Slobodan Milošević* case there were 400 witnesses up to the time of the case's unexpected termination. By contrast, the Nuremberg Tribunal relied mainly on the documentary evidence.

When to the length of the trials is added the cost of the Tribunal's budget, and its budget for 2011 and 2012, is 289 million US dollars, one can understand the criticism that international criminal justice is long, it is slow and is expensive. But from early in its life, the Tribunal had adopted two procedures to expedite its proceedings. Thus in 1999 the trial chambers were given the power to require the Prosecutor to shorten the estimated lengths of examination in chief for some witnesses, to set the number of witnesses and to readjust the time available for

presenting evidence. As criticism of the slow pace of trials mounted, the Tribunal in 2000 amended its Rules to allow the admission of written evidence or transcripts of previous testimony in lieu with oral testimony as long as the evidence went to proof of a matter, other than the acts and the conduct of the accused - a measure inspired by procedures in the civil law system.

In 2003 the Security Council established a Completion Strategy for investigations to be completed by 2004, trials by 2008, and all work by 2010. By this time the Tribunal, in response to the mounting criticism to the length of its trials had, in my view, become obsessed with the devising of procedures to expedite its trials. The single most important aspect of the Tribunal's work did not relate to the substantive law of any of the core crimes, but rather to its Rules of Procedure and Evidence. The single most pressing issue was not the definition of genocide or the *mens rea* or the crimes against humanity. It was instead: what measures can the judges devise to shorten trials?

It was not of course ideal for any court, especially on determining the liberty of the individual, to perform its judicial functions in that environment. It was against that background that in 2006 the Tribunal adopted what may be considered its most radical time-saving measure by empowering the Trial Chamber to reduce the number of crimes charged and to reduce the number of incidents in respect of which evidence may be lead. Having regard to all the relevant circumstances, but so that the remaining charges are reasonably representative of the crimes charged in the indictment. In practice, there is an average of about one third reduction of the scope of indictment in respect of each trial.

The Tribunal which has the legislative power to amend the Rules of Procedure and Evidence has done so 47 times since the first set of Rules was adopted in 1994, and this mostly in response to the need to devise strategies to expedite its work.

But in what legal context was this flurry of activity taking place? Against the background of what legal system were amendments made? Indeed, what is the Tribunal's legal system? I have been at the Tribunal long enough to recall the stinging comment of a writer in the *London Times* in 1999, that the Tribunal is a rogue court with rigged rules, and that it dips into a *potpourri* of different legal system from around the world.

My view is that, at base, the Tribunal's legal system that was established by its Statute is common law, adversarial, with an independent prosecutor responsible for the investigation, and prosecution of crimes, squaring off against the accused, and the three-member bench of judges in the middle, as an impartial arbiter. And that would need to be said immediately. With the passage of time and with the view to expediting proceedings, judges were given more powers

to enable them to become more involved in trials. Generally, the collection and presentation of evidence follows the common law adversarial system where these matters are in the hands of the parties, and independent prosecutor is responsible for the investigation and prosecution of crimes. Fact-finding and the collection of evidence is predominantly in the hands of the judge of the civil law system.

On the other hand, admissibility of evidence is based on the more relaxed civil law model. Evidence is admissible so long as it is relevant and probative, making hear-say evidence admissible whereas it is inadmissible in the common law system. Thought I am very quick to say that the exceptions to that rule in the common law system are legion.

We thus have the interaction of the two legal systems at the most basic level of a criminal trial: regime for the collection and presentation of evidence and regime for the admissibility of evidence. Nonetheless, this interaction should not be overstated because in practice neither the civil nor the common law system exists in a pure form. They borrow from each other, and as has been rightly said, it is more accurate to speak of a dominant model.

Now, let me mention some of the measures adopted by the Tribunal in the interest of the expeditiousness of its trials. As a general rule, pursuant to Rule 89 (F) adopted in 2000, a Chamber may receive the evidence of a witness in a written form if it is in the interest of justice to do so. And I have already referred to the amendment of the Rules in 2000 which allows the admission of written evidence or transcripts of previous testimony in lieu of oral evidence, provided that evidence goes to proof of a matter other than the acts and conducts of the accused. This measure to be found in Rule 92 *bis* is decidedly civil law in flavour in contrast to the common law's predilection for the orality of evidence. An interesting feature of this measure of this measure is that it is at discretion of the Trial Chamber to allow cross-examination. If allowed, cross-examination takes place in accordance with the Rule 92 *ter*. This raises the question whether there is any detriment to the accused and his defence in not having, as is the case in common law jurisdictions, the right to determine whether to cross-examine albeit in relation to evidence, that does not go to the acts and conduct of the accused.

Rule 92 *ter* adopted in 2006 provides for the admission of written evidence or transcripts of previous testimony in relation to evidence that may or may not go to the acts and conduct of the accused, provided the witness is present in court, is available for cross-examination and attests that the written evidence accurately reflects the witness's declaration and what the witness would say if examined.

In 2006 Rule 92 *bis* was reincorporated into the Rules as Rule 92 *quater* to allow for the admission of written evidence, of a person who has subsequently died or who can no longer with reasonable diligence be traced, or who is physically

or mentally unable to testify. This evidence may or may not go to proof of acts and conduct of the accused, but when it does, this may be a factor against the admission of such evidence.

Although the use of written statements in these circumstances has a civil law flavour, many common law jurisdictions have similar provisions. In 2009, Rule 92 *quintiles* was adopted to allow the admission of written statements or transcripts of previous testimony of a person whose non-attendance at trial is due to improper interference such as threats, violence and bribery.

Now, the last measure I wish to mention is judicial notice. Rule 94 (E) provides for judicial notice of facts, of common knowledge not subject to reasonable dispute. This aspect of judicial notice is found in many common law jurisdictions. It has not been relied on to a very great extent in trials and has not given rise to much dispute.

More controversial, however, is the judicial notice of adjudicated facts from other proceedings. This is Rule 94 (B), and facts are considered as having been adjudicated in a previous case when they have been unchallenged on appeal or confirmed by the Appeals Chamber. Where is, then, no need to lead evidence to establish this fact, and once the fact has been admitted, a rebuttal of presumption arises, shifting the burden of contesting it to the other party which is usually the accused since in 99 per cent of the cases it is the Prosecution that seeks to have adjudicated facts admitted. The shift resulting from this rebuttable presumption has given rise to much debate as to whether it breaches the rule that the burden of proof is on Prosecution. Nonetheless, the Tribunal's case law is that there is no such breach. A great deal of evidence, usually evidence of physical crimes, is admitted in this way from previous trials thereby expediting the trial process.

And now, the provenance of these species of judicial notice is not entirely clear. Indeed its paternity might be said to be in dispute. But, whatever DNA evidence is available, it would seem to suggest that it was inspired by the practice in a particular civil law jurisdiction.

For a variety of reasons it is entirely appropriate at this time to consider the legacy of the Tribunal in terms of the Rules of Procedure and Evidence it has adopted in order to expedite its trials. To begin with, the Tribunal is the first of its kind since the Nuremberg Tribunal was established 66 years ago. Second, the latter consideration takes place at a time when the Tribunal's procedures have already taken shape and matured, and finally the assessment comes at the time when the Tribunal is very near the completion of its work.

What will future generations learn from the debate as to whether the Tribunal embodies the common law adversarial or the civil law inquisitorial

system? Indeed, is such a debate productive? The same question may be asked about the debate whether the Tribunal system is or should be judge-driven or party-driven. Will future international criminal tribunals, or indeed current ones, or domestic criminal law systems benefit from these expediting procedures, or will they be rejected as unhelpful, unnecessary, or worse yet as a manacle to achievement of international criminal justice? Has fairness, which must be the overriding consideration in a trial been compromised in any way by the several procedures the Tribunal has adopted to expedite trials? Have the rights of the accused been adversely affected by these procedures?

Former ICTY judge and USA District judge, Patricia Wald, speaking of the increased role of written testimony in the Tribunal's trials, splendidly summed up the potential collision of fairness and efficiency in a wonderfully titled article to establish incredible events by credible evidence, when she said: "Whether that trend will go so far as to offend bedrock principles of a fair trial, will almost surely be litigated by defence counsel in the forthcoming trials.

It is indeed an issue that deserves thoughtful consideration by international commentators and practitioners. International courts of some genres will probably exist for the foreseeable future. Their entire body of trial practices must be regularly scrutinized to assure fundamental fairness, especially in view of the fact that they operate in isolation, not as part of national system of courts of governmental bodies capable of oversight. At the same time, if they are to perform their unique function, such courts cannot be required to conform to a particular national code of criminal procedure. There must be due recognition that to preserve respect, such courts must act not only fairly but expeditiously.

Now, ladies and gentlemen, this is the background for the three themes that I have identified for discussion. And the first theme I have described is as follows: there is no fundamental principle of law that requires the Tribunal to work in both the common law and civil law systems. And it will not be difficult to argue that they should work in one or the other. The considerations that have led them to work in both systems are political and not legal.

I would like to explore whether the ICTY model which draws from the common law adversarial and the civil law inquisitorial systems has proven to be more efficacious than the use of either one or the other system. Bearing in mind the criticism that has been made, that since the countries in which the conflict occurred are civil law countries, the Tribunal should have used the civil law system.

And the second theme I identified for discussion is as follows: the system at the Tribunal is not just an amalgamation of the common and civil law systems, but one which is *sui generis*. The conflicts between the common law and civil law systems are resolved using the principles of fairness, and thus the system is neither

party-driven nor judge-driven. It is a system that is fairness-driven. In that regard, I want to consider whether it becomes relevant whether the Tribunal's system is civil or common law, because after all, Article 14 of the International Covenant on Civil and Political Rights sets out the minimum standards for fair trial, and it is not specifically related to either system.

The third theme is as follows: the Tribunal has been criticized that it has employed measures to increase efficiency in order to meet its Completion Strategy at the expense of the rights of the accused to a fair trial. Sub-themes: what has the impact of the Completion Strategy been on the fairness and efficiency of the Tribunal's proceedings, have measures employed to expedite trials actually increased efficiency? Have these measures been in accordance with the object and purpose of the Statute and Rules to ensure a fair and expeditious trial? Have they compromised the fairness of the trials or served to further safeguard the rights of the accused? By way of example, how has the introduction of written statement in lieu of oral testimony impacted on the trial process, particularly in light of the issue of fairness to the accused?

That is as much as I want to say by way of introduction, and I should say that in meeting with the panellists this morning, they all stressed that they want this discussion to be done in a way that is interactive and affords as much time as is possible for you, the participants, to ask questions. In this sense, I think they said they want it to be democratic - not to suggest that other panels have been undemocratic. There must be at least one hour for discussion.

I am going to first call on Judge Gabrielle Kirk McDonald, who was a judge of this Tribunal, and indeed was the President of the Tribunal when I came here in 1988, and who was very, very gracious to me as a newcomer. And I am going to ask her to say what she has to say.

Judge Gabrielle Kirk McDonald, Iran-United States Claims Tribunal, former ICTY President

Thank you, President Robinson, for those kind remarks.

Good morning to everyone.

Today my remarks will cover three themes. First, what constitutes efficiency and fairness; second, what are some of the ways we can achieve it; and third, how can we assess whether these goals had been achieved at the ICTY.

I do not purport to have answers to all of these questions. I have been away from the Tribunal for 12 years now, but whenever I prepare for events such as these, I am even more convinced that the Tribunal will go down in history as one of the

United Nations' success stories. And the reason I believe in this is because of the Tribunal's relentless efforts and successes in achieving procedural efficiency and fairness, both for victims and for those brought before it to answer for their crimes.

So, first, what constitutes efficiency and fairness? The catalogue of atrocities that took place in the former Yugoslavia in the mid-1990s is well known, and it's critical to keep this in mind as we frame our arguments with regard to efficiency and fairness, because these goals should be gauged by indicators wider than the Tribunal's judicial operations. First it must do justice through its trials and appeals. But it also was conceived as an instrument of peace.

It was established by the Security Council acting under its Chapter VII powers, while the conflict was on-going, a conflict which involved mass killings, organized and systematic detention and rape of women, and ethnic cleansing. Thus the ICTY, a judicial body, was given the ambitious mandate of not only halting the commission of these serious violations of international humanitarian law - it was also mandated to bring about and maintain international peace and security. What a tall order! I agree with President Robinson that the ICTY is a model for international criminal justice.

Undoubtedly, however, there have been numerous hiccups. However, the ICTY as well as the Rwanda Tribunal have served as templates - and that's your word President Robinson - as templates for other tribunals, including the International Criminal Court. I also agree with President Robinson that the first step in assessing whether the Tribunal's Rules of Procedure and Evidence meet fairness is to look at the Statute, to its interpretation in accordance with the ordinary meaning of the terms provided in the document, in their context and in light of its object and purpose. The first judges were guided by these factors when we drafted and adopted the rules.

Yet, I may be more open to a blending of common and civil law traditions than some, even if this fusion on its face may appear to create tension. I believe what we should apply is whether in the totality of circumstances the rules have applied for a fair trial, consistent with the *sui generis* nature of the ICTY, as opposed to whether they need to be tested under our national perceptions. Thus the lens through which we view concepts of efficiency and fairness should not be heavily influenced by our own legal backgrounds, but by our critical assessment of whether both accused and victim received an efficient and fair trial under international standards.

Two: what are some of the ways to achieve efficiency and fairness? Undoubtedly, when the judges first met in 1993, our primary allegiance was to our own national systems. Yet, we ultimately shed our tunnel vision and created an international institution. We framed rules to fit the nature of the conflict, and

to provide efficient and fair trials that complied with the highest standards of due process.

By way of a few examples, we adopted specific evidentiary procedures recognizing the widespread and coercive nature of sexual assaults against women, evidence of patterns of conduct not limited to the guilt or innocence of the accused was made admissible under our Rule 93. Similarly, rules for the protection of witnesses, such as protecting the identity of a witness from the public were adopted; understanding that they may have the reluctance to appear. The only exception to our preference for live testimony was to allow testimony by deposition where cross-examination was preserved.

The question of whether the Tribunal could hold trials *in absentia* was passionately debated among the judges, and those of us who came out against it carried the argument. At this time I might pause because yesterday there were many remembrances of President Antonio Cassese. What no one told you was that Nino was a fierce fighter and he and I went 15 rounds: I against trials *in absentia*, he in favour. He suffered a TKO at my hands, but he didn't go down for the count, because, as we know, Nino had the intensity and perseverance. And what happened was that trial *in absentia* reappeared at the Lebanon Tribunal where he was President. So, that's one of my memories of Nino.

Now, let me speak about amendments to expedite trials. The Rules of Procedure and Evidence, however, have undergone a total of 47 amendments, as President Robinson said a few minutes ago. The last one occurred on October 28th. The vast majority of these amendments were made following careful assessments by judges, the Prosecution and defence counsels. But the Rules have been amended for other reasons. Essentially, in response to external pressures, including by the United Nations, these amendments enabled the tribunals, at least some of them, to achieve increased efficiency and fairness in trials. But they also have been the subject of severe criticism. I had disagreements with those critics, most of whom hail from common law traditions who based their criticisms, especially of the 2000 amendments as they turn from earlier emphasis on the principle of orality. There is one former judge who President Robinson cited, Judge Wald, put it "a departure from common law rules of evidence".

I wondered, though, if these critics know that the United States whose legal system is founded on the common law tradition, itself proposed in 1993 when we first met a rule allowing the admission of witness statements in lieu of oral testimony which, however, was bereft of the factors that are now contained in the Rule 92*bis*. The first judges, however, declined to accept this proposal.

While it is indeed true that the amendments on their face circumscribe the principle of orality, what is undeniable is that, in practice, live testimony remains

predominant at the ICTY. In view of the Tribunal's decisions relating to efforts to introduce evidence under 92 *bis* and *ter*, shows that the trial and appeals chamber judges carefully weigh both efficiency of the proceedings and fairness to the accused before allowing for the introduction of such evidence. It is important to know that the cases before the Tribunal are highly fact-intensive and spend long periods of time, and President Robinson has made a reference to the *Milošević* case. That case involved crimes occurring from 1991 through 1999 in three different conflicts. And it was originally estimated that there would be 386 witnesses. Therefore, admitting written testimony, following a careful analysis of the factors provided in Rule 92 *bis*, especially redundancy can speed up proceedings considerably and save significant cost associated with the task of documenting and adjudicating these mass crimes.

Another consideration, however, that should be taken into account is whether the amendments violated Article 21 of the Statute which among other things incorporates the guarantees of Article 14 of the International Covenant for Civil and Political Rights providing for the right to cross-examine witnesses. Based on my review of the ICTY's jurisprudence, in the totality of the circumstances, the Tribunal has succeeded in making the trials much more efficient without sacrificing the due process rights of the accused.

The urgency the Tribunal now feels was brought to bear by the UN. The Completion Strategy was designed to reduce cost and close shop concerns about the right of the accused to be tried without undue delay, and even the length of detentions has now been replaced by Tribunal fatigue, the high cost of international justice. Such pressure to provide speedy trials that is not motivated by concerns for the rights of the accused can threaten the integrity of the proceedings and may even damage the credibility of the ICTY. This is the threat to fairness of the trials, even more than the progeny of a particular rule. Perhaps now, some 16 years after the Dayton Accords, the obsession with expeditiousness should be re-examined, particularly when persons alleged to have been the major actors in the conflict are now in detention. And the ICC which has learned so many lessons from the ICTY should reject the short-sightedness.

Let me get to the third point. So, how do we assess whether these goals have been achieved? This brings me to my final point. We can spend decades debating the comparative fairness of the common and the civil law systems. What matters, however, is whether the ICTY has succeeded in meeting out its mandate. Has it made an impact on the affected populations? One of the goals has been met: these widespread killings, rapes and other forms of sexual violence, detention and expulsion have been halted. Significant movement has been made towards establishing more than its secession of hostility. Real progress has been made for a lasting peace.

We heard yesterday from Diane Orentlicher that the Bosnians she interviewed felt thankful for the Tribunal. They felt that without they would not have received justice. The impact of the trials that are broadcast in the region cannot be overstated. Trials enhance the perception of the Tribunal's fairness and help deter future atrocities by educating the population about what occurred through the use of testimony and evidence that they themselves can view and assess. Trials showed the rule of law is the best way to hold accountable those who violate international humanitarian law. The Outreach Programme reinforces this process.

In the early 1990s, as horror was being visited on the people of the former Yugoslavia, the international community was stymied by inaction and a lack of agreement about what to do, if anything. The ICTY was born out of this uncertainty. When the first judges arrived in The Hague, we had practically nothing. We had no budget and received monthly allotments making it difficult to hire staff. We even had no premises, including a courtroom or detention unit. And Georges Abi-Saab was here yesterday. I remember... - There you are! You remember, Georges, when Nino and you, and I came to visit what was then the AEGON insurance building? And that's where we ultimately settled. So we had no place to hang our hat.

What we also critically lacked was a way to bring indicted persons to the Tribunal. The multinational peacekeeping force failed to intercede claiming its mandate was to keep the parties apart, and not to arrest persons indicted by the Tribunal. Indeed, not a single indictee was arrested and transferred to the Tribunal until July 1997, some four years after our establishment. The 11 judges who adopted the Rules in 1994 operated in this uncertain reality.

So, finally there are sound reasons for demanding that complex international trials be efficient. Yet, there are compelling reasons for providing a process which places a greater emphasis on making sure that the Tribunal gets it right, that it delivers justice regardless of the time that it takes. In my opinion, this is the most important benchmark to assess whether our efforts at efficiency and fairness were successful. Did we get it right? I think we did.

Thank you.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much Judge McDonald. I now ask Professor Claus Kress to speak.

Claus Kress, Professor of Criminal law and Public International Law, Cologne University

Thank you, Mr. President.

On a very fundamental level, I think the legacy of the ICTY on substantive law is rather clear: revival of what I would call the first generation of international criminal law and then two decisive steps: crystallization of war crimes in non-international armed conflicts and emancipation of crimes against humanity from the connection clause with armed conflicts as it was the case in Nuremberg. This legacy has been received by the ICC Statute, and with the revival of what remains to be revived - the crimes against peace legacy in Kampala last year - we have reached basically a consolidated body of international criminal law, and I would call it international criminal law of the second generation, generation which was brought to light by the ICTY. This will be, I think, a lasting achievement at least for the foreseeable future. Much more difficult is, I think, the situation in our panel here - international criminal procedural law. It is very important to assess this legacy because it is also rather easy to foresee that international communities' discussion focus in the next perhaps ten years will be on international criminal procedure rather than on substantive law. So, it is particularly important to assess the legacy of the ICTY.

But it is more difficult, I think - the picture is more nuanced. The starting point has been much more difficult. There was not one law to choose, to re-discover, to re-identify. There was a major choice to be made from a universe of procedural systems. And, of course, we all know this ideal type comparison between common law or the adversarial system, I should rather say, and the inquisitorial system is far too easy. It exists only as an ideal type and then you have infinite variants of national resolutions. The choice was made initially and I, of course, speaking as an external observer, I can only believe what I read. But if it is true what I read, then my neighbour here had a crucial role in making this choice. There is one sentence reported from you, Judge McDonald, which goes broadly like this: "You want the rules? Here they are. And the ABA proposal." Of course, essentially, adversarial rules were presented to the judges. I don't think the ICTY Statute forecasted decisively this choice. It was made by the judges.

The reception of this basic choice, when again the negotiators in the course of drafting the ICC procedure were confronted to take a stand, was more nuanced. And nobody knows it better than Judge Silvia Fernandez who is here with us and who had to steer this debate. There was a perception - I guess it is fair to say it was essentially or predominantly a perception voiced, or most powerfully voiced by France - that the balance was tilted too far towards the adversarial side. And so, some crucial elements of the ICTY procedure were not adopted: the role

of the Prosecutor at the pre-trial stage was devised differently. Prosecutor's role as an objective fact-finder towards both sides was stressed more clearly than in the ICTY's Statute. The second point, the establishment of a pre-trial chamber with the confirmation herein clearly differs from what we had at the ICTY. And thirdly, the role of victims, victims' participation – another significant difference where states made the clear-cut decision to deviate from what at this moment in time was not yet a legacy, but a development of the ICTY practice.

So, the picture – you can see it from these very basic facts – is more nuanced when it comes to procedure. I want to, in this very limited introductory statement, perhaps raise some questions with regard to three, only three issues. It's really more questions from the perspective of an outside observer not familiar with the details of the Tribunal's practice.

The first is ascertainment of the truth and the role of the parties; second, some remarks on the fairness with the specific focus on fairness to the accused, the basic notion of fairness is, as we learned from Judge Trechsel, much broader under the ICTY's Statute. But I will focus on fairness to the accused and then concluding remarks on victims; on the ascertainment of the truth which I think, after all, is the fundamental question, because whatever you think about goals and theories, in the end it boils down to the fact that international criminal trials as national criminal trials are about ascertaining the truth. And I borrow this language, "ascertainment of the truth", from the ICTY Rules.

The story here, the ICTY story here, basically is well-known and was recaptured in both statements that we heard: a rigorous adversarial start, some inquisitorial text elements already included in the initial draft but not really used by the judges for a long time, and then since 1999, the second phase, a number of steps and reforms. I am not so sure whether I would portray them as inquisitorial, strictly speaking, as the President did; rather managerial seems to be the appropriate term, to correct them. Because there was not much, it seems to me, shifting, what is the crucial point, shifting the ultimate responsibility for ascertaining the truth on the judges but they were rather emphasising their role in organizing parties' contest more efficiently. So, I would call, with all unavoidable simplifications for such a short statement, I would call the ICTY legacy here a slightly softened adversarial model.

The question is, and that would be I think an important question to discuss for us - is this the most efficient model for the future of international criminal proceedings? The ICC negotiations have left this basic question essentially open. There was a huge debate during the negotiations whether to make this decisive further step beyond the ICTY legacy and to attribute an obligation on judges to assume ultimate responsibility for the ascertainment of the truth. This suggestion

did not prevail, so in the end the ICC procedural framework is open in both directions and it is a fascinating question for outside observers now to see how this open framework is filled. My feeling for the time being is, as far as we can see, the ICTY shadow or the ICTY legacy, the ICTY model is strong. We see at least a model of presentation of the evidence that follows the adversarial path whether or not judges and how judges within this adversarial model of presentation of the evidence will see their duty or not - to finally take their responsibility for the truth themselves. It's probably too early to say, and I am just adding that from a comparative perspective, there is nothing inherently alien from an inquisitorial perspective to have the model of the presentation of the evidence being done in an adversarial manner. And I would even say that the comparative trend in criminal law is rather going in that direction, and you may call that the "hybrid" or a "mixed" model.

The crucial question then remains: what the ultimate, also the safe perception of judges will be, when it comes to who is responsible for the final outcome? Here I think the jury, even though the jury doesn't exist in international criminal proceedings - that is also a legacy of the ICTY- the jury on that very fundamental question is still out.

Second point: fairness to the accused. Again, I can only do injustice to that topic and I would like to refer you to a wonderful chapter on the ICTY legacy in that respect, written by Judge Trechsel, and this chapter makes it very clear. But, again, the picture is mixed. There are some areas not mentioned today in the two previous speeches. I would refer specifically to the issue of the defence of the accused, the so-called right of the accused to defend himself alone. I don't like the word self-representation because it's a little bit self-contradictory, even schizophrenic – self-representation. So, the right of the accused to defend himself and the legal aid scheme which for example in *Karadžić* case was granted by the President to the Defence to the accused defending himself. I think here we have a clear example for the ICTY going beyond what is required under international human rights standards. One might go so far to question the wisdom of going so far. It might seem provocative to some of you and I am happy to discuss it in more detail a little bit later.

I want to focus here on the other side, which was the one focused on by the President when he asked us to address the matter: the sequence of the ICTY reforms curtailing to an extent the right to cross-examination and allowing the introduction of written evidence. It has been mentioned twice that these elements are inquisitorial. Perhaps I am allowed to qualify that slightly. It is true that if you take the ideal type of inquisitorial criminal proceedings, the admission of written evidence and the allowance of cross-examination, it is easier, compatible. But, I think we all know an inquisitorial system with no contradictory elements of that

sort doesn't really exist anymore. It's rather a *cliché* of an inquisitorial system to assume that cross-examination or a right to confrontation would not be respected. Since we have the international human rights standard, at least since that moment in time all inquisitorial systems in a word are bound to respect the right to confrontation. They have a problem with a hear-say rule and so forth.

So, basically, all those reforms which were addressed here are a challenge, a fairness challenge both from the adversarial and the modern inquisitorial perspective. They are simply a challenge to the fairness of the proceedings measures on any standard.

I'm not sure whether I would speak, Mr President, of fairness as being the driving factor on international criminal proceedings. I think rather the question is really whether it is judge-driven or party-driven. I would consider fairness as a controlling factor and here the problem... - and therefore I think your choice has been excellent. This curtailing down of cross-examination leads is, of course - whether you like it or not, a lowering of the fairness standard guaranteed to the accused. Saying this and recognizing this does not mean that that was a serious error or mistake, a flaw, but it raises a question mark whether the rhetoric of the international criminal proceedings have by any means - and we heard this sentence today again - to adhere to the highest standards of fairness - whether this rhetoric can really be upheld sincerely in international criminal proceedings. That's perhaps also a question that not everybody likes, but a question that has to be asked as a result of the experience we have.

Is it really sensible to put the standard for assessing the success of international criminal proceedings so high to say they are successful only if they meet the highest standards? And I would argue that there are a number of specificities of international criminal proceedings which make it extremely difficult to meet such a high standard.

Last point, and very briefly – victims. Here you can perhaps say that the subsequent development of the international criminal procedural law departs most clearly from the ICTY legacy and even within the ICTY a number of key persons have, so to speak, regretted the non-existence of victim participation rights. I remember Carla Del Ponte's statement in 2000: "That's a significant lacuna". In that respect, perhaps one might be tempted to say the ICC Statute has remedied a shortcoming of the ICTY's legacy. But my suggestion here would again be to be a little bit cautious and to say the jury is still out.

Yes, the ICC has clearly enshrined victim participation rights and we are now seeing the ICC struggling with putting it into operation. My feeling is from the first instances of ICC practice that problems are huge. So, the first question that will go to the testers: will this permanent international criminal jurisdiction

be able to manage this huge challenge? The second question, very important, and it will need, I think, strong empirical studies to assess this, what we can see from the ICC proceedings already is: there will be no immediate victim participation at the pre-trial or trial level. Victims will and have to inevitably act through legal representatives. So, important question will be to test how important this mediated participation of victims will really be followed.

So, in the end, last sentence: it might be that in that respect, what I would call the modesty of the ICTY procedural model might be reconsidered for its wisdom at a certain moment in time. Perhaps this is one very important, even though perhaps not splendid and not particularly useful for festive speeches, but important element of the ICTY's legacy – modesty in certain respects in terms of international criminal procedure can be very important, helpful and conducive to bring these high values, these emphatic values on the substantive criminal law level to life.

Thank you very much.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much, Professor, for that fascinating contribution. Now, Judge Orie.

Judge Alphons Orie, ICTY Trial Chamber

Thank you, President Robinson.

My younger son announced recently that he would study mechanical engineering. I was extremely happy for him, because there's no common law mechanical engineering, and there's no civil law mechanical engineering. I am a bit addicted to comparative criminal procedure. Before I go to sleep, I read an article written by Professor Langbein in the early 1990s explaining that in practice there's not that much difference between the common law and civil law system. And then sometimes I dream that choosing for either system finally settles the matter: civil law criminal procedure is more efficient than common law procedure, or the opposite. But then I wake up. And I remember that the common law tradition in the United States has 94 per cent guilty pleas and that the system would collapse if the percentage of not guilty pleas be double or triple of the present 6 per cent. Only in 18 per cent of the cases heard before the ICTY the accused enters a guilty plea.

The founding fathers of the ICTY estimated that a trial would take six weeks. Wikipedia tells me that the trial of OJ Simpson, where only two persons were found killed, alone took nine months. Politicians would say the OJ Simpson

case was heard in 1995 and therefore that such an estimate of 6 weeks could have been made in 1993, but that would be a political answer, not a very convincing one. Perhaps the founding fathers were still living in a Nuremberg era, in which some 25 cases were adjudicated in approximately one year. And often I ask myself whether it would make any difference: working on the basis of the dossier, a file, as in the civil law tradition, or in a system where all the evidence is presented to the judges at trial.

What would be put in such a dossier? At least all the evidential material which we would consider being of possible relevance for the charges and from which the parties can select what suits their case best. Would that be equivalent in numbers to the materials disclosed by the Prosecution to the Defence in the ICTY practice under Rule 68(ii): collections of relevant material held by the Prosecutor? And what would that mean for such a dossier in a big case? I rely on the numbers I've taken from an article written by Julian Higgins about the size, the scope and the scale of the *Milošević* case as per November 2005, which is a couple of months before Mr. Milošević died. Such a dossier would comprise the 1.2 million pages that were disclosed in the *Milošević* case. You would say that it would take a while to read such a dossier. How much?

If I read 1,000 pages a day, not bad, I would need 1,200 days for those 1.2 million pages. That means five years of 250 working days a year; I don't take any holidays. Realising what it means to have such a dossier I asked myself whether it would then not be better, like in that still unfinished case, to digest what was presented in court through close to 250 witnesses at the time, in 46,000 pages of transcripts, an average of 250 for each witness, 85,000 of pages of OTP exhibits. In this summing up I'm still ignoring the 100 videos that should be added.

I further tried to compare and understand what would happen in the one system and what in the other system.

Part of the comparison deals with written statements in a dossier and oral testimony at trial? Using written statements saves time, doesn't it? We urge parties to use witness statements and tell them that the time thus saved justifies a reduction of 50 per cent of the time we originally had in mind to present their case, our original estimates based on the assumption that all the evidence would be presented by *viva voce* witnesses.

Let's think about what this time saving approach really means. Let's start from the assumption that a *viva voce* witness takes two hours in examination-in-chief. If you use a witness statement from your dossier, however, perhaps with some additional questions, you can present that same evidentiary content in half an hour. So we have reduced the time for case presentation to 50 per cent. Instead of an allocation of two hours that party may now use only one hour. In that one hour

that party now can present two witnesses through statements taken from them. It also means that you suddenly have doubled the body of evidence, the evidentiary content. In the now only one hour, instead of the two hours *viva voce* testimony, you have presented the evidence of two witnesses, each taking 30 minutes of your court time. But this also means that the time needed for cross-examination of the witnesses has been doubled compared to the one *viva voce* witness, that processing and evaluating the evidence may require considerable more time as well. So, at the end, you ask yourself how efficient it was to save 50 per cent of court time? Was that a good idea, yes or no? Where are we saving time and what are the indirect consequences? Are we too generous if we reduce the time for case presentation by only 50 per cent?

The comparison does not lead to clear answers.

Unlike in my dreams, in law efficiency is not dealt with directly in the Rules of Procedure. These Rules are governed by principles, and for criminal procedure mainly principles of fairness. These basic rules of fairness we find in Article 6 of the European Convention of Human Rights, Article 14 of the International Covenant on Civil and Political Rights, almost literally copied in our Statute. These basic principles are the same and they are not any different in the civil law tradition and the common law tradition. Fairness is basically to be found in both systems.

Now, that's interesting. First, in both systems fairness is the bottom line, and second there seems to be no hierarchy in efficiency between the systems: the one is not by definition more efficient than the other. So, what we should do is use the features of the system as it was adopted in the ICTY in order to make the trials as efficient as possible. We should not blame the choice of the system.

The system is not the culprit. At the same time, one should not be surprised that our trials take much time. If you are expected to try a case in a representative way, covering many years, tens of thousands of victims in an individual case against an accused, facts that occurred in 10, 20, 30 municipalities over series of years, this cannot be done in a minute. It took us 18 years to have all the accused transferred to the Tribunal, and if you are to try them all fairly, then this takes some time. Apart from these inherent factors, many of the circumstances are totally beyond our control: health of the accused, cooperation received over the years from states, and just a very simple fact, a distance of well over 1000 kilometres between the former Yugoslavia, where the witnesses are, and The Hague.

But despite these circumstances, including those beyond our control, we have to ask ourselves have we been inventive and creative enough within the limits of basic fairness? I will not elaborate on all the rules we have adopted - President Robinson has said a lot of about it and we've heard other information. But, I will

just give one example: if you think of the concept of adjudicated facts -almost completely unknown in either system - and has a strong potential to add to the efficiency. And I think the concept is fair in the context of cases against political leaders and military leaders especially as far as the adjudicated facts relate to the crime. The adoption of the rule on taking judicial notice of adjudicated facts was one of our achievements.

The key to the success that can be achieved under our Rules, however, is the awareness of efficiency issues in our daily work. Whether in preparation for trial or at trial, that awareness is what we really need in addition to amending the rules. Common sense, the awareness I just referred to, and mathematics like in mechanical engineering are the same in the common law and the civil law word. I used 1,400 words including this last line.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much, Judge Orie.

Now, Professor Papa.

Michele Papa, Professor, Faculty of Law, University of Florence, Italy; Visiting Professor, Columbia University School of Law

Thank you very much, President Robinson, and thank you also for the extra time that you allowed me to use, and so I am not going to read just alternate lines.

First of all, I would like to stress the fact that I have been invited as a professor of comparative and international criminal law, and this would be enough to recall Nino Cassese as a maestro, as a mentor, as an example, for my generation in particular. But I am not only a passionate scientific reader of Nino's work, I was also a colleague of Nino at the University of Florence, and at different times Dean of the Law School and Vice-Rector of the University. So, in some way I represent... well, not so much the institution, I would say, but a large and transversal community of about 60,000 people: professors, students, and administrative staff. And it's on behalf of that community that I would like here to publicly express our gratitude and pride for having had such a wonderful person with us. We will miss him a lot, really.

Now, coming to the topics that we are discussing here today, I would like to comment from the particular perspective of my background. Before getting involved in the international criminal law I was and I basically remain a criminal law and criminal procedure professor with a strong comparative law pretension.

My first point would be to say that I totally subscribe to President Robinson's suggestion that there is no fundamental principle of law that requires ICTY to work both in civil law and common law systems. I also agree that it is irrelevant whether the Tribunal is a civil law or a common law system. Even more radically, I think that we should restrain from referring so much to these two models, I mean the common law and the civil law as useful tools to understand, develop, reform criminal procedure today. In general, reference to these two models is most of the times misleading and non-informative. Reforms inspired by the models' approach are about producing most of the time unintended results, and then often, results which are very different from what reformers had in mind.

My point is that the models' approach produces poor architecture and poor designs, so to say. My example is plea-bargain, and I think that's a very good example since one can never tell whether introducing some form of plea-bargaining would be well received in a system or almost ignored. I think for example that the structure, size and work organisation of law firms is a very important factor, but has not very much to do with the models.

Also in recent history we have been watching transformation of criminal procedure everywhere. Almost everybody is claiming to be going towards the adversarial Anglo-American model. Even France, the homeland of the *juge d'instruction* wants to get rid of the investigating judge. However, everybody is going its own way and the result is the great number of national variations. But even more than this, even besides this, I think that when we deal with international criminal law, we should not forget the achievements and the awareness that we developed in domestic criminal law and procedure. And thanks to credible legal thinking to the reaction against the excesses of formalism, the excessive positivism, thanks to sociology, thanks to legal anthropology, we should not forget the lessons of legal history that tells us that the law is much more experience than written rules and logic.

So, the point is that domestic criminal justice and criminal procedure is heavily based, so to say, on closure. We see only a small portion of the mechanism. A large part of the machinery is hidden in some way and we can only guess about how it is. So, closed procedure also, they spell out, so to say, the essential place, crib of a much more elaborated drama. And the drama, the action of the criminal proceeding takes place in the real world, in the real society with many more actors. And the performance of these actors is heavily affected by a number of factors, legal factors, but very often factual, political, and sociological. This is why the shape of each legal system is very unique.

The real challenge today - I think we should not forget that - is to try to understand how each system actually, really works, which forces and factors drive

the system, where is discretion, how it is controlled, to what extent the criminal procedure is affected by its social functions. So I think that this makes really difficult to borrow single rules, specific rules from one system to the other, and even more difficult to bring these rules and mechanisms into the international criminal law setting. In fact we are borrowing rules from a model... we are not really using a model, but we are referring to a given historical experience. And we can now borrow all factors that make the rule and the legal mechanism work in that way in that system.

So I think that for all these reasons it is much better to develop international criminal procedure as something driven by, first of all, its own political foundations, its own policies, its own principles of efficacy and fairness. What can we say about this distinction, common law / civil law? Is there anything that can be still useful? I think that one issue to keep in mind, the mentality of the people that come from one experience or the other, but not so much. It's more important, I think, the legal education that they received in the two different settings than the experience in the criminal procedure itself. And also the awareness of certain connections between segments of the procedure. For example, we know that some rules of evidence depend on the presence of the jury. And we have to keep in mind - we know that some powers of the judges depend on the knowledge of the dossier. When we don't have that connection we should really wonder if it will work.

We also should keep in mind that some features, and for example the standard of evidence depends also on the bifurcation between adjudication and sentencing. We know that that link exists and we should keep in mind that that might be relevant.

Now, always trying to be fast... I think we should keep in mind the relation between substantive law and criminal procedure. When we consider the criminal procedure, we always should keep in mind what kind of criminal law, of substantive criminal law that procedure is implementing. We know the specificity of international criminal law. But I don't think that the very problem is due to the context elements, or the complexity of the description of *actus reus* in international crimes, or the particularity of the forms of *mens rea* to be proven. Yes, these are particular features, but I think that the real problem is another one and it has to do with the fact that international criminal law is very much focused on modes of liability. So what really makes special international criminal procedure and what really requires a fine tailoring of the rules of international criminal procedure is the fact that the criminal responsibility does not attach so much to direct perpetration of the very conduct which is this crime part of criminal offence, but depends on the mechanism of imputed and derivative liability, such as command responsibility, JCE, aiding and abetting, and I would say even responsibility for omissions is a doctrine of imputed liability. This is the very problem. And from this point of

view, the work of the ICTY has been really remarkable; developing a set of Rules and Procedure, having in mind that these rules should work in relation to modes of liability, as a main reference in substance to criminal law. And so, here we have a great legacy.

The issue of fairness: I think that the work of the ICTY, just to say very shortly, really matters to increase efficacy without serious prejudice for fairness and protection of human rights. Rules like 92 *bis* are surely problematic since the principle affirmed is the admissibility of out of court evidence. However, one should really question if this Rule is really revolutionary. The right to cross-examination should always be respected, and this is the main guarantee, and it's not in discussion. All systems have exception to the principle of orality of evidence. And we do not really know how judges really evaluate out of court evidence once, for example, the evidence is officially produced just to impeach witnesses. And we also should remember that many systems have numerous rules of evidence when the issue is not to prove the very conduct of the crime, but, for example, when it comes to sentencing. The sentencing phase is almost without rules of evidence in the so-called Anglo-American procedure.

So, the system, I think - I totally agree with President Robinson - should have as main reference the standards set by Article 15 of the International Covenant on Civil and Political Rights, and general principles there. And we have the case law of the European Court of Human Rights. In this respect, also, I would like to stress that European Convention was drafted when almost all systems of criminal procedure in Europe were inquisitorial. So, this shows that it is possible to consider the issue of fairness without only specific commitment to a model of procedure. In this respect I think that - and I agree with the speaker before me - that it's not at all that simplistic, but it's wrong to consider the civil law as a crime control model and the common law as a due process model of procedure. This is, I think, totally wrong.

Just a couple of remarks, President...

First of all, I think, talking about fairness, we should keep in mind what is happening in other settings. For example, what does that mean in other categories of macro-crimes, like the transnational crimes, the cross-border crimes? Take, for example, organized crime or international terrorism. Here what we see today at the domestic level is a significant trend towards double-truck criminal procedure. Almost all systems are going towards the creation of special procedure for organized crime prosecution. So these special rules, I think, create problems of fairness which are more serious than the problem of fairness in international criminal justice because these special rules are not drafted in order to speed up the procedure, but they are created mainly to ease the prosecutor's task. So they

put in discussion the very basic principle of criminal procedure, the autonomy of criminal procedure as a branch of the law that is not shaped to fight criminality, but to fairly adjudicate the issue of individual responsibility.

The very last point has to do with efficacy. I agree that the system is going towards that kind of managerial criteria as criteria for handling cases, and I think that it would be very important to start some serious empirical research, and I think that we have some references. One is the European Commission for the efficiency of justice which has been established under the Council of Europe. I don't know if you have seen the web site of this Commission; I think the kind of work there is really useful whether we want to really understand if some changes in the procedure do have an impact or not, because sometimes – and this is really my last sentence – might have reforms that speed up the traffic, so to say, in a particular crossroad, maybe a trial. But the general amount of time that has to be used to handle that matter is more or less the same. Maybe we need more preparation for that, and less time in trial. It is really important to verify, to assess the impact of these reforms with some kind of empirical research.

Thank you so much.

Moderator, Judge Patrick Robinson, President of the ICTY

The floor is now open. The first question or comment will come from Professor Abi-Saab.

Question from the audience: Georges Abi-Saab, Professor Emeritus for International Law, Graduate Institute of International Studies, Geneva; former ICTY Judge

Thank you, Mr. President.

I just have a small comment other than the question. When I was at the Tribunal, I usually said that as a judge I am bound by the principle of judicial caution, but as a professor I can be responsible. Now, I am only a professor, so I speak a little frankly. We have heard very enriching comments from colleagues, very technical, et cetera.

I would like to speak for just two minutes of how we perceived the problem at that time in 1993. I start by saying that I consider that the Rules of Procedure and Evidence which were elaborated and then evolved, are perhaps, if not the greatest, but one of two or three peaks of the achievement of the Tribunal. The problem when we met is that it was a very good mix because we had many very senior judges. With the exception of one or two of them, they didn't have

international experience, but still they were very good at judging. We had one prosecutor, Claude Jorda, and two professors of international law, and that was Nino and myself. So, it was a good mix.

But the challenge was, in comparison to what existed before... - in Nuremberg you have two pages and three lines, 12 articles which were very - in French I would say *lacunaire*, 'lacunar'. The last article, I think Article 12 says: "And the judges ought to improvise solutions if they don't find". So, that's the starting point from which we went.

But the task, at least as I perceived it, and I think my colleagues perceived it was threefold. The first thing is what has been debated about the two systems and how to make a kind of a mix. Of course, every system has its own inner logic, and you cannot just take one thing here and put it... It's like taking one piece of car and putting it in an airplane. It might not work. So the synthesis was not that easy.

But, secondly, in the meantime, we have accumulated a code of human rights which is much more severe, that develops with the UN, and we have to integrate. And third, that is a very important point which was not mentioned up to now. You have to put all that into the international environment. Remember that criminal procedure is basically a very internal law and it has to be adapted to the international environment.

I did tell my colleagues, two of them here, the two ladies, we are like astronauts: we have to know how to evolve in weightlessness and try to see how these concepts which are developed in a very dense legal system can apply in a very ethereal environment like the international. This is why we took about eight months to produce the first set. It was Jules Deschamps who was mentioned yesterday, who was the president and I was a rapporteur of this Rules Committee. I think to some extent we did a very, very dense and important tapestry. Since then, of course, we went perhaps a little bit further in one way or less in another, but these have been marginal adjustments. The basis was there, and I think it will stay. This is a very important thing because in fact the credibility of the Tribunal is that it seems like a serious tribunal respecting all the rules and functioning efficiently, et cetera. So, that's it.

Now I come to the anecdote, and anecdote is the fifteenth round that Gabi has mentioned against Nino. In fact, there were three civil law musketeers, and that was Nino, Claude Jorda and myself, and we were pushing particularly about the *in absentia*. It was not completely lost because Article 61 which was not mentioned was introduced. The Article 61 was a kind of what we called pre-confirmation of indictment and towards that if we can't get the accused, at least the evidence which has been accumulated could be presented formally. It could later on be contested, but at least it would be presented formally and there is a

process of reconfirmation. It was done, I think, for *Milošević* - if I remember - or *Karadžić*? *Karadžić*, yes.

So, it was one way of showing what the Tribunal has done towards the prosecution if this didn't exist. But I think this Article 61 has disappeared later on, again because judges changed and so forth. I say, again, that what has been done in terms of procedure is very important and will remain, and I think this is one of the greatest achievements of the ICTY.

Thank you.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much, Professor, for that historical perspective and for stressing the importance of looking at the Rules of Procedure and Evidence in the context in which they operate, that is at the international level.

Judge McDonald wants to make a comment.

Judge Gabrielle Kirk McDonald, Iran-United States Claims Tribunal, former ICTY President

I just wanted to comment because I wanted to remind the jurors perhaps that, yes, there was this concern about developing rules that would fit an international court that would reflect the international character. But you will recall that the United States, not known for its civil law procedures, submitted a very comprehensive proposal for the Rules of Procedure and Evidence. In fact we used that document as a model in the drafting of the Rules, so that we did not have to create them all over again, nor did we have to create the structure of the Rules themselves. What we did was to make modifications. So, these came from the United States; there were national lawyers. I told you I that I had worked on the Rules with them, with the representatives from the State Department, Department of Justice, et cetera.

The other thing is that – and I don't think I made this clear – but our Rules were really..., and this was a big effort to fit the nature of the conflict. That's why we came up with, for example, such detailed, specific rules for evidentiary rules for the trial of cases involving sexual assault. Not all of the judges agreed with the specificity and the high standards that we incorporated, but we did that, again because of the nature of the conflict.

And, finally, the Rule 61 that you make a reference to was actually drafted by Judge Stephen who was from Australia, former Governor-General, was on the *Tadić* panel,

So, here you have again a court common law trying to at least propose a procedure that would allow the showing to the international community of the evidence, even though we could not seriously begin trials until we had cooperation from the multinational forces. It was an unusual effort that we were making: five civil lawyers, or five judges from the civil law system, five from the common law and one from China, a kind of a mixed system.

Thank you.

Moderator, Judge Patrick Robinson, President of the ICTY

Thanks very much. And just to remind the participants that the Rule to which Judge McDonald refers is Rule 96, an illustration of the high standard is not required in collaboration of the victim's testimony in sexual assault. And of course there are two or three other subsections. I think that was indeed very, very thoughtful and highly commendable.

Are there any other question? Yes, several. Please, just identify yourself.

Question from the audience: Judge Gelaga King, Appeals Chamber Special Court for Sierra Leone

I'm Gelaga King, Appeals Chamber Special Court for Sierra Leone.

I find the topic most interesting and fascinating; the interaction of civil and common law procedures. When I was appointed to that Court in 2002, my colleagues... - some of them were from the common law jurisdiction, others were from the civil law jurisdiction... - in practical terms, it took us some time to understand each other, our various approaches to the evaluation of evidence, for instance. That's why I found that topic today extremely interesting and fascinating.

Having said that, I think Professor Claus Kress mentioned the question of victims. I know that in the Special Court for Sierra Leone there is no special provision for victims as such, victims who have suffered under the hands of accused persons, and particularly those accused persons who had been convicted. The worst atrocities you can imagine took place during that civil war in Sierra Leone. There is no such a provision for compensation to those victims, there is no fund from which they could be compensated. I know that there is no such fund, also, in the ICTY. I think the Statute of Rome provides a trust fund for victims at the ICC.

I would like to hear the views of the panel in this regard because justice just does not consist of trying and convicting accused persons. I think justice also

should include the victims who have suffered at the hands of those who have been convicted. And not much attention has been paid so far to those victims.

Thank you.

Moderator, Judge Patrick Robinson, President of the ICTY

You would have heard me yesterday. I have been advocating for some kind of assistance for victims of the Yugoslav conflict for several years. I think it is a matter of regret that the international community has so far not come forward to support that approach. But I think we have made the first step.

As I said, the International Organization for Migration in Geneva raised the funds to carry out an evaluation of the needs of the victims in the former Yugoslavia. And I believe that if that happens, it will set a standard which will be followed, or which should be followed elsewhere, in the Court of Sierra Leone and elsewhere. So, from my own part, I am fully in support of what you have said, that victims need to be taken account of in the dispensation of justice at the international level, and that the rendering of a judgement is not enough by itself. There needs to be more, and part of that more, I think, is rendering some kind of assistance, some kind of recognition.

One is not really talking necessarily about handing money over to victims. The victims really want to have their suffering recognised and acknowledged, and that can be done in many ways apart from giving people money. There are community projects that can be elaborated for the benefit of victims, and many other ways in which victims can be recognised.

Is there any other member of the panel who would wish to speak on this?
Judge Orie.

Judge Alphons Orie, ICTY Trial Chamber

I would like to make a brief comment on this. I fully agree with Judge Robinson that you should care about victims. At the same time the question arises, also in view of the dimensions of these cases, whether it should always be done in the context of a criminal trial. Again - and I am very much down to earth - when I visited the Cambodia Tribunal, which mainly finds its roots in the French system, I discussed with the judges there the position of victims - and they have got a special position in the trials - I asked them if every individual victim has a right to put this claim before the Extraordinary Chambers. They said: Yes, of course. That's provided for by law. I said - let's take a very low estimate, a thousand victims, but there are of course many, many more. They said, yes, yes. They all are entitled to

do that. Then I asked them how many seats were there in the public gallery and whether they wanted to give the right to these victims to speak. Yes, of course; they are entitled to do that. OK, five minutes for each victim, five times 1000, that's 5000 minutes, which makes close to a hundred hours or 20 days of court time.

I mean, you have to be realistic. One of the worst things that could happen to victims is to give them rights on paper and not really care about them, and not really take effective measures to support them in their position as victim. That's what I would like to add.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much.

Judge McDonald.

Judge Gabrielle Kirk McDonald, Iran-United States Claims Tribunal, former ICTY President

Real quick on the issue of compensation for victims: some people suggest that that has no place in a court of law, even in an international court of law because they would argue that the purpose of the court is to try individuals to determine whether the individual is guilty or innocent. But they forget that one of the mandates for ICTY and for other courts as well was to bring about international peace and security. That cannot be done without addressing the concerns of the victims, which of course would include compensation in one form; if not financial, then some other sort of recognition.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you.

Comment from the audience: El Hadji Malick Sow, Judge of the Special Court for Sierra Leone

Thank you. I am El Hadji Malick Sow, Judge of the Special Court for Sierra Leone.

I want to just contribute because we talk about fairness. Are all these procedures driven by fairness, because fairness is something every judge owes to the accused person. It's a fundamental right of the accused. Fairness is just something every judge must guarantee to any accused. But the other thing is the

finding mission of the judge. Where do judges go to find what the truth is? How through the procedures they will just go to find where the truth is? Because I think the worst thing for any judge is just to make mistakes when it comes to the outcome of any trial. And judges are more concerned with which elements of the evidence, which pieces of evidence they may gather to find what the truth is in the trial.

And I say, to end my contribution, is that an opposition between civil law or common law system is about how to build a universal system taking into consideration all different systems to end up with something which is acceptable by everybody.

Even when you look at the way it is organized here, it's not about one system swallowing all the different systems: the common law system just imposing itself. I think Your Honour talked about this predominant system, which is the common law system. So, how are we going to build now a universal system of law with a procedure which is acceptable and which is understandable? I think this is the mission we have as judges, I think.

Thank you so much.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much.

Judge Wyngaert wanted to say something.

Comment from the audience: Judge Christine Van den Wyngaert, Judge at the ICC

Thank you.

Two points, starting with the last point that was made by my colleague from Sierra Leone: I think that this truth finding process and the way that judges feel about it is something metaphysical. I have served at the ICTY, I am now serving at the ICC, and I've worked with different colleagues. And working with common law is very different than working with civil law. The common law takes a more passive attitude towards the case. If the prosecution has not managed to bring its evidence - that's it, and that's where the role of the judge ends. So, the judge does not have to do more than to look at what the prosecution has brought and the way in which the evidence has been presented and that's it, whereas a civil law judge would find his moral duty to go beyond that, and to try and find, to make sense from the evidence that has been brought even if the prosecution has not made sense of it in the way it the way it has been presented. It's a totally different attitude,

even a metaphysical attitude which can create sort of discussion between judges of different legal tradition sitting in the same panel. So, it is quite interesting. I can't say more; I am not in the luxurious position of Georges Abi-Saab, who is now academic again, and I wasn't academic. I am a judge so I am bound by the restraint of my function.

The second point has to do with victims' participation. I sat at the ICTY for six years, and now at the ICC for two years, and a totally new system has been introduced at the ICC. As Claus Kress has said, the jury is still out, and the question is whether the system is really meaningful for victims because much of the ICC system is inspired by the so-called failure of the ICTY, the ICTY which is blamed for having caused secondary victimization which is the process by which victims through their contact in the judicial process are victimized the second time because of all the problems that they have; cross-examination is often given as an example of secondary victimization. And so the ICC wants to improve on all this by allowing victims to participate in the proceedings and to give them reparations in the criminal proceedings. And that's the whole question as Judge Orié was saying: it needs to be meaningful, because if it is not meaningful, then the whole question is whether it is not potentially another form of secondary victimization for which the ICC may in its turn be blamed. But the question is open and it will need to be assessed once the first trials will have run their full course.

What is certain is that victims' participation comes at a very high price in terms of the costs invested in dealing with applications, dealing with participation motions during the trial. So, the certain consequence is that trials will probably get longer. So this is also something that needs to be assessed.

So, on that point I would commend Judge Robinson. I think one of the very important things is for reparations, or for compensation to be guaranteed. Here I think this proposal that you have made a couple of days ago will really be a very important complement to the work of the ICC and to its success.

Thank you very much.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much.

So - perhaps tertiary victimization.

Professor Claus Kress and then there are a couple of others.

Claus Kress, Professor of Criminal law and Public International Law, Cologne University

As I raised the victim issue, I would like to add just a couple of additional thoughts. I think there will be no disagreement in this room about the principle that you raised, and this is again a broad trend in comparative criminal procedure to, so to speak, increase the voice of the victims, not just with regard to reparations, but as the trial is evolving. The problem as so often is below the level of abstract principle, how to make it work, and then of course, with a view in this respect, very particularly in the specific framework of international criminal justice. I will leave aside the matter of reparation, even though that's fascinating in itself, and one could, for example, already reflect on what has happened in the early years of the ICC on Article 75, Paragraph 1, where the judges had been asked to adopt principles of reparation, and what the outcome of this debate will finally be, crucial point, I think, and not really to foresee at this point in time because not much has happened.

On the participation issue itself, it was by no means an uncontroversial decision that was taken to give the victims a stronger voice in the ICC proceedings. There were many, many state allegations, rather urging for caution and following the ICTY legacy in that respect. The international community has made its choice. In the ICC Statute I think that the decision once made should be accepted, and now a very sincere effort should be made to give meaning to those provisions. But I would urge to do that in a spirit of fairness to the ICC at this moment in time. What I'm hearing already on quite numerous occasions, very severe critics to the ICC that proceedings are so lengthy that the Lubanga trial has not yet been completed and so forth.

If you want to make a fair assessment of the length of ICC proceedings at this early stage, I think, one has to take that point made by Judge Van den Wyngaert fully into account. Of course, obviously it must add to the length of proceedings. The situation is more difficult now where probably every decision concerning victims involves a new question and judges have to, so to speak, flesh out the principles that very often have been agreed by states in a compromised form. So, that's an additional factor to make it lengthy. But even if at one moment in time the ICC will have separated its jurisprudence on victims' participation, it will not be without price and the crucial question then will be whether the state community will be ready to stick to the choice once made and support the ICC, this institution, even though trials inevitably have this additional impediment. What I would find utterly unfair is on the one hand place this burden on the Court for festive speeches, and on the other hand, when the consequences have to be borne, criticise this institution for being longer.

And then I think, secondly, this process, this procedural process should be evaluated very and without any adversarial or inquisitorial bias that doesn't help at all. It should be evaluated empirically and probably scholarly from the outside, so without any bias to really see what this form of victim participation, which will not be a direct participation, but one through the intermediary of legal representatives, the forming of victims' groups and so forth – what really this means to the victims on the ground? We don't have these data now, to be honest. We can only speculate, and this is something attention should be given to, and I would encourage the ICC to allow for such a research to happen. And then there will be a moment in time when we have to re-evaluate and to see whether the choice that had been made at the moment in time, for good reasons, for a very sound principle, whether it has proven on balance to be the way forward.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much.

Let us hear Judge McDonald and then this gentleman from the audience.

Judge Gabrielle Kirk McDonald, Iran-United States Claims Tribunal, former ICTY President

I just wanted to quickly mention a book that reports on a study of secondary victimization and the trials of women who have been victims of sexual violence in the former Yugoslavia. The name of the book is Gender, Shame and Sexual Violence by Sara Sharratt. As I said, it's a massive study of the way that the courts have handled these issues, and they are very difficult to handle. But it might be of interest to you.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much.

Comment from the audience: Sara Sharratt, author of the book Gender, Shame and Sexual Violence

This is a coincidence, but I am Sara Sharratt.

One of the professors has been emphasizing his empirical research. I did extensive work on my book on the former Yugoslavia, especially in Sarajevo, and the impact that testifying before the ICTY and or the War Crimes Court in

Sarajevo had on the survivors, women who had testified about sexual violence. Interestingly enough, most of them, and I had a sample of about 60, but most of them did not report getting traumatized by the court itself. They did not find it traumatic. They found it difficult, which is different than traumatic – I may be just talking as a clinical psychologist – so they did not find it traumatic. They found it difficult. All of them with one exception said they would testify again if they were asked to testify again.

Therefore, I think our discourse about victims and victims' testifying has to change because many, many victims and witnesses are willing to testify, and in many cases you are talking about the differences between civil law and common law. In the cases of victims of violence, Judge McDonald and Judge Orić were leaders in introducing Rule 96 which allowed no questions of consent, which was later modified. That is not part of ICC now which is in my opinion shameful, and in those particular cases the cross-examination tends to be so severe and so discrediting to the victims, as if women are not believed, and that there are so many myths about rape, that it's very difficult to evaluate which system is better in general. But you have to look at the very specific instances in which the procedure has been applied.

And thirdly, my last comment is: my understanding was, and I am not being condescending, I am just trying to be clear, the courts were for victims and justice of victims. And sometimes I think we tend to forget that. And one evidence of that is that there are no victims or survivors here. So, I would like to say, sorry, but the evidence in my case shows something else.

Thank you very much.

Moderator, Judge Patrick Robinson, President of the ICTY

So, let me just understand you. So, you are saying you have done a research and you are the person who wrote the book that the Judge referred to? I wanted to make that clear. So you are saying that your research which is in your book does not confirm secondary victimization.

Comment from the audience: Sara Sharratt, author of the book Gender, Shame and Sexual Violence

No, no, because it's a term, and again I am speaking as a psychologist, it's an overused term. People find it traumatic. And as one male prosecutor told me in the court: I have had so many men crying in the corridors when they are testifying about what happened to them. Crying, weeping, because testifying is very, very

difficult. And a lot of times what makes it more difficult for certain cases is because women are seen as being more vulnerable, which is not necessarily the case, but certainly the standards of proof in cases of rape and sexual violence are so high, that they do find it difficult. And it is very difficult to testify. That doesn't mean that they are traumatized forever, or that they are not going to recover.

That was my point.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you. I will ask you to tell us where your book can be found.

Comment from the audience: Sara Sharratt, author of the book is Gender, Shame and Sexual Violence

My book was just published by Ashgate in October. The title is Gender, Sexual Violence and Shame, The Voices of Court Members and Witnesses in War Crimes Tribunals. And I also interviewed many of the judges and members of the Court about their attitudes and feelings about working in rape cases. And that's something that we don't pay much attention to because in general there were lots of judges who had a significant number of stereotypes about women and about women who have been raped.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you.

Ambassador Gilbert-Roberts.

Question from the audience: Marcia Gilbert-Roberts, Ambassador of Jamaica to Belgium

Thank you very much. Although I come from the background of international relations and I am therefore a total lay person to international criminal law, I really found this morning's session fascinating.

The first point I want to raise is the issue of trials *in absentia*. I imagine that if the Tribunal had proceeded accordingly, this would have decreased the pressure on the states concerned to have sought to bring the accused to trial. But that evidence would have most certainly have had value, for whatever point the accused were brought forward. I just wondered whether there was any difference in the approach, the common law versus the civil law approach, to the extent to which

that evidence should be brought to the attention, not only of the international community, but the states concerned to bring pressure. How was that managed?

And the second point is on the difference between the two systems on issues relating to adjudication and sentencing. But I want to refer specifically to the issue of early release. How did the two sides see the issue of fairness, the relevancy, and appropriateness of the value of early release? I think, for example, on the issue of responsibility to the populations concerned of releasing someone. I am sure one would not want to see a prisoner appear to behave well simply because he wants to be released. You want to be sure that you are sending back into the community someone who has really been rehabilitated. I know you have a percentage of the sentencing that has to be served before someone can apply. But that's a concern of mine, as I say, just coming from a background of international relations issues relating to peace and security: how did the system see the two sides, see this issue of early release and how to deal with it in the context of its value?

Thank you.

Moderator, Judge Patrick Robinson, President of the ICTY

Well, if Judge Orie who with some other judges assisted me in considering applications for early release would like to say anything on that...? - But you have highlighted the difficulty; essential difficulty that surrounds early release of sending back convicted persons to their communities. We have many complaints from victim groups about that, that we released the convicts too early. On the other hand, the practice is that after you have served two thirds, you can apply. And we take into consideration a number of factors, the rehabilitation of the person whether the convicted person has been rehabilitated, cooperation, the demonstration of remorse and a number of other factors. But it's not an easy issue. I don't know if Judge Orie wants to say something on that.

Judge Alphons Orie, ICTY Trial Chamber

I am not saying much about it. We usually get a full report from the local prison system. First of all, I would like to make the following observation: early release is in many different systems dealt with in quite different ways. I know of countries where you grant early release after the person having served 20 per cent of his time. There are other systems where it is two thirds, there are systems where it is a half... And it may be also an important question where to make distinction between locals and foreigners. It's usually considered that being in as a foreign prison is more severe than when you're in a prison where you get the food you are used to, where you know your own people, you can speak with them, you can

communicate with them. So, it is a rather complex matter where certainly in state practice, there is no unified system. It is quite different everywhere. We have more or less developed a system where after two thirds of your sentence, there is a fair chance to be granted early release.

Now, one observation. You said: “We don’t want people to behave well because they want to be early released.” I wish that with my children as well, that they would behave because they are genuinely good youngsters, rather than not risk punishment or to risk whatever. I find that a very intriguing approach. I don’t know exactly how to deal with it, to be honest, neither with my children nor with the prisoners.

Moderator, Judge Patrick Robinson, President of the ICTY

Judge McDonald, quickly.

Judge Gabrielle Kirk McDonald, Iran-United States Claims Tribunal, former ICTY President

Just a quick word on trials *in absentia*, and I won’t present a brief against it or even for it. At the front end, there might have been some gain because there would have been this showing the international community that we were doing something, and that’s really why we were established because the international community itself could do nothing or chose not to do anything. But that would be a little gain, and I think it would be detrimental in the long run because the trials really wouldn’t be considered legitimate. There are trials *in absentia* and there are trials *in absentia*. If you accept the fact that the accused has a right to a trial in his presence, then we run into problems. Even in the United States though, and *United States versus Crosby*, trials *in absentia* are allowed, but only if the defendant appears and then absconds, and then he is deemed to have waived this right to his trial in his presence.

So, it’s philosophical, but there are some details that have to be considered as well.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you.

Professor Kress and then Professor Papa.

Claus Kress, Professor of Criminal law and Public International Law, Cologne University

Madame, on early release I think you raised a very important question and the whole area, I think, honestly speaking is seriously underexplored. On a technical level, I think there is an additional problem that sometimes, at least in the relationship between the ICTY and national states, the rules might differ, so there is an area of potential conflict, and I don't think these conflicts have often arisen in practice. One has sorted it out some way or the other. But in theory, the problem is there.

On a more substantive level, I think, even more fascinating and important is the question of what actually happens to the sentenced person once the international sentence is being enforced. You must recognize we don't have an international enforcement agency like Spandau was to a certain extent after Nuremberg. So, what is usually being done, the person is sent to a state willing to enforce the sentence. But, to my awareness, the international level, the ICTY, but please correct me, they have not yet come up, so to speak, with guidelines to be observed by the national enforcement state in how to treat and in how to address perhaps the specific needs of international-sentenced persons. Those needs which arise with a view, at a certain moment in time, to sending them back into their local population from a very distant place.

But if this is the case that there are no guidelines - which I trust, presume - this is not something judges are to be blamed for. International criminal legal scholarship has devoted very little attention to that area. You have brought development - we have all started with looking at the substantive law, then we moved to an extent to procedure, but with regard to procedure, we have focused on those parts of the proceedings which were of more burning interest. First, the actual trial, pre-trial and so forth, and there was a real need to my awareness, a real need for not just articles, but monographic scholarly treaties of making sense of the enforcement of international sentence under the prevailing circumstances.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you.

Professor Papa.

Michele Papa, Professor, Faculty of Law, University of Florence, Italy; Visiting Professor, Columbia University School of Law

Just a brief remark concerning the distinction between systems which separate adjudication and sentencing, and systems which do not... I think this is

one of the deepest and most significant distinctions in criminal justice because it has a lot of consequences, and sometimes we are not aware of those consequences.

For example, the relevancy in the admission of evidence changes a lot whether you consider the evidence relevant as to the proof of the conduct prohibited by the offence definition, or if relevancy has to do with the entire set of circumstances that you can consider in order to adjudicate and punish, and decide the sentencing.

Then it has to do with separation of powers. The principle of legality is very much related to the adjudication phase, while respect to sentencing, a recurrent idea is that that power belongs to the judiciary, is an original judiciary power. Also, I think, the idea of citizenship and human rights is different because when you have the separation you might think that until you are a full citizen, so to say, the presumption of innocence shields you, and you have all rights. But once the presumption is overcome by the verdict of guilt then, at that point, you enter into a different status, and you do not have any more the same rights. That's why in the sentencing phase you might find no rules of evidence, lesser protection for the Defence... So, I think it's very important to keep in mind that this is a basic distinction.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much.

Yes.

Comment from the audience: Judge David Re, Trial Chamber of the Special Tribunal for Lebanon

David Re is my name. I am a judge of the Trial Chamber of the Special Tribunal for Lebanon. I would just like to insert three brief comments into this interesting discussion, and I say that I've worked in the three systems, civil law, common law and hybrid, mixed.

First comment, then comments on precedent, totality and the trials *in absentia*. The first one is, one of the distinguishing or defining differences between common law and civil law systems is the role of precedent, or to say - which is of course in its simplest form - that the ruling of one superior court judge or a supreme court bound every court in the hierarchy underneath, notwithstanding 3,000 other judges may disagree at a lower level with that ruling. And the ICTY moved towards adopting the common law rule of precedent. I think it was the *Aleksovski* appeal where it decided that its own decisions were binding on the trial chambers. So, that was an extremely important shift in international criminal law.

I note that the bench was a mixed common law and civil law although there are majority of common law judges on that particular bench.

The second one is the totality point, and that's often when the differences are accentuated between the two great or larger legal systems of the world. I think in my reading there are about 80 countries that use common law and about 120 or so use civil law. Often there is a misunderstanding about the totality. And the two systems are much, much closer than you might imagine, especially if you take out the criminal cases because criminal cases are a tiny percentage of any system. If you take out that five per cent and move to the 95 per cent, most – I can't talk for the United States, but in the other maybe not Anglo-American systems, the rules of evidence basically don't apply in most civil cases, in most non-criminal cases. And even in the higher courts with large civil cases, it's all done by affidavit, by statement, and cross-examination is optional. In the great bulk of tribunals the rules of evidence don't apply in the court in forms itself as it thinks fit, but the evidence must be relevant and probative. So once you look at the system in the totality, they are not as different as people often think.

The third point I insert is on trials *in absentia*. And again, often when – of course I am working in a tribunal where that is a very active consideration at the moment – but if you actually look at the common law systems – and I can't speak for the United States – but when people talk about it, they tend to analyse only the most serious criminal offences. In most, as I understand it, common law systems there are a lot of trials *in absentia*, just not for the serious criminal offences. I participated as a prosecutor in Australia in numerous cases heard *in absentia* for minor, more minor offences in which a person could not be imprisoned in their absence and as long they were notified the offence is on. Basically the system would collapse in many systems if a lot of these cases weren't heard *in absentia*. So, of course, I acknowledge completely Judge McDonald's point about persons deliberately absenting themselves, but if you look again globally at these systems, there are not as many differences as people might think when they take the more superficial overview; not that I suggest anything said was superficial.

Moderator, Judge Patrick Robinson, President of the ICTY

Thank you very much

Yes.

Question from the audience: Henry Ambush, Embassy of Zambia to Belgium

My name is Henry Ambush, from the Zambian Embassy in Brussels. I think I will have no contest on the hybrid procedures, and certainly I am quite

comfortable now, and at least I am happy about the fusion that actually has been made in the procedure. The only issue that I would actually want to raise is about what you, Judge, have been campaigning on the reparations of the victims. I was trying to find out whether it is possible within the judgment, the rules on the judgment that a provision could be made that the properties or the assets of the perpetrators of these crimes should be forfeited to the court so that they could be actually be given, probably transferred, be paid to the victims. I don't know how possible that could be?

Thank you very much, Judge.

Moderator, Judge Patrick Robinson, President of the ICTY

We do have such a provision in our Statute and Rules for restitution.

Any other questions?

Question from the audience: Mia Swart, Leiden University and Witwatersrand University

Hello. My name is Mia Swart. I am from Leiden University and Witwatersrand University in South Africa. I want to thank Judge Robinson for acknowledging the problem with the frequent amendments of the rules that this could be seen as problematic, because this is something I think has been under-recognized by the ICTY commentators and judges.

So I would like to ask Professor Kress about this. Because, coming from a German background, the principle of legality is something that German law is generally very sensitive to, the fact that rules should be clear, fixed and certain. I am curious to hear your opinion about this. With regards to victims I am delighted that this has received so much attention and discussion today. I just want to mention that I think that these trials are expensive and long anyways. So to lengthen it a little bit in the interest of victims would not be such a bad thing.

Thanks.

Moderator, Judge Patrick Robinson, President of the ICTY

Can you repeat the last part of what you said, "to lengthen them would"...?

Question from the audience: Mia Swart, Leiden University and Witwatersrand University

The last part is more of a comment on the comment partly by Judge Orić that the trials are so lengthy and this would unduly perhaps extend existing trials. I just think that international criminal trials are very, very expensive to begin with, perhaps too expensive and too long. So, to perhaps extend them a little bit in the interest of victims would not be a bad thing.

Thanks.

Moderator, Judge Patrick Robinson, President of the ICTY

Would not be bad?

Question from the audience: Mia Swart, Leiden University and Wits University

Not bad. No, it would not be bad.

It would be a commendable thing for the tribunals to take victims' rights seriously and not to hide behind excuses such as expenses. They have been creative in other respects, in terms of expediting trials for example, so I think they can be equally creative when it comes to victims' rights and reparations.

Moderator, Judge Patrick Robinson, President of the ICTY

I see.

Comment from the audience: unknown speaker

I am learning a lot, and I am very happy about the success of the ICTY. One worry I have is to what extent... - as one of the ideas is not only making justice applicable, but also contributing to peace - to what extent after 161 people accused have been rendered and so on, to what extent this contributes to peace in the region? I live in Belgrade and I see that the Serbians consider themselves still punished today by the crimes of Milošević. I saw yesterday one presentation by an NGO, then presentations by people from governments showing how important had been the pressures so that these accused criminals would be given to justice. But, to what extent is there recognition that the government in power...

If you think of President Tadić, he and many of his allies have been in the fight against Milošević since the mid-1990s. If you remember, Milošević fell in

October 2000. There were international pressures of course, but there was a huge social movement there. So that today it has a rate of unemployment of 22 per cent, probably among young people it's around 30 per cent or more; it's a very, very difficult political situation. And I remember when Mladić was arrested, CNN said the following: OK, he was arrested. But why did it take 16 years? As if there had been simply bad will on the part of the government. When arrest did not actually happen was a very tough political and institutional struggle because, as you know, for many people in Serbia, as a defeated country, Mladić was a hero, and not a criminal.

So, I am just trying to point out that these questions are sometimes very complicated. I am very happy with the success of the ICTY, I think it's great. The question, as always, is that human rights are basic as a principle... But of course you remember that Turkey has been forced to abolish capital punishment so that it can have the hope of trying to join the European Union at a certain point. If you think of human rights and statistics, the state of Texas in isolation executes more convicts than the other 36 states where you have capital punishment in the United States.

Again, in statistics, really 90 per cent of people in Serbia are against NATO because in 1999 Belgrade was bombed during 70 days, from March to May. So I am just trying to bring some aspects here. Of course it is easier to have a court functioning against defeated and reasonably powerless countries. So, the great thing with the international criminal procedures is when powerful countries can be submitted to those. Bombings of civilian populations, be it in Asia or in Europe, this has happened in the past. No one has been punished.

So this is a great precedent, ICTY. I am very happy and I really hope that it can extend also to powerful countries.

Thank you very much.

Moderator, Judge Patrick Robinson, President of the ICTY

I certainly agree with that sentiment that where powerful countries have been delinquent, they should be held as accountable as others. I believe we can have just one more question.

Comment from the audience: Aonghus Kelly, International Legal Officer, Prosecutor's Office of Bosnia and Herzegovina, War Crimes Chamber

My name is Aonghus Kelly from the Prosecutor's Office of Bosnia and Herzegovina. Just an addendum to the comments of the lady who was speaking on research on gender violence. A very short observation from the coalface, so to speak. I don't deal with gender violence cases, but in mass killing cases, I can

tell you that two of the biggest problems we face every day are witnesses testifying and the refusal to do so because they are afraid or because they've got witness fatigue because they have testified so many times, and witnesses being threatened. Those issues are on-going and happen every day in Bosnia. So I just think that's important to recall and remember. Thank you.

Moderator, Judge Patrick Robinson, President of the ICTY

So, you are not in agreement then with...

Comment from the audience: Aonghus Kelly, International Legal Officer, Prosecutor's Office of Bosnia and Herzegovina, War Crimes Chamber

Well, I can't speak for sexual violence crimes. So it's a different issue. But what I can say is that in the cases I do, which are mass killing cases, victims are refusing to testify for a large number of reasons including the fact that they don't want to relive these experiences, they are afraid of those who live in their communities or live nearby. I know that from talking to my colleagues in other jurisdictions where they prosecute people in those jurisdictions that they have the same difficulties. When they come to Bosnia and also with people living with immigrant diasporas around the world.

Moderator, Judge Patrick Robinson, President of the ICTY

I'm not sure whether you actually contradict her point.

Comment from the audience: Aonghus Kelly, International Legal Officer, Prosecutor's Office of Bosnia and Herzegovina, War Crimes Chamber

I'm not saying that it's contradictory, it's an addendum.

Moderator, Judge Patrick Robinson, President of the ICTY

Her point was that court proceedings cause secondary victimization.

Comment from the audience: Aonghus Kelly, International Legal Officer, Prosecutor's Office of Bosnia and Herzegovina, War Crimes Chamber

Yes, but I am not saying I am contradicting. It's just an addendum to it.

Thank you.

Moderator, Judge Patrick Robinson, President of the ICTY

Thanks.

Just one more question.

Comment from the audience: Professor Hans Van Houtte, President of the Iran-United States Claims Tribunal

I would like to add a second addendum to the rape issue. Some years ago I was chairing the Ethiopian Eritrea Claims Commission where we also had a lot of rapes. Our impression was that in an African context you cannot find witnesses about rape because if you testify that you have been raped, you are ostracized out from society. Therefore, let's say, now in our Commission we accepted the fact that a woman after having delivered a baby refused to see it as an indication that there has been rape.

Judge Gabrielle Kirk McDonald, Iran-United States Claims Tribunal, former ICTY President

I want to respond to that because it comes from the President of the Tribunal where I am now working, US Claims Tribunal, and I want to express my views very quickly. When I was at the ICTY, I confirmed a number of indictments, and I often heard from the Prosecutor that he was having problems bringing to the Tribunal persons who had been raped. That was why they had not charged sometimes in the indictment, rape or another form of sexual violence. What I found in a couple of instances that in fact within the file there were affidavits, or we call them declarations, of women who were willing to testify about what had happened to them. So that instead, I think, that's the vision or the attitude of the investigators, most of whom were men. I think that has changed and I think that that's really no excuse not to at least approach the victim. With the proper investigation done by gender sensitive men or women who were gender sensitive themselves, the problem is not as great as some may say.

Moderator, Judge Patrick Robinson, President of the ICTY

Well, I want to thank you all for participating in this discussion. I found it very interesting and I hope you have also. We could go on, but you have been given one hour to participate, so the panel has been true to its word.

Thank you very much.

Panel 4***The Tribunal's Jurisprudential Contribution to the Clarification of the Core Crimes of Genocide, Crimes Against Humanity and War Crimes*****Moderator:****Judge Fausto Pocar, ICTY Appeals Chamber****Panellists:**

- **Paola Gaeta, Professor, Faculty of Law, University of Geneva; Adjunct Professor, Graduate Institute of International and Development Studies, Geneva; Director, Geneva Academy of International Humanitarian Law and Human Rights**
- **Stephen Mathias, Assistant Secretary-General for Legal Affairs, United Nations**
- **Rein Müllerson, Professor and President, Tallinn University Law School**

Master of Ceremonies, Christian Chartier, former Chief of ICTY Public Information Service

For the two coming hours you are invited to follow the proceedings of this Conference's last panel, which is going to discuss the Tribunal's contribution to the clarification of the core crimes of genocide, crimes against humanity and war crimes. Judge Fausto Pocar will chair the panel and moderate the discussion. A leading scholar, a prolific writer, Judge Pocar is a member of the ICTY and ICTR Appeals Chamber. He has been serving with the ICTY for more than 10 years including as the ICTY President from November 2005 to November 2008. Judge Pocar will preside over the panel consisting of the following three members: first, Professor Paola Gaeta, who worked closely with the then President Nino Cassese, and he was her mentor in the early years of the ICTY. She is now teaching International Criminal Law at the Law Faculty of the University in Geneva, Switzerland, as well as at the Graduate Institute for International and Development Studies, also in Geneva.

Then, and he is sitting on your right side, Mr. Stephen Mathias, the United Nations Assistant Secretary General for Legal affairs since September 2010. But he knows the ICTY very well as he was the Legal Counsellor at the US Embassy in The Hague between 1992 and 1996, which was at the inception of the Tribunal.

And finally, Professor Rein Müllerson, the President of the Law School of the University of Tallinn, in Estonia, Estonia of which he was Vice Foreign minister, between 1991 and 1992. He also taught in London at the King's College and at the School of Economics. He also held a number of advisory positions, among others with the UN and President Gorbachev.

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber

Good afternoon. It is indeed a great honour and a pleasure for me to be the moderator of the last panel of this successful Legacy Conference so well planned by President Robinson, and so ably and efficiently organized by his Cabinet and the staff of the Tribunal. To both the President and the staff involved goes my deep gratitude.

Let me also join my colleagues in paying tribute to Nino Cassese and to his prodigious contribution to the foundation of, and the first significant developments in international criminal jurisdiction and international criminal law. We heard yesterday and this morning about the role he played. And we will hear more at the ceremony that will follow in the afternoon at the Peace Palace, solemnly organized by the Special court for Lebanon, the last court of the now numerous family of international criminal jurisdictions, a court which saw Nino again as its first President and where he had already presided over some seminal decisions.

Nino Cassese was a close friend of mine for almost 50 years. Our paths crossed several times, particularly in the human rights field where our respective roles in international institutions led us to interact frequently. The vacuum he leaves - I am aware I am just repeating what others have said - is huge, and the best way to honour him is to continue firmly in our commitment for international justice, following the way indicated to us. I particularly feel obliged to carry out this duty, not only because of our friendship, but because I was his successor at the ICTY, when he resigned in early 2000. The privilege which I felt at the same time was a great responsibility. It was not easy to take the job of replacing Nino at this Tribunal; it was a really difficult task which almost induced me not to accept the position. I have to recognize his encouragement despite my hesitations, as I knew that I could always count on him, and on his advice, should I need it. This encouragement he repeated to me the first time I contacted the Tribunal in January 2000, and that was on the occasion of the rendering of the *Kupreškić* judgment, the last judicial act of Nino at this Tribunal, a judgment largely based on the crime of persecution.

Two years later sitting as an Appeal Judge on the panel chaired by Judge Wald, I participated in the acquittal of some of the accused in the *Kupreškić* case, but that was on the basis of new evidence heard on appeal. This was the first time

this Tribunal heard new evidence on appeal. However, the legal contribution given by the *Kupreškić* trial judgment to the clarification of the crime of persecution remained unaffected on appeal and continues to be the basis, even now, for the definition of this crime, which is particularly significant in terms of the legacy of this Tribunal because it has become the crime that characterized most of the cases before the ICTY. In particular, the *Kupreškić* trial judgment gave the Tribunal's position on a very complex issue which is the identification of the underlying acts that persecution encompasses.

According to the Nuremberg Charter, persecutions should be committed in association with another crime. The problem before the ICTY was to decide whether, under customary law, this was the case or not. This position, the association of the persecution with another crime under the jurisdiction of the Tribunal, was explicitly rejected by the ICTY in the *Kupreškić* case. The judgement clarified that the crime of persecution, due to its development in the 50 years since Nuremberg, consists of the intentional gross or blatant denial on discriminatory grounds of a fundamental right laid down in international customary or treaty law. These are the words of the *Kupreškić* judgement. This means that persecution is not limited to crimes enumerated in the statute of the ICTY, but may encompass other acts in violation of fundamental rights, including attacks on political, economic and social rights, as well as acts of harassment, humiliation and psychological abuse.

The importance of this expanded definition clearly builds on a tight connection between human rights and humanitarian law. A gross violation of human rights can come under the umbrella of persecution if committed in the conditions where crimes against humanity are committed or aimed with a discriminatory intent. The *Kupreškić* judgment shows how the ICTY contributed to bridging the gap between the two traditional and distinct areas of international law, the law of peace and the law of war, which is now called law of armed conflicts or international humanitarian law.

The future of the ICTY's definition of this crime, however, is still to be assessed, as the ICC statute has taken a step backwards and as to persecutions it reads that the crime must be committed in connection with other acts or crimes, which are within the jurisdiction of the ICC. However, whether the Court will strictly adhere to this narrower definition is still to be assessed, as the ICC may refer under its statute, at least to a certain extent, to customary law where appropriate. It could therefore adopt the ICTY's definition based on customary law rather than the treaty definition under the Rome Statute. I will not expand on what 'where appropriate' means because anybody who has some familiarity with any UN documents knows that that expression may have a variety of meanings depending on how a document is read. It will be necessary to wait for the case law of the ICC on the matter.

By referring to persecutions, I wanted not just to pay tribute to Nino, but to use that tribute to introduce the theme of our panel, which is the contribution of the Tribunal's case law to the clarification of the core crimes of genocide, crimes against humanity and war crimes. The starting point of our consideration is that, after Nuremberg, no international judicial assessment was made of the law for decades. However, some international legislation was adopted by means of treaties which recognise the criminal nature of certain conducts, like the Geneva Conventions, the Protocols thereto, and the Convention on the Prevention and Repression of Genocide. I will not list all these documents, these treaties, but will note that these treaties do not necessarily provide for all the elements of the crimes concerned, in particular, as to the *mens rea* requirements.

We heard yesterday, during the first panel, how the assessment of customary law has worked in that respect to complete the treaties. *Tadić* is the seminal case on this topic. *Tadić* put the accent on customary law on one hand, and on the other hand, interpreted the famous paragraph 34 of the Secretary-General's report to the Security Council in the sense that it is now clear that the treaties can be the basis for the decisions of the ICTY. The problem is that treaties do not normally contain complete criminal law in all its elements. So even when applying treaties, one has to refer to customary law in order to complete the provision of the treaty.

Moving on to the schedule of this panel, although its heading "the clarification of the core crimes" may suggest that all these crimes – war crimes, crimes against humanity, and genocide – should be explored, we will not have the time to discuss all of them in detail in this panel. Thus, I chose to limit us, without prejudice to any question that may be brought by the panelists and any specific issues that may come up during the discussion, to an overall assessment of the clarification of international law on the core crimes brought about by the case law of the Tribunal.

There are some issues that need to be mentioned here, where the legacy of the ICTY, besides clarifying the element of each individual crime, might bear a role in the evolution of international criminal law. I would mention first the connection between different categories of core crimes, particularly the connection between war crimes and crimes against humanity. It is well-known that war crimes and crimes against humanity were interconnected at the beginning. The London Charter made it clear that a number of crimes were to be considered by the International Military Tribunal in connection with any other crime under the jurisdiction of the Tribunal, which means with crimes against peace and war crimes. Therefore, crimes against humanity did not have an independent status. They were recognized only as far as they were connected with the two other categories of crimes – aggression and war crimes. This is probably due to the fact that the notion of "crimes against humanity" had not been sufficiently clarified at that time.

One has to bear in mind that, up until that point, human rights were not recognized and had not yet been affirmed under international law. The conduct of states in dealing with the individuals in their countries remained within their internal domain. Establishing a connection between the criminalisation of egregious violations of human rights and war crimes justified and strengthened their international dimension.

After 1945 this link has been progressively dropped. However, the statute of the ICTY maintains the link to a certain extent by giving jurisdiction to the Tribunal over crimes against humanity only when the crime is somewhat connected to the war. The connection established in Nuremberg having been maintained by the its Statute, the Tribunal had to choose whether to insist on the connection in order to define such crimes.

It is interesting to note that the *Tadić* decision made the choice of distinguishing crimes against humanity from war crimes as far as possible. It is also interesting to note that the *Tadić* decision considered this conclusion as obvious, and did not waste too many lines to explain why. It simply declares that it is well settled in customary law that crimes against humanity do not require a connection with an armed conflict, although that statement is made in the context of an internal conflict. A more detailed discussion might have been appropriate, although it is obvious that the solution adopted is the correct conclusion once it was decided that the requirement of the connection with the conflict was just a jurisdictional requirement, which is in fact the holding of *Tadić*. It is curious to note that according to the *Tadić* decision the need for a connection with an armed conflict had already been abandoned in customary law. One may therefore wonder why the Security Council kept that connection in the ICTY Statute. It may be simply due to a prudent approach of the Security Council, aimed at dismissing a possible challenge to its authority to establish a court of justice. By linking the jurisdiction of the Tribunal to an armed conflict, it clearly remained within Chapter VII of the UN Charter. Admittedly, this was unnecessary because gross violations of human rights are per se a threat to peace. However, a prudent approach suggested to strengthen the Security Council resolution adopting the ICTY Statute by linking the crimes under the jurisdiction of the Tribunal to the war in the Balkans.

Now, coming back to the list of the core crimes, the Nuremberg charter provided for a classification of the core crimes in three categories: war crimes, crimes against humanity, crimes against peace. Because of the link I had mentioned with war, all the crimes were related to some extent either to the *jus in bello* or to the *jus ad bellum*. The ICTY has played no role as far as aggression is concerned, because no jurisdiction was given to the Tribunal over crimes against peace. However, genocide was added as defined after Nuremberg on the basis of the case

law of the International Military Tribunal, and was singled out from the crimes against humanity as an independent crime.

The specific place recognized to genocide may be disputed, and has indeed been disputed by eminent scholars, including scholars that attend this conference. Without entering into this question, I wish to emphasize the contribution of the ICTY to the clarification of the crime of genocide. Although the number of cases of genocide has been far less significant than before the ICTR, the contribution of the ICTY should not be underestimated. I cannot refer to all the cases because for some of them the appeals are pending, but will only mention the *Krstić* case which has been finally adjudicated. I wish to stress the significance of the clarification brought in defining when genocide occurs through destroying in part a national, ethnical, racial or religious group. It is my view that the clarification provided by the Tribunal in defining the targeted group, not only in relation to its numerical size, but in reference to its emblematic nature for the entire population as a whole, and in relation to the intent to destroy in part, deserves the highest attention. There was no other case before this in international practice on such delicate issue. It is a unique case where both the Trial Chamber and Appeals Chamber decisions bear great importance for the legacy of the Tribunal as to this crime.

I wish to note at this point, in light of the Tribunal's Statute singling out of genocide from crimes against humanity, that there is also a trend to single out of the so-called "classical" categories of core crimes the crime of torture. My question is, and I put the question to my panellists, resisting the temptation to answer it myself: has the case law of the ICTY, which has dealt several times with torture, contributed to this trend towards an independent consideration of torture, resulting in attributing to torture an independent status as compared with war crimes and crimes against humanity? Or does the case law of the Tribunal not contribute to this trend, although there are some elements, in literature in particular, that go in that specific direction?

In the context of the classification of the crimes, it is necessary to mention, and has been referred to yesterday in all the panels and in the welcoming remarks by Alison Cole, the evolving issue of gender crimes. Now, we will consider what the Tribunal has done in this area, and indeed the Tribunal has dealt significantly with gender crimes, in establishing that these crimes have their own independence as compared to other crimes against humanity or other war crimes. Gender crimes come within the categories of crimes against humanity and war crimes, but they do not come therein as crimes subsumed into other crimes, as a quick reading of common Article 3 of the Geneva Conventions might suggest.

The ICTY has certainly contributed to affirming the independence of gender crimes from other crimes. It is sufficient to mention the decision that

was been frequently referred to yesterday, in the *Kunarac* case. Here, one of the problems was not only to establish the elements of the crimes of torture and rape, but to see whether rape would come under torture, as an included crime, or would be a separate crime irrespective of its commission through the same conduct. The decision in the *Kunarac* case was that, indeed, we were facing two different crimes with different shaping elements, thus allowing the Trial Chamber to convict the accused for both torture and rape. This decision marks clearly the view that the crime of rape is distinguished from other crimes, in particular from torture.

I believe that this is a major contribution because this distinction was not obvious in light of the existing legislation. The assessment was made on the basis of customary law, but it was not obvious that it should have come to this conclusion, so that the trial judgment remained and has been referred to later as a seminal decision on these matters. With respect to sex crimes, I would like to put to my colleagues the same question I am positing on torture: are we facing a trend towards, or a contribution of the ICTY to the independent consideration of gender crimes as a new category in the classification of international crimes, or are we simply clarifying issues within the existing categories? Should we adopt the view expressed earlier in this conference by Patricia Viseur Sellers that, in fact, gender crimes are a distinct category that should have independency, autonomy, and be dealt with separately? I do not know if my colleagues will share this view, but I consider the contribution of the ICTY in that direction as very significant.

Let me conclude this introduction to this panel with one argument I took from a debate yesterday on domestic jurisdictions. There was something that was discussed yesterday afternoon which suggests that the two legacies of the Tribunal, the regional legacy, which we discussed last year, and the global legacy we are discussing this year, as clearly interconnected.

When an international jurisdiction defines the crimes, these definitions will have to be taken up by domestic courts. Frequently, however, domestic courts will not try these crimes as international crimes, but as domestic crimes, and will insist on dealing with them as non-international. Hopefully, the fact that these are international crimes should lead in the long run state jurisdictions to deal with them as such, and to apply international law or use international case law as a precedent. This development should not only take place within the region concerned with specific international case law, but also globally. And indeed there are already several domestic cases which refer to the jurisprudence of the ICTY in many jurisdictions. Thus, the interplay between international and domestic jurisdiction is global, is mainly focused on the region concerned, and yet goes beyond the region. It is an important feature of the legacy of this Tribunal to have shown clearly that there must be interplay between international and domestic jurisdictions, not only through referrals of cases, but also through what has been regarded as a sort of assistance by

the international courts to the domestic courts. It should not be forgotten that, at the end of the day, the primary responsibility for trying crimes, whether domestic or international, rests with the domestic jurisdictions.

I will stop here and I will give the floor to my panellists, starting with Paola Gaeta.

Paola Gaeta, Professor, Faculty of Law, University of Geneva; Adjunct Professor, Graduate Institute of International and Development Studies, Geneva; Director, Geneva Academy of International Humanitarian Law and Human Rights

Thank you, Mr Chairman. You have raised so many issues in your introductory remarks. It's difficult to take all of them. Of course, the last one you have raised is really crucial, I would say, and there is hope I think, to see more and more national courts applying international courts' decisions. I think some examples are given by the US courts applying the Alien Tort Statute Act. They often refer to the ICTY case law in dealing with the civil cases.

But, of course, I would like to thank the organisers of this conference for inviting me and I will try, I promise the translators, to speak slowly in plain English if possible.

Among the various issues that you have raised, I have decided to deal with the issue of torture, and whether or not ICTY case law has given the attribution to torture of a core crime, different from war crimes, crimes against humanity, and customary international law. In particular, I would like to address the issue of whether or not, unlike the Torture Convention which makes torture a crime *per se*, the possible definition of torture as a discrete crime under customary international law would need the "state official involvement" requirement as the Torture Convention provides. And the crucial landmark decision of the ICTY in this respect is the *Kunarac* decision which has been mentioned many times yesterday and today also by the Chairman.

So why have I decided to deal with very specific topic? First, because I wrote an article on this and therefore the task has been easier, but I really think that the topic is an important one for three main points. The first one is that once we deal with the issue of torture and whether or not the state official involvement requirement is requested or not, after all we discuss whether or not torture as a war crime and crime against humanity, first and above all, can be committed by private individuals, simply like that. And therefore I think it is crucial to make international criminal law as a separate, an autonomous branch of public international law, totally independent from any issue of state responsibility.

And second, I think that the *Kunarac* decision must be commended because it tried to depart from the previous case law of the Tribunal, the Appeals Chamber decision in *Furundžija*, for example, taking a different stand on the issue. The facts are different, so therefore the Trial Chamber managed to depart from the Appeals Chamber's previous decisions. Nonetheless, I think this was a sign of maturity by the Tribunal to be capable of revising its own jurisprudence when it was necessary to do so.

And third, I think that the *Kunarac* decision has followed an important methodology, in particular when it has stressed forcefully that human rights notions are important when trying to interpret international humanitarian law rules when those rules do not contain a definition of particular institutions. But nonetheless, the Trial Chamber in *Kunarac* had a word of caution because it said: "One must be very cautious because, after all, human rights law is a body of law which was meant for a different purpose in comparison to international humanitarian law." So, I think it is a very important decision.

What was the final finding in *Kunarac* on this issue? It is very well known and the Tribunal said that in the case of torture as a war crime and crime against humanity, it is not requested that the person has acted as a state official, or with the involvement of a state official. And in *Kunarac* this was crucial because the accused were not acting as state officials or with the involvement of state officials. They were acting as private individuals. Therefore it was crucial for this Tribunal to tackle this issue.

And in this way the *Kunarac* decision of 2001 has given, I would say, authoritative support to the ICC's decision in the elements of crimes to indeed drop the state official involvement requirement in the definition of torture as a war crime and crime against humanity. The issue was debated, of course, for the elements of crimes and *Kunarac* has given the reasoning for it.

Let me now deal with the main point of my presentation: it is that while I do agree with the final result, I don't agree with the reasoning of the *Kunarac* decision, and I am sure that Mr Chairman would not agree with me. And I will try to explain why. The Tribunal has missed an important opportunity, to my mind, to clarify what a core crime is, and what could be the reason for identifying among the different forms of criminality the difference between an ordinary crime and an international crime, and particularly a core crime, perhaps.

So, to tackle this issue, I must give a bit of legal framework. And very quickly, of course, I would say that torture as a crime, as a criminal conduct, was not defined in the instruments which made reference to it. In particular, torture was considered to be a crime against humanity under Control Council No. 10. It was not included, torture, in the statutes of the Nuremberg Tribunals and Tokyo

Tribunal. It also appears as a crime in the Control Council Law No. 10 and it appears, of course, in the grave breaches provisions of the four Geneva Conventions of 1949 as a crime, and it is prohibited by our Common Article 3 of the Conventions, although we know very well that Article 3 *per se* does not criminalise any conduct, it is customary international law which has provided for the criminalisation.

Torture has not even been defined in the various purely international human rights instruments which contain prohibition of torture, and in particular the UN Declaration of Human Rights, and the Covenant and the European Convention for Human Rights, just to mention some of these human rights instruments prohibiting torture. The first definition of torture as a crime was contained, as we all know, in the Convention of 1984, the UN Convention on Torture. And the Convention, as I said before, does provide for the involvement of the state official for torture to be considered a crime and be criminalised by the state parties.

However, the case law of human rights bodies has taken a different stand. And when these human rights bodies, for example the Human Rights Committee and the European Court for Human Rights, had to clarify the notion of torture and the prohibition of torture and their relevant treaties, they clearly and plainly stated that the prohibition does not require state official involvement. Therefore torture can be committed also at the private level and the state can be responsible under the relevant human rights treaty for the private act of torture to the extent that it does not investigate and punish the act of torture.

So, the only issue that had to be dealt with by the ICTY, first in *Delalić* and then in *Furundžija* – in *Furundžija* the person was accused of torture as a war crime – the Tribunal had to try to define what the elements are of the crime of torture as a war crime. And they naturally turned towards the Torture Convention which, I think, was quite an understandable instinct because the Torture Convention is of course a human rights treaty, but it is a particular type of human rights treaty like the Genocide Convention. This is a treaty which mainly intends to protect human rights through criminal sanction, and therefore the definition contained in the Torture Convention has torture as a crime, as an act committed by an individual and engaging his individual criminal responsibility.

However, the *Kunarac* decision disagreed for the reason I've explained, because otherwise the accused couldn't have been found responsible for torture because they were not state officials. And in which way did the *Kunarac* decision disagree? As I said, I totally agree with the final outcome of the decision, but the reasoning is not entirely convincing to me. Because, they say that the Torture Convention – I try to summarise, the reasoning is a very complex one, so I do apologise for perhaps being too short on this – but what they said is that the

Torture Convention, being a human rights instrument, can be misleading if the definition has to be imported into the international humanitarian law. And I agree with the methodology. Of course, when we have to import human rights notions at a different level, one has to be very cautious.

But then, what I found contradictory is that when the Tribunal tried to demonstrate that the customary international law definition for war crimes and crimes against humanity did not mean that state official requirement... well – the Tribunal then heavily relied upon case law and general comments by human rights bodies. So, it was ascertaining what it was debating one moment ago. And, this is mainly the reason for which I do not think that the Tribunal is very persuasive in the reasoning, because it tries to be a bit contradictory at least.

I think that the Tribunal could have perhaps taken a different stand in explaining why the definition of torture as a war crime and a crime against humanity does not require the state official involvement requirement, unlike the Torture Convention. I think that the reason must be found in the fact that, as we know, international criminal law is a particular body of public international law which immensely interferes in criminal matters which are normally and naturally reserved to states. And my understanding of the rationale, if I may say so, of the entire edifice of international criminal law is that, of course, we want to impose, I would say, criminal responsibility when there was little prospect of success, of obtaining it by relying on national criminal jurisdiction and national criminal law. And therefore, international criminal law, in general, since its origin, deals with a form of “state criminality”.

Therefore, we want to have an international element transforming the conduct into a criminal conduct of international concern. Because, as Professor Crawford said yesterday, of course murder is a crime everywhere, but this does not mean that murder is an international crime for which international criminal law has something to say. Usually murder is prosecuted by national courts and they normally tend to do so.

So, when it comes to torture in the definition of the Torture Convention, I think that, of course, the state official requirements there play an important role because it wants to differentiate the individual, perhaps sporadic, case of infliction of severe pain and suffering. It was to distinguish between the ordinary crime of someone for private reasons, torturing his wife, let us say, which would be an ordinary offence, and if the international element requested to attract international concern... - and this international element is the fact that the person is acting under the cover of law of an involvement of a state official, and therefore practicing what is an ancient phenomenon of state torture, which has been used for centuries to extract information, to obtain a confession, and so on and so forth, since the Middle Ages.

And I think that in the Torture Convention, the state official requirement has been added also to prosecute even under universal jurisdiction, under *aut dedere aut judicare* rule, a crime of international concern because it has been inflicted by state officials. This is the international element which transforms the crime into the international crime. Is this element necessary when it comes to the severe infliction of pain and suffering, upon an individual as a war crime and crimes against humanity? Well, my answer would be – no. Why? Because the international element is already enshrined in the general definition of the big category of war crimes and crimes against humanity. In crimes against humanity, the private infliction of pain and suffering would in any case require the fact that this act is part of a widespread or systematic attack against the civilian population. And this is the international element which helped us to distinguish between the ordinary act committed by a husband against his wife, and the crime of international concern.

In the case of torture and war crimes, what matters, and the Tribunal said it very clearly, is the status of the victim, the fact that you are a person who is protected under the Geneva Convention, so you are not a combatant; you are a civilian in an international conflict. That is the fact that in connection to the war nexus requirement, you inflict severe pain and suffering upon a person, a protected person. Well, this is, I would say, the international element. And, of course, when it comes to other war crimes which have nothing to do with the torture but the violations of matters of welfare, the nexus would be there.

I think that this is a very important thing to keep in mind, because this would therefore allow me to say that if torture *per se* should become, or has become, a discrete crime under customary international law and therefore there be something that does not require the war crimes or crimes against humanity context to be punished by international or national courts, well I would tend to say: “Yes, of course, it has become perhaps a discrete crime, but the state official requirement must be there. Because, otherwise, I fail to see the importance of the crime for the international community if it would be a discrete, private act of torture.

And, do I have time? No. OK, so I’ll stop here. I wanted just to add, that from the purely human rights perspective I totally understand why the requirement of a state official involvement is not requested, because the state, under human rights treaties, under the current interpretation of human rights treaties, is there to be the guarantor of the freedom and rights of the individual. Therefore, if one does not intervene to prevent or punish an act of private torture, it has committed a violation of the human rights treaty. But in the human rights, as you said, has a different scope of purpose than international criminal law.

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber

Thank you, Paola, for these critical remarks, including your remarks on the reasoning of the *Kunarac* judgement. I will not even try to defend it. I sat on the bench in this case, and I prefer to leave any comment to the audience, in order not to risk do disclose anything related to the deliberations.

Rein Müllerson has the floor now. We are old friends and have sat together many years in the Human Rights Committee under the Covenant on civil and political rights. I am pleased to give you the floor.

Rein Müllerson, Professor and President, Tallinn University Law School

Thank you, Fausto.

And I would like also to thank the organisers for this wonderful conference which has given me an opportunity to meet many old friends and make some new friends. But I feel there is certain sadness in the air here and a void, and that is that Nino Cassese is not here and everybody feels that he is still with us. I met Nino Cassese maybe some 20 years ago in Florence and I addressed him: “Professor Cassese!” And he told me, and I think it is usual: “Call me, simply, Nino.” Since then it was always Nino Cassese wherever we met - in London, in The Hague, or elsewhere. And last time we met, maybe it was not accidentally, in Italy – not in Florence, but in Naples. So it is very sad to be now here in The Hague without Nino.

In my presentation I would like to comment on the impact of the ICTY on crimes against humanity, on some aspects of it.

The basic reason is that recently I was a member of an international commission which studied crimes committed or bloody events in southern Kyrgyzstan in 2010. The report of this international inquiry commission paid tribute to the case law of the ICTY, and the ICTR as well, and used customary international law, and by doing that also used the case law of the ICTY as evidence of customary norms to the development of which, of course, the Tribunal has contributed immensely. And about that I will speak maybe a bit at the end of my presentation.

First of all, the ICTY has contributed to the clarification of differences and overlaps between the three categories of crimes we are discussing now, here. It is well-known that one and the same act *actus reus* may be qualified depending on *mens rea* or the context in which acts were carried out: as a war crime, a crime against humanity, or an act of genocide.

For example, for war crimes, the characterisation of some acts has been widespread or systematic – it is an aggravating circumstance indicated *inter alia* that such acts are not individual incidents, but systematic crimes, and there is a state or other, more or less organised, authority behind them. At the same time, for crimes against humanity, widespread and systematic nature are necessary qualifying elements. In the *Tadić* case the Tribunal clarified these concepts indicating that widespread nature refers to the number of victims, while systematic character indicates that a pattern or methodical plan is evident.

In the case of genocide, there has to be direct intent to commit an act of genocide, that is to say, to destroy in whole or in part a protected group, while in the case of the crimes against humanity, there has to be knowledge that one's behaviour constitutes a part of widespread or systematic violence. And I quote one of the decisions of the ICTR: "The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act, that he has an actual or constructive knowledge of the broader context of the attack, meaning, that the accused must know that his act is a part of a widespread and systematic attack on a civilian population and pursuant to some sort of policy plan."

One of the forms of *actus reus* of crimes against humanity that is somewhat close to the acts of genocide is persecutions. As Nino Cassese has written, the distinction between genocide and persecution, as for *mens rea*, is that the perpetrator of genocide must intend to destroy all or part of a protected group, while the perpetrator of a crime against humanity needn't have such intent. And persecution can be seen in many other forms of inhuman and discriminatory intent other than intent to destroy.

The Rome Statute stipulates that an attack against the civilian population is a source of conduct involving the multiple commissions of enumerated acts. Nevertheless, a single act also can constitute crimes against humanity if it is a part of a larger attack. The widespread nature of the attack is based upon its scale, the number of people targeted or the cumulative effect of a series of inhumane acts or through the specific effect of a single large-scale act. Its systematic nature is inferred from the organised character of the acts committed and from the improbability of them being random in nature. Patterns of crimes that are the non-accidental repetition of similar criminal conduct on a regular basis are a common expression of such a systematic occurrence.

The ICC Statute also includes the requirement that the attack must be committed pursuant to, or in furtherance of, a state or organisational policy. However, in the jurisprudence of the ICTR and the ICTY, this requirement has been interpreted as not constituting a separate legal element of a crime against

humanity, though it is still evidentially relevant including the widespread or systematic nature of an attack.

In relying upon customary international law approaches to crimes against humanity, the Kyrgyz Inquiry Commission didn't need to take a position on the debates surrounding their approaches to this matter. Instead, in conformity with the existing law, it adopted a relatively demanding standard "in order to assess whether sufficient degrees of the organisational policy existed in relation to the June 2010 events." That is to say, the Commission considered that certain organisation and certain policy of that organisation was a necessary element of crimes against humanity. It is clear that such an organisation need not be a state, and in the case before the Kyrgyz Commission it certainly was not the central authorities of Kyrgyzstan who organised the attacks under consideration.

The protection of the civilian population is central to the concept of crimes against humanity. It is from this that the requirement that the widespread and systematic attack be directed against them arises. And civilian population, as the ICTY has established, includes not only people who are not in uniform and have no link to the public authorities, but all people who are not combatants anymore and who are no longer taking part in the conflict. A population may be classified as civilian even if it includes non-civilians, provided that civilians comprise the majority.

Thus, the expression "civilian population" must be understood in the broadest sense. Of the enumerated acts listed in the definition of crimes against humanity, the Kyrgyz Inquiry Commission considered that the following crimes were committed during the attacks against – they are called "mahalas" – Uzbek compounds in southern Kyrgyzstan: murder, rape, other forms of sexual violence, other physical violence and persecutions against an identifiable group on ethnic grounds.

While the enumerated acts are generally well-known crimes under domestic law, persecutions required further elaboration. Persecution is a crime encompassing a large number of acts, including among others those of physical, economic or juridical nature that deprive an individual of the exercise of their fundamental rights. The acts of persecution must be a manifest and flagrant denial for reasons of discrimination of the fundamental rights protected by international customary or treaty law and be at the same time a degree of seriousness as the acts listed in the definition of crimes against humanity.

In this respect, this Commission considered that many of the acts committed, including the targeted burning of Uzbek property, fell within the definition of persecution. In assessing whether the attack against the Uzbek population in the city of Osh was widespread or systematic, the Commission

followed the methodology established by the ICTY Appeals Chamber, that is, to first identify the population which is the object of the attack, and in the light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic.

In doing so, the Commission considered the consequences of the attack upon the targeted population, the number of victims, the nature of the attacks, the possible participation of officials, authorities or any identifiable pattern of crimes to determine whether the attacks satisfied either or both requirements of widespread or systematic attacks. Numerous incidents reported by the Commission showed that the acts of violence targeted Uzbek compounds and the Uzbek individuals, groups and property contained within them. The targeting of the Uzbek population was, at its most simple, reflected by the fact that 75 per cent of the people killed and the overwhelming majority of the destroyed property belong to the Uzbek community.

The attacks on the compounds exhibited pattern and order of several days' duration. Attackers, unable to penetrate barricades, often withdrew, re-grouped and re-launched the attack with the aid of APC - armed personnel carriers. This sustained the behaviour of specific targeting and some kind of discipline and order which would not be commensurate with the normal, chaotic actions of fighting civilian crowds. Almost all evidence of sexual violence involved gang rape. Usually a rape occurred in front of either male family members or publicly. And the Commission was satisfied that this sexual violence was integral to the widespread and systematic attack on the civilian population. That's to say - it was part of crimes against humanity.

And the Commission, emphasising that it was not a criminal tribunal, found that "if the evidence of some acts committed during certain attacks against the compounds in June was proven beyond reasonable doubt in a court of law, those acts would amount to crimes against humanity." In coming to such a conclusion, the Commission used not only customary international law as imported *inter alia* in the Rome Statute, but also the case law of the ICTY and, to a lesser extent, also the ICTR. The Commission was satisfied that all three physical elements of crimes against humanity were present. There were acts such as murder, rape or serious injury, the bodily or physical; they were committed as part of a widespread or systematic attack, and these attacks were directed against a civilian population. And of course, what the Commission did not do, could not do, and was not mandated to do, was to study the presence of the subjective element, *mens rea* in the behaviour of those concrete individuals who committed organised or instigated such attacks.

These should be the tasks of the Kyrgyz judicial bodies which they so far, at least, are failing to implement. The work of the Commission illustrated a problem

that it is not idiosyncratic for central Asia or Asia only. Victims of the violence, and especially of those who backed them, tried to persuade the members of the Commission that they were victims of genocide, and nothing else would satisfy them. The Kyrgyz authorities, on the contrary, were unhappy and even furious that we found *prima facie* the case for crimes against humanity. The Kyrgyz parliament even passed a resolution asking the executive branch to declare the Head of the Commission, a Finnish diplomat and politician, *persona non grata* in Kyrgyzstan. Such an attitude seems to indicate that the concept of genocide is sometimes used too loosely, or even abusively, and crimes against humanity are not always considered to be most serious crimes which they certainly are.

And finally, I would like to offer some comments concerning the impact of the ICTY and other international tribunals on the development of the customary international law in the domain of war crimes, crimes against humanity and genocide. Everybody is familiar with the assertion that decisions of international courts and tribunals are binding only for the parties of the case and they don't serve as precedents. But, almost everybody also agrees that in practice they often do exactly that. The matter is that it is often for judicial bodies to look for the state practice and *opinio juris*, and to analyse various acts of behaviour and decide if there is a customary norm and what is its content.

As Georges Abi-Saab said here yesterday - they perform their role of midwives. If we may say, there is a trinity, if the mother is state practice, then the father is *opinio juris*, and the midwives are international courts and tribunals. But here, a caveat is necessary, I think. The final word still remains with states. States are bound to implement decisions of international courts and tribunals, whether they agree or disagree with them. But disagreements or agreements are not without legal consequences. If they voice their disagreements, they express their *opinio non juris*. States that do not express their disagreements may be seen as acquiescing to the decisions of the tribunals. But if a sufficient number of states voice their disagreements with such decisions, we may indeed say that such decisions do not reflect existing law and were erroneous, though even such decisions will remain legally binding.

And finally, Professor Dinstein has written that unfortunately an international court or tribunal may make an explicit finding about the existence of customary international law and yet there is no escape from the conclusion that their finding is wrong. As an example he offers the *Kupreškić* case before the Trial Chamber of the ICTY. The Chamber found that the belligerent reprisals against civilians prohibited by the First Additional Protocol were also part and parcel of customary international law.

Yoram Dinstein believes that such a pronouncement is clearly incompatible with the general practice of states since 1977. I am not going to take any stand on

this issue. In any case, it is not, with all due respect, for Professor Dinstein or for myself to decide. What is important is the reaction of states to such judicial pronouncement. Even if considered erroneous by quite a few serious academics, states have the final say. What is important are the acquiescent judgements of international courts and tribunals which should express their approval or disapproval of such judicial pronouncement.

In the domain of international humanitarian law which is heavily value-loaded, states, even if they disagree with what, say, the ICTY decides, often prefer to remain silent, keep their views to themselves. This means that in adequate circumstances, international criminal tribunals can push their envelope and play a more creative role than other international judicial bodies. And the ICTY has used this opportunity creatively.

Thank you.

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber

Thank you, Rein.

This shows the contribution of the Tribunal to the law applied by other bodies. I started with *Kupreškić* and you ended with *Kupreškić*, although on different tones. As you said, possible criticism does not detract from the importance of this judgement presided over by Nino and its contribution to the assessment of customary law.

Now, Steve Mathias has the floor for his presentation.

Stephen Mathias, Assistant Secretary-General for Legal Affairs, United Nations

Thank you very much, Judge Pocar. And I would also like to thank the organisers and President Robinson for inviting me here. I want to begin by associating the United Nations with comments that Judge Pocar made at the beginning about Nino Cassese.

The United Nations called upon Nino on many occasions throughout his career and he always responded. His contribution to international law was immense, as we all know, and was greatly valued by many Secretaries General and legal counsellors, and he will be missed. Speaking personally for a moment, I knew him only as a president. When I first knew him, he was the President of this Tribunal and I was working at the American Embassy as the Legal Counsellor there and then. Then, when I came to the United Nations last year, I had the great pleasure of working with him again in his capacity as the President of the Special Tribunal for Lebanon. So, he will be missed.

Now, when conflict broke out in the Balkans in the early 1990s, and shortly thereafter in Rwanda, I do not think that anyone here, or anyone in the larger audience than this one, could have imagined what has since happened here in The Hague and in Arusha: that an international court was created, and has punished the guilty, has given voice to the victims, and has hoped to establish the historic truth of the horrors that took place in the former Yugoslavia and then in Rwanda. I think it follows from that that no one would have predicted today's extensive architecture of international criminal justice with the *ad hoc* international and hybrid or mixed tribunals, the International Criminal Court.

These developments of the past 18 years have heralded a new era of accountability for individuals committing serious violations of international criminal law, and importantly, from my perspective and the purposes of my brief presentation this afternoon, many of these developments, many of the aspects of this extensive architecture have been adopted on the basis of mandates, supported by the international community, acting through the United Nations.

It turned out, I think, that the establishment of the ICTY was actually a watershed event in the life of the United Nations, and I thought I might speak briefly this afternoon about some of the effects that I think this Tribunal has had on the broader United Nations and the work there. In talking about the United Nations, of course we need to have in mind both the political organs of the United Nations, the Security Council and the General Assembly, and also separately the Secretariat, and the manner in which the Secretariat goes about its business. And so, I am going to make a few observations about actions, both by the political bodies on the one hand, and then by the Secretariat on the other, that in some way, I think, reflect the legacy of this Tribunal.

Now, with respect to the political organs, and in particular the Security Council, although not exclusively – because as you know, the General Assembly had a leading role in the creation of the Extraordinary Chambers in the Courts of Cambodia – but in the case of the political organs, perhaps the most obvious effect that ICTY's work has had can be seen in development of later international courts and tribunals.

The lawyers in the office in which I now work, who had the lead in drafting the Statute of this Tribunal, had very little to go on, in terms of practice, for the 50 years after the Nuremberg and Tokyo trials. During the Cold War period there was very little practice in the field of the international criminal justice. As Judge Pocar noted, there had been some conventional law during that period, but practice – no.

Now it is clear, I think, that the Office of Legal Affairs did a pretty good job with the Statute of the ICTY in the sense that the Statute of the ICTY has become the standard of reference, if you will, from which other international tribunals

have been adopted. And we have seen already with the Rwanda Statute, there was a broadening of what the jurisdictional aspects and nature of some of the crimes - of course, also taking into account the different factual situation in the events in Rwanda. But then we have seen subsequently, as each of the additional hybrid courts and other bodies have been developed, there have continued to be developments, and to a large extent, I think, reflecting some of the jurisprudence here, but also taking into account the specific factual situations of those particular *ad hoc* bodies.

For example, the jurisdiction of the Special Court for Sierra Leone included for the first time the international crimes of attacks on the peacekeepers and the conscription of child soldiers. And one can see, if one carefully tracks the developments, similar jurisprudential developments in those statutes. Of course, these statutes generally, as I say, have been adopted by political bodies, mostly the Security Council, and so we see through the political organs of the United Nations a kind of indirect recognition of the jurisprudence of this court. This tendency toward the development of the body of international criminal law, I suppose, reached its culmination with the Statute of the ICC, which so clearly benefits from the lessons learned from the ICTY, in particular with respect to the definition of the crimes within its jurisdiction. Now, the ICC is not a UN entity, in the sense that this Tribunal and some other tribunals are, but of course the relationship between the ICC and United Nations is very strong.

I think it can be suggested that the establishment of the ICTY promoted what could be seen as an emerging global culture of accountability. When the Office of Legal Affairs was drafting the ICTY Statute, there were very few experts in international criminal law, and fewer actual practitioners. I suppose Judge Cassese was one of them at that time. Of course, since the ICTY was established there has been a tremendous growth in the practice and the study of the discipline of international criminal law, and it has a new place in the public consciousness. And I think this culture of accountability has touched the member states of the United Nations, and also it has affected the United Nations itself.

With respect to the General Assembly, I wanted to make a brief reference to the development of the "responsibility to protect", the doctrine which I think can also be viewed in a way as an outgrowth of this culture of accountability that I have spoken of. Now, for the United Nations, the responsibility to protect found its expression in the 2005 world summit. And there, as I am sure many of you realise, the heads of state and governments who were present affirmed that each individual state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, those four categories of crimes; and that the international community, through the United Nations also has the responsibility to help protect populations from those same four crimes.

I think it is clear that the jurisprudence of the ICTY was critical in defining and developing the crimes that underpin the General Assembly's concept of responsibility to protect and in raising the consciousness of the international community with respect to this group of crimes. Now, in the context of the responsibility to protect, the United Nations works on the basis of three pillars of activity which were set out in that world summit declaration. First, that it is obligation of the states, the responsibility of states, to protect their own populations. Secondly, that there should be international assistance and capacity-building to assist states to develop to protect their population. And third, there should be a timely and decisive response by the international community where states are not able or willing to protect their populations.

Now, I do not think this is the place for a discussion of the responsibility to protect; we could probably have a separate panel on that. But I do think it is worthwhile to note in this context, because it does represent a political acknowledgement by the international community that sovereignty entails responsibility, and that the international community has a responsibility to assist states to protect their populations from genocide, crimes against humanity, war crimes, and ethnic cleansing. Again, I think the key role of the ICTY in defining these crimes and in shaping the debate about these crimes demonstrated the need for the international community to develop a concept that would permit action to be taken against them.

Now, those are the instances that I wanted to mention of action by the political organs of the United Nations, the creation of subsequent tribunals, the development of the doctrine of responsibility to protect.

Now, I am going to deal very briefly with the few aspects in which, within the Secretariat itself, the development of the ICTY has, I think, contributed to the manner in which the Secretariat does its work in a way that responds to the legacy of this Tribunal. One very concrete effect of the global culture of accountability has been the appointment of special advisors and representatives of the Secretary-General on themes that have featured largely in the jurisprudence of the ICTY and the other tribunals. Thus, for example, in 2004 we had the appointment of the Secretary-General's Special Advisor for Prevention of Genocide and Mass Atrocities; in 2006, the Special Representative for Children in Armed Conflict; in 2007, the Special Advisor on the Responsibility to Protect; and in 2010 the Special Representative on Sexual Violence in Conflict.

The fact that these offices are now standing offices within the Secretariat has allowed the United Nations to take a more active approach in seeking to prevent genocide, war crimes and crimes against humanity. The effectiveness of the individuals serving in these roles has been promoted by the development of the International Criminal Court and by the jurisprudence of this Tribunal and

the Rwanda Tribunal; for example, in de-coupling crimes against humanity from armed conflict, and from defining and calling attention to crimes of a sexual nature.

So, based on these developments, the United Nations and international community are more empowered than when they were previously being able to prevent and combat these crimes by means of early warning systems, and importantly, by raising the threat of prosecution for these crimes as a deterrent to the commission of the crimes. The culture of accountability that I have been speaking about, that resulted from the ICTY's work, has also a concrete effect on the UN's peacekeeping activities. Currently in the United Nations there are over 80,000 troops, blue-helmeted troops in 16 different peacekeeping operations around the world, and they are serving under increasingly complex and multidimensional mandates which increasingly include the authorisation to use force under Chapter VII of the Charter, which as you know was not true of the initial group of peacekeeping missions.

A very important development in the Security Council is that these missions increasingly are mandated to protect civilians under imminent threat of violence. And we've just heard how the protection of civilians is related to the crimes against humanity, they're parallel concepts. One is a more active set of steps to prevent the other. Now, this protection of civilian mandates has presented a lot of challenges to the United Nations; it is a very difficult mandate to satisfy. And they are somewhat restricted in scope in that they are subject to the availability of resources and geographically limited to areas where peacekeepers are deployed, but nonetheless they do provide a crucial means to prevent violent attacks on civilian populations.

Another way in which the United Nations has addressed accountability is in what's called the "human rights due diligence policy". And this policy is a means of ensuring that the United Nations itself is never perceived to be connected to, or complicit in, the commission of the crimes that we have been discussing. The genesis of this due diligence policy was the United Nations response to allegations in 2009 that some members of the Congolese army, the FARDC, who were being provided logistical support by the UN's peacekeeping operations in the Democratic Republic of the Congo, MONUC, that some members of the FARDC were looting, killing, and raping the very population that they were supposed to be protecting. So this presented a difficult situation for the United Nations, how to carry out its mandate from the Security Council in the DRC without supporting in any way the Congolese soldiers who might abuse human rights. This led to the development of the policy in the Secretariat to prevent any perception of association by MONUC, the peacekeeping operation, with these violations by the FARDC. The policy specified that MONUC would not participate in or support operations with FARDC units if there were substantial grounds to believe that there was a real risk that such units would violate international humanitarian law, international human rights law or refugee law in the course of their operations.

This policy developed by the Secretariat was later endorsed by the Security Council, which in Resolution 1906 of 2009 called upon MONUC to intercede with FARDC command. If elements of an FARDC unit receiving MONUC's support were suspected of having committed great violations on such laws and the Resolution continues that if the situation persists, MONUC should withdraw support from these FARDC units.

This policy developed, initially only in the context of MONUC, has now been further developed and clarified, and applies across the board where the United Nations is considering providing some kind of support to non-UN security forces. And this reflects, I think, the culture of accountability that we have been discussing, and it shows that it applies to the United Nations as well as to member states.

The final point I am going to address is the amnesty policy in the United Nations. The jurisprudence of the ICTY and the global culture of accountability have also affected the position of the United Nations with respect to peace-making, namely with respect to UN assistance to peace negotiations, and in particular in connection with the issue of amnesties. In 2005, the General Assembly adopted the document "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". In 2006, the Security Council similarly addressed the issue in its Resolution 1674.

These policies reflect the agreement of the member states with the long-standing position of the UN human rights bodies and experts, as summarised by the Secretary-General in his 2004 report on the rule of law and transitional justice in conflict and post-conflict societies: that United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity, or gross violations of human rights. In its 2009 Guidebook for Practitioners, dealing with amnesties in post conflict states, the Office of the High Commissioner for Human Rights noted that peace agreements secured at the price of amnesty for atrocious crimes, may not secure peace that is just or lasting. Accordingly, the United Nations through the Department of Political Affairs directs all of its officials, including peace negotiators and field office staff, that they must never condone or support amnesties that would prevent prosecution for the crimes that we are discussing today, including gender crimes, as doing so would violate the right to an effective remedy for the violations of human rights, as enshrined in Article 8 of the Universal Declaration of Human Rights.

Now, the UN's policy on amnesties has its roots in and takes support from the ICTY's 1998 decision in the *Furundžija* case. A trial chamber of the ICTY held in that case that a domestic amnesty covering crimes such as torture, that are prohibited by *jus cogens* norms, would not be accorded international legal

recognition. The Trial Chamber in that case drew up the support from a 1994 statement by the UN Human Rights Committee, that amnesties covering torture are generally incompatible with the duty of states to investigate such acts, to guarantee freedom from such acts within their jurisdiction and to ensure that they do not occur in the future.

The Statute for the Special Court for Sierra Leone specifically provides that amnesty cannot be a bar to prosecution for the crimes within the SCSL jurisdiction. And in examining that provision of the Special Court's Statute, the Appeals Chamber drew support from the ICTY's jurisdiction and stated that it stands to reason that the state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reasonable fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation.

So, we conclude on the point of amnesties, and I think that the significance of that, for our purposes, is that by preventing amnesties that would include these core crimes, that we permit accountability for those, we prevent impunity. And I think, in the broader sense, the great legacy of this Tribunal is that it has made The Hague a symbol of a world which is refusing now increasingly to countenance impunity. And I think this Tribunal has made a great contribution to the development of that principle.

Thank you.

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber

Thank you, Steve. This has been a very interesting aspect of the legacy. The case law, the definitions, and the clarification of the crimes that has developed at the ICTY and other international courts, indeed, can serve as a point of reference for international obligations as set forth in other international instruments. The UN has referred to this legacy in shaping the obligations of other states - which is a very important contribution because the repression of crimes is not the only approach to crimes. Actually, repression is the approach of the courts, but prevention of crimes is the main obligation for the international community and is the policy of the United Nations.

We do not have much time for debate, but we can take some questions. I will pass the floor to the audience if there are questions to put to our panellists. Please, this is the moment, and this is the last moment possible during this conference. So, don't miss the opportunity if you have any questions to place.

Yes.

Question from the audience: Christine Van den Wyngaert, Judge at the ICC

Maybe a question to you, Mr. Chairman. I am not sure I understood the purpose of what you were proposing to turn torture and gender crimes into autonomous crimes. Would that then mean that the chapeau requirements that we have for classical crimes, like war crimes, crimes against humanity, genocide will disappear? And what would then be the difference from national crimes?

My second question is to Paola. I was wondering what she makes of the distinction between torture as a crime against humanity, and torture as a war crime in the ICC statute. Does it make sense according to you?

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber

Well, I can answer very quickly. I do not have any particular purpose. I was simply noticing a trend in that direction, and left the question to my colleagues. The case law was going in that direction or at least could lend support to the trend of singling out some crimes, some types of crimes, as in the case of genocide. Initially, genocide was under the umbrella of crimes against humanity in Nuremberg, irrespective of the denomination of the crime, of course, which was not yet adopted. Subsequently, there was a decision to single it out, making it a separate, independent type of crime. It almost represents an entire category of crimes, because genocide is not one single, individual act; it is a number of acts, of crimes, in fact, that have been identified in the 1948 Convention. I also noticed, particularly in legal literature, a trend to single out torture and was wondering myself what would be the difference with domestic crimes, and I considered it interesting to debate the issue here.

Now, Paola has identified such difference from ordinary crimes essentially in the qualification of the perpetrator. Torture would be an international crime when it is committed by a public official, and would not when the perpetrator is not a public official, if I got exactly her position. Only in the first case, it would be an international crime irrespective of being systematic, or widespread, or linked to an armed conflict. But Paola, you may better answer the question yourself.

Paola Gaeta, Professor, Faculty of Law, University of Geneva; Adjunct Professor, Graduate Institute of International and Development Studies, Geneva; Director, Geneva

Now I do not have with me the elements of crimes, but I guess that you referred to the purportive element where it is requested for war crimes, although in general terms it is not requested at all for crimes against humanity. I think that

the distinction does not make sense from the point of view of logic, as I mentioned before. And I do not think it would necessarily correspond to customary international law, because I asked myself for which reason for the war crime, once you drop the state official requirement, you need very general purpose, and for crimes against humanity, that does not make any ... any...

I think the only answer that is perhaps... because when it comes to war crimes which are usually committed by soldiers and not by necessity – but generally of course it is for private individuals – but war crimes is the particular category. States drafting the elements of crimes wanted to be more restrictive. Simply like that. And that does not make sense to me. I hope it does not make sense to you too.

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber,

Yes, Georges Abi-Saab.

Georges Abi-Saab, Professor Emeritus for International Law, Graduate Institute of International Studies, Geneva; former ICTY Judge

Thank you. I have a very short question. It is about the principle of legality. Can we really invent new crimes? We have three categories, we cannot go out of. In my short separate opinion in *Tadić*, I said that after the Second World War we were trying to grasp these horrors from different angles, and we had a lot of overlap. I understand very well that we try to rationalise the thing and make them four into separate categories, but we cannot go beyond the categories we have, and say that this has become a crime, but in itself. I think it creates a problem. It could be, perhaps... try to say that through custom, et cetera, but for the Tribunal as such – it has its Statute and it is limited by it, its jurisdiction is limited by it. It is just a question and I do not know who wants to answer it, if anybody.

Rein Müllerson, Professor and President, Tallinn University Law School

Of course, what Georges said for the ICTY remains. The ICTY is bound by the Statute, and torture is part of either war crimes, crimes against humanity or even genocide. But what Fausto said is for the future maybe, what the jurisprudence of the ICTY has contributed to this development which would separate torture or maybe gender crimes from crimes against humanity and war crimes. I do not think personally so, and I tend to agree with Paola that the prohibition of torture is a human rights norm. Yes, it is understandable that it is addressed to states and states are involved in torture, and they have to punish those who torture. Therefore, there is this element of state participation – either active or passive. And if we

take private torture, then in that case in order to become an international crime, a separate crime, than it has to become widespread and systematic, and I do not see any need for that special crime, a separate crime. It is part of crimes against humanity; or if it is all in the context of an armed conflict, it is a part of war crimes.

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber

There is no doubt that it so today. But State practice is unpredictable. Nothing could prevent state practice from orienting itself to say that a particular crime, which is so heinous that it becomes of international concern, should be classified as an international crime. After all, the idea of crimes against humanity was based on that notion. So, conditions were set up – widespread, systematic – and were employed to define the crime as international. But what was the initial concern of the international community? It was that certain crimes could not be accepted internationally even if they were connected only with one country. Now, nothing could prevent the practice from going in a direction where torture would be regarded as so heinous that wherever it is committed, even by private people, it cannot be accepted. However, it is not the case nowadays in human rights. The Human Rights Committee – which was the first body to clarify the obligation of States to prevent and repress torture committed by private individuals – did not have in mind the private crime committed individually. It had in mind, rather, that ill-treatment could be committed in a school or in a hospital where medical experiments are carried out. If torture occurred in a private school, or in a hospital, it should not be tolerated, and the state would have an obligation to prevent it. These were the situations that primarily moved the Human Rights Committee to insert a sentence in its general comment on Article 7 of the Covenant, which was very much disputed because it went against, or beyond, the Convention on Torture. The *Kunarac* case took note of this position of the Human Rights Committee. It started from there. It is true that in current international law torture, in order to be regarded as an international crime, must be systematic and widespread. However, it would not be strange if in specific instances torture were to be regarded by the international community, through state practice, as an international crime irrespective of these conditions.

Whether the ICTY contributed to a trend in that direction is still an open question. I am not giving an answer “yes” or “no”. But certainly, a definition of the elements of a crime may eventually lead to certain developments. I will leave the question open for the time being.

Comment from the audience: unknown speaker

If we open this question, we will open the box of Pandora as well.

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber

OK. We can keep it open.

Any other questions? We have only few minutes.

Please.

Question from the audience: unknown speaker

I wanted to ask about something that was mentioned at the very beginning of this panel, and that is the crime of aggression, something that was obviously absent from the ICTY's Statute and mandate. I wanted to ask for the views of the panellists - whether the contribution of the ICTY's jurisprudence perhaps contributed to this next step in the evolution of this global culture ending impunity that was mentioned on the panel in addressing the action that could constitute the crime of aggression? And also the views of the panellists on the fittingness or the rightness of having this crime in the same league as the other core international crimes, considering the difference in nature between the crime or acts that constitute the crime of aggression and acts that could constitute genocide or crimes against humanity.

Thank you.

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber

It is difficult to answer a question on the possible contribution of the ICTY on a matter in which the ICTY had no jurisdiction, actually. And right or wrong, it was the decision of the Security Council, to exclude its jurisdiction on this matter.

Certainly, what the ICTY has definitely done is to clarify that, irrespective of the reasons or the responsibilities in starting a conflict, in the responsibilities for the conflict, whether international or non-international, the crimes coming within the jurisdiction of the Tribunal have to be dealt as such. An attack is not listed as an excuse to any crime committed. But as for the crimes of aggression as such, its definition goes beyond the competence of the ICTY.

Paola Gaeta, Professor, Faculty of Law, University of Geneva; Adjunct Professor, Graduate Institute of International and Development Studies, Geneva; Director, Geneva Academy of International Humanitarian Law and Human Rights

May I add something? Because, of course you are right, but there is a worrying development, I say at the ICTY, on joint criminal enterprise. Now, I did

not revise recently the most recent cases, but if I am not wrong, joint criminal enterprises have been also interpreted where the common purpose is the design to build the Great Serbia, which is very much linked to the political idea behind the conflict in the former Yugoslavia, as if this was a criminal common purpose.

So if you have a bit of imagination, you might think that what is now envisaged under the doctrine of joint criminal enterprise is the fact that by having this common criminal design of creating this Greater Serbia, in a way you do not go so far.

But I do not know if it is unconscious in the jurisprudence of the Tribunal, but certainly there is some tendency. I do not know what you think, but it is a big Pandora box, I would say. A big one.

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber

It is difficult for me to comment as a judge, on your jurisprudence. You see, I know that there are positions or interpretations that have been given, but it is not for me to endorse any of them.

Rein Müllerson, Professor and President, Tallinn University Law School

You are not like the ICJ in their advisory opinion on nuclear weapons which tried to confuse something ...use empowerment, use it in peril. Not all parties are always equal. Some acting in self-defence in extreme circumstances when their survival is at issue, they may... the court cannot say whether the use of nuclear weapons is illegal or not. So, for you it is always illegal to torture, to commit utter war crimes against humanity.

Moderator, Judge Fausto Pocar, ICTY Appeals Chamber

I would tend to say so unless the behaviour may be justified under criminal law. But that is a different issue. It is the tools of criminal law, actually; there are reasons justifying the conduct.

If there are no more questions, we can conclude this final panel which was the final activity of the conference. I will not conclude the conference itself. That is the responsibility of the President, but I think that we have explored, if not all, many of the areas of the legacy, and today, this afternoon, we dealt with many of them.

We can also see that the legacy of the Tribunal goes really in many directions, not just to promoting other international courts, as it has done, not only

to supporting the role of domestic courts in dealing with international crimes, but also to reaching, regionally and worldwide, a number of other bodies that make use of the case law of the Tribunal for the clarification of international crimes for different purposes than their adjudication.

In one of the first years of this Tribunal, a small publication was issued, and I believe Nino Cassese was behind it. The title was *The Path to The Hague*. It invoked criminal justice with the Hague as the centre of criminal justice and the ICTY as a model to promote it. Today, after almost twenty years of life and activity of the Tribunal, we could perhaps start thinking of a new publication titled *From The Hague to the World*, reflecting the legacy of the ICTY, as dealt with in this Conference, on international criminal justice.

I will conclude the panel discussion here, with my sincere thanks to our distinguished panellists and all the participants in this stimulating debate.

Conclusion of the Conference

Master of Ceremonies:

Christian Chartier, former Chief of the ICTY Public Information Service

Closing remarks:

- **Marjolein de Jong, Deputy Mayor for Culture, City Marketing and International Affairs, Municipality of The Hague**
- **Ed Kronenburg, Secretary-General, Ministry of Foreign Affairs, the Netherlands**
- **Judge Patrick Robinson, President of the ICTY**

Master of Ceremonies, Christian Chartier, former Chief of the ICTY Public Information Service

We are going to listen to the three concluding remarks. I will call the speakers in turn. The first speaker is Ms Marjolein de Jong. She has been living abroad for a number of years, as I understand, and as soon as she returned to The Hague, she was elected as a member of the Municipal Council. She is in charge of culture, city marketing and international affairs, and Ms de Jong is also a Deputy Mayor of the City of The Hague.

Marjolein de Jong, Deputy Mayor for Culture, City Marketing and International Affairs, Municipality of The Hague

Thank you. It's my pleasure, Your Honours, ladies and gentlemen, also in my function as a Vice-Mayor of the City of The Hague to extend a warm welcome to you; and as Deputy Mayor for International Affairs it's my honour and pleasure to extend a few words to you.

We are about to close the Global Legacy Conference, which has been organised for the second consecutive time in The Hague - the international city of peace and justice. I do hope that you can look back on two interesting and inspiring days. When I looked at the programme, I saw a whole lot, an impressive lot, of interesting speakers and renowned moderators. So I trust nobody has been let down.

The ICTY has accomplished a lot in the last two decades. The jurisprudential contribution is enormous, and so is the impact of the Tribunal on the future of global justice and the advancement and enforcement of human rights. The Hague -

again the international city of peace and justice - is a host to over 130 international organisations, and we are very proud to have the ICTY in our city.

There is another legacy of the ICTY that we feel is very important. As I said, international city of peace and justice, and the headquarters of the ICTY are on the Churchillplein, on the Churchill square, and this square has become, more or less, the embodiment of peace and justice when it comes to crimes that had been committed in the former Yugoslavia. The victims of those monstrous crimes and the academic world look to The Hague and await the verdicts of the ICTY.

On the other hand we also see a growing interest among the inhabitants of The Hague when it comes to the work of the Tribunal and the courts in our city. Last September, we once more organised our yearly international open day, and the city of The Hague works with all the international organisations and the embassies in our city, so that both the inhabitants of The Hague and visitors from outside can experience from the inside what the work of the tribunals and courts is all about, the importance of that work. And there was an overwhelming interest this year to visit the ICTY and to listen to Prosecutor Brammertz and Judge Orie, a sign to us that the work of the Tribunal appeals to the imagination of many.

I would also like to take this opportunity to briefly draw your attention to the academic aspect of The Hague as an international city of peace and justice because of the recently established The Hague Institute of Global Justice that plays an important role in the academic debate on peace and justice. It was established by The Hague Academic Coalition, by the City of The Hague, by The Hague Conference on Private International Law and by The Hague Centre for Strategic Studies, and of course, supported by the Dutch government.

The Institute is dedicated to the promotion of knowledge of law and justice in relation to peace, security and social and economic developments, and the objective, as you might know, is to develop an integrated approach to its issues where the lack of law and justice could lead to political, military, social or economic instability and inequality. And this establishment of the Institute of Global Justice came at the right moment because recent developments in the Middle East demonstrate that the struggle for freedom and justice is universal and has nothing to do with culture or religion. It is global and it is a human phenomenon.

Ladies and gentlemen, the work that the ICTY has done will have a lasting impact on future developments, and I am afraid that, in the near future, conflicts will continue to affect the lives of innocent citizens, like they have done for so many centuries.

One closing remark: I do hope that, aside from all the important academic work, that you have taken upon yourselves in the last two days you

still have time or will have some time to enjoy our city. We are host to numerous cultural and culinary institutions. You might have heard of the painting Girl with the Pearl Earring, which resides in our city in the beautiful Mauritshuis. You might want to visit Mondrian's Boogie Woogie in the Gemeente Museum 500 metres down the road. Take in a few culinary delights in Chinatown, or go to one of top three dance companies in the world, here in The Hague, the Netherlands Dance Theatre.

I wish you all well, I wish to those who came from outside The Hague safe travels, and do hope to see you again and welcome you again in The Hague.

Thank you very much.

Master of Ceremonies, Christian Chartier, former Chief of the ICTY Public Information Service

I am pleased to turn the floor over now to Mr Ed Kronenburg. He is the Secretary-General of the Dutch Ministry of Foreign Affairs. This is a position he came to after holding senior management positions in various international organisations such as the OECD and NATO.

Ed Kronenburg, Secretary-General of the Dutch Ministry of Foreign Affairs

Thank you very much. Your Excellencies, ladies and gentlemen, it is really a great pleasure to see so many distinguished guests back in The Hague today and also yesterday to continue the discussions on the global legacy of the International Criminal Tribunal for the former Yugoslavia. I would like to thank the ICTY for organising this conference which will prove to be instrumental in safeguarding its important legacy.

I would also like to express my great appreciation for the achievements of President Robinson over the past two years, and at the same time I'd like to congratulate Judge Meron on his election as the ICTY's new president. I look forward to continuing the outstanding cooperation between the Tribunal and the Netherlands.

The Dutch Government is pleased to be the co-sponsor of this important conference. We have a special relationship with the ICTY, and if I say "we", it's not just the Dutch Government. It is also the city of The Hague as the Vice-Mayor just pointed out, and of course very important are the inhabitants of the city of The Hague. The ICTY was the first major international criminal tribunal since the Nuremberg and Tokyo trials, and also the first international criminal tribunal to be located in The Hague. Apart from being a milestone in the development

of international criminal law, the ICTY has played an important role in the positioning of The Hague as the international city of peace and justice.

In the last two decades the world has changed from a place where it was virtually impossible to bring perpetrators of heinous crimes to justice into a place where such individuals are increasingly faced with criminal proceedings. The ICTY's success has been crucial in this development. On the 21st of October I was saddened by the news that its first president, the eminent scholar Antonio Cassese passed away. I am sure I can speak for all of us when I say that we are grateful for his immense contribution to the field of international criminal law. The ICTY would not have been the same or as influential without him.

Ladies and gentlemen, last year I applauded the ICTY for its outstanding contribution to the international fight against impunity. With the arrests of Mladić and Hadžić this year, all of the 161 persons indicted have been brought before the Tribunal. The ICTY has exceeded all expectations and sent a powerful warning to the entire world that justice will eventually catch up with perpetrators of the most serious crimes.

As has been discussed over the past two days, the legacy of the ICTY stretches far beyond the legal proceedings in its courtrooms. The ICTY has contributed in many ways to the development of international criminal law and has paved the way for the establishment of the subsequent international criminal tribunals. It has also helped to strengthen national capacities in the fight against impunity. The Netherlands is a staunch supporter of this two-track approach and will remain so.

Peace, of course, is more than simply the absence of conflict, as you all know. Lasting peace requires reconciliation. Only the future will tell to what extent the ICTY has been successful in achieving its second objective, bringing about reconciliation. And in this regard the Tribunal's Outreach Programme, encompassing multiple transition of justice mechanisms, will continue to play a pivotal part. Transition of justice aims to build a bridge between the past and the future by dealing with past human rights abuses, while trying to ensure that such abuses will never happen again.

Together, we are now preparing for the transition to the Residual Mechanism. The Netherlands is honoured to host this institution. We will continue to focus our efforts on maximizing the ICTY's legacy, both through our commitment to its Completion Strategy and with regard to the establishment of the Residual Mechanism. In short, we will remain committed to the ICTY and continue to support its contribution to lasting peace and stability.

Thank you very much.

Master of Ceremonies, Christian Chartier, former Chief of ICTY Public Information Service

Of course, the concluding words of this conference will be uttered by His Excellency, Judge Patrick Robinson, the outgoing ICTY President. As you know, he will hand over tonight, at midnight, the presidency to Judge Meron, so his remarks constitute his last public address in his capacity as the ICTY President.

Judge Robinson.

Judge Patrick Robinson, President of the ICTY

Thank you very much, Christian.

Excellencies, ladies and gentlemen, I wish to thank you all for participating in this Conference. I see this Conference as recognition of the important pioneering role of the Tribunal and also recognition of the multifaceted legacy that it leaves. I have no hesitation in coming to the conclusion that the Conference was a resounding success. That success was due not only to the expertise and a very high calibre of our moderators and panellists, but also to the eagerness of the audience to participate in the discussion of the many issues debated. In that respect I must note the eminence and the intellectual richness of our audience participants.

So what did we learn from the Conference discussions? I think we can all agree that we have confirmed the tremendous and profound impact of the Tribunal on all facets of international criminal justice. The work of the Tribunal has identified, not all together without controversies as our debate revealed, the scope of customary international humanitarian law. It has also identified, with unprecedented specificity, the precise elements of the core crimes of genocide, war crimes and crimes against humanity, and these elements have been endorsed in the jurisprudence of other international criminal tribunals, and in the domestic prosecution of war crimes. We also had an interesting discussion on the procedural law of the Tribunal with many expressing the view that the stress on the classification of the procedures, as of common law or civil law origin, was misplaced.

And finally, we consider the global impact of the Tribunal on the advancement of human rights. The Tribunal was the first international institution after Nuremberg that called individuals to account for atrocities committed during armed conflict. It gave victims of those crimes the means of seeking redress and it dispensed justice. It also inspired the establishment of other international and mixed tribunals in places which cried out for justice, such as Rwanda, Sierra Leone and Cambodia. The Tribunal also had a resonating impact on the decision of the international community to establish a permanent International Criminal Court.

The success of this Conference has a particular significance for me because tomorrow, the 17th of November, I demit office as President of this Tribunal, and my successor Ted Meron will take up the mantle of President for the second time. For those of you who do not recall, Judge Meron served as President of the Tribunal between 2003 and 2005. I am indeed gratified that both Legacy Conferences, regional and global, were hosted during my presidency. During both conferences, the Tribunal has been enriched through hearing your reflections and views of the importance and impact of the Tribunal's work. Your interest in and continuing commitment to the work of Tribunal is inspiring to all of us charged with its completion.

Ladies and gentlemen, at the opening of the Conference I had the occasion to mention the generosity of the donors and their foresight in these very difficult of economic times of supporting the Conference as something very worthwhile. This Conference was funded entirely by voluntary contributions, and I cannot express forcefully enough my gratitude to the governments of the Netherlands, Luxemburg, Switzerland, and the Republic of Korea, as well as to the Municipality of The Hague and the Open Society Justice Initiative for making it possible.

Much has been said about the Conference and I have received much commendation. Quite often civil servants work in the background without enough recognition. I want to tell you that the person who is responsible for the success of this Conference is my Chef de Cabinet Gabrielle McIntyre. It was Gabrielle who conceived the whole notion of a Legacy Conference and divided it up into a Regional Legacy Conference and the Global Legacy Conference. It was Gabrielle who stood by my side when doubts were expressed by many, including the United Nations headquarters itself, who surprisingly questioned the hosting of a Legacy Conference by this Tribunal. I trust they have changed their minds.

It was Gabrielle who stood by my side when we had doubts expressed internally about the feasibility of a conference of this kind. And Gabrielle therefore deserves all the praise for the conception, the implementation, and the success of this very great endeavour. Might I also mention Diane Brown, my Legacy Officer who worked hard, putting the nuts and bolts together for this conference. And, of course, I want to mention Christian Chartier who was formally Head of the Public Information Office at the Tribunal and who has taken his not inconsiderable talents to, I think, greener pastures, to academia. They will benefit from his immense talent.

I also wish to mention the Head of Outreach Nerma Jelačić, the Registrar's assistants Isabelle Lambert and Jolanda Kaloh, the assistants in the Chambers Pierre Galinier and Mia D'Aspremont, the Special Assistant to the Chief of Administration Moya Magilligan, the Legacy Officer in the Registry Kevin

Hughes, Graphic Designer Leslie Hermer and the Budget Officer Michael Sylver. To all these and more I say a very big thank you for a job well done.

I will be issuing a report summarising the conclusion of this Conference in due course, and my report, as well as the full transcription and videos of the Conference will be uploaded onto the Tribunal's website as soon as they are available.

I thank you all once again for your attendance and for your valuable contribution. Your support remains critical as the Tribunal winds down its work, and we hope to have further opportunities for fruitful collaboration with you in the future.

Thank you.

