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Tribunal Pénal
International pour
l'ex-Yugoslavie

STATEMENT

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PROSECUTION

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ADDRESS OF CARLA DEL PONTE AT THE POLICY BRIEFING, EUROPEAN POLICY CENTRE, BRUSSELS

Excellencies
Ladies and Gentlemen,

Let me first thank the European Policy Centre and the Swiss Mission to the EU in Brussels for organizing this event. I also thank Mr. Rehn for taking part in this discussion.

I attach a great deal of importance to our relations with the EU, because of its role in the former Yugoslavia and the impact of EU policy on our work. The EU and the ICTY are on the same side and aspire to the same: a stable and reconciled Western Balkans region where those who committed atrocious crimes in the 1990s are finally brought to justice. As we are in the midst of implementing our completion strategy, the Tribunal does not have much time left. We must soon arrest those who are still at large and conclude ongoing trials and appeals.

I am here today to present you with an assessment of the past eight years at the Tribunal. How successful have we been? In preparing for this discussion, I realised that it is perhaps too early to give a complete answer. Therefore, I will focus today on highlighting what I see as some important developments during my two mandates at the Tribunal.

1. Bringing senior political and military leaders to justice

The Tribunal has clearly demonstrated that political leaders and military commanders are no longer immune from prosecution and cannot commit serious crimes with impunity. We have been able to bring those most responsible for committing crimes in the former Yugoslavia to justice - former presidents, prime ministers, military chiefs of staff, high-ranking officers, etc. Until his untimely death, Slobodan Milosevic was on trial before the ICTY. Who would have thought that possible in 1993 when the Tribunal was established?

According to some, there are times when justice should not interfere with diplomacy, international politics and peacemaking efforts. Some, who strongly advocate against the creation of an international tribunal, still fear that it could cause instability and trigger waves of violence. I firmly believe that, in the long term, peace and stability will only be achieved if there is a fair judicial process bringing perpetrators of serious crimes to justice. At the ICTY, I was asked on several occasions to refrain from taking steps, which could, according to some, destabilize a country. I did not accept such suggestions because that was not part of the mandate given to me by the Security Council. The arrest of Slobodan Milosevic did not destabilize Serbia. The indictment against Vojislav Seselj did not cause civil war. Ratko Mladic and Radovan Karadzic have been banned from political and public activity. What would the situation in Bosnia and Herzegovina be today if they were still in power? The arrest of former Prime Minister Ramush Haradinaj of Kosovo has not led to an outbreak of violence. Neither has his ongoing trial in The Hague. Of course, every situation is different and in some cases there may be political turmoil, perhaps even civil unrest. Despite that, peace and reconciliation cannot be achieved without the

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pursuit of justice. It is clear that there is no fundamental contradiction between peace and justice.

Today, it is a fact: international criminal justice is now on the agenda of world leaders and peace deal brokers. Since 1993, we have seen the birth of other courts and tribunals, such as the Special Court for Sierra Leone, the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia. And, on 30 June, the Security Council, acting under Chapter VII of the UN Charter, established a new Tribunal for Lebanon. These are extraordinary developments. Kofi Annan, in his last report to the General Assembly on the work of the Organisation, called the establishment of the *ad hoc* Tribunals "*the most striking development at the international level over the past decade*" which "*demonstrated the collective will not to allow grave violations of international law to go unpunished*".

2. Progress and completion strategy

We have gone a long way towards achieving the goals set for the Tribunal. Over the years, we conducted investigations of crimes committed in conflicts in Croatia, Bosnia and Herzegovina, Kosovo and the Former Yugoslav Republic of Macedonia. Let me give some figures which are indicative of the amount of work that was carried out. Since our inception in 1993, we indicted 161 persons. By now, proceedings are concluded involving 106 accused.

Since I arrived, we have brought 91 persons into the Tribunal's custody. Today, only four accused remain at large. Unfortunately, they include the most notorious - both charged with genocide - Ratko Mladic and Radovan Karadzic.

Trials and appeals are progressing and nearing completion. 25 accused are currently on trial, only 11 accused are at the pre-trial stage and 12 accused are before the Appeals Chamber while 3 accused are awaiting their first instance judgement. Thus, we expect to complete first instance trials in the course of 2009 and appeals by 2011.

3. Contribution to the development of international criminal law and International Humanitarian Law

The Tribunal has greatly contributed to the development of international criminal law and humanitarian law. Indeed, there has been a formidable growth in the jurisprudence and development of procedural and substantive law. Notable judgments have addressed the application of the Geneva Conventions. It is before the ICTY and ICTR that the first convictions based on the crime of genocide were rendered since the Genocide Convention was signed in 1948. It is also before these two tribunals that it has been established beyond reasonable doubt that rape was used as an instrument of terror and considered as a war crime and as a crime against humanity. National jurisdictions and other international tribunals can draw upon the developed case law.

Within a new legal context, engaging competent and qualified personnel, especially in the early days of the Tribunal's existence, was not easy. Since then, the ICTY has been in a position to attract competent staff and provide training. Today, there is a body of investigators, analysts and lawyers and former staff members available with experience and know-how who have already placed their skills at the disposal of the different international investigation commissions and tribunals.

4. The selection of suspects and transfer of information and cases to national prosecutors and courts

The ICTY was not established to prosecute all individuals who may have committed crimes which fall within its jurisdiction. The scale and scope of atrocities made it impractical for any one judicial institution to prosecute all of them. From the outset, careful consideration had to be given to the selection of targets: which crimes and which offenders should be prosecuted?

Targets were selected irrespectively of the ethnic origin of the perpetrator or the victims. Only the scope, level of responsibility, degree of violence, number of victims and impact on community were taken into account during the selection of targets.

The number of indictments and accused tried has been influenced by several factors including the limited capacity to process large numbers of cases and the Tribunal's Completion Strategy. In 2003, the Security Council urged the ICTY to "concentrate on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and to transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions".

We have worked intensely over the past years with authorities in Belgrade, Sarajevo, Zagreb and Skopje to transfer knowledge and evidence we possess pertaining to hundreds of other suspects that could not be tried in The Hague. We have seen progress in domestic prosecutions but we still urge the international community to remain vigilant and support monitoring of domestic prosecutions and trials.

5. Complexity of international investigations and prosecutions

We are often criticized because we are apparently too slow or inefficient. I reject that. I believe that we have made progress over the past years: pre-trial management has improved, the judges are taking a more active stance, more written evidence and more adjudicated facts are accepted.

However, I think it is important to underline the complex context within which we operate and conduct investigations. Prosecuting large scale crimes at the international level is different from investigating and prosecuting organized crime cases at the national level. Though similar investigative tools may be used or similar legal concepts applied, unique challenges arise at the international level. We have no police force or enforcement agents and have a mixed system of combined common law and civil law procedures.

The ICTY and ICTR were new concepts when they were established and, at that time, very few tools were available. The Statute was silent about how the Tribunal was to carry out some of its tasks. Adding to that challenge was the fact that procedures would require the cooperation of states often hostile to the mandates of these tribunals.

The ICTY was established when the war was still raging in the former Yugoslavia. There were practical and operational difficulties in conducting investigations - we had very difficult access and had to rely on the assistance of multinational forces. The political, factual and legal situation was also complex with different States opposing each other and different entities and militias also involved and sometimes changing alliances and sides. The crimes that the Office of the Prosecutor had to deal with were often massive events covering wide areas. Some lasted for many months and were highly organized.

Many of the ICTY's investigations began far from the crime scenes, among the thousands of refugees who had fled the conflicts to other parts of the world. Information was also obtained from States and from a number of non-governmental organizations and humanitarian agencies who were operating during the conflict. National and international media were another source of information. Nevertheless, it was vital for investigators to go directly to the victims and survivors to record their first-hand accounts. In collecting

the evidence, the ICTY had to rely on assistance provided by international armed forces specifically in Bosnia and Herzegovina as a result of their mandate under the Dayton Peace Accord. During the conflict in Kosovo, we had to move quickly, request the assistance of States, and conduct on site exhumations.

Over the years, we have been able to collect a massive amount of documents which are now part of our evidence collection. In total, this collection represents some 7 million pages of documents. To organize this evidence, it was crucial to have in place the necessary modern (and sometimes expensive) electronic management tools. Given the importance of the evidence collections to the institution for our trials, but also for legacy purposes, international tribunals need to invest in intelligent and performing evidence management systems.

It is worth stressing that, although substantial, when compared to those available to important domestic investigations, our resources have been quite limited.

6. The Protection of witnesses

Let me now turn to another important and specific aspect of our work - the issue of witness protection. Due to the nature of crimes prosecuted, the position of some perpetrators and other characteristics of our trials, some witnesses face serious threats if they came to testify. Without witnesses, we cannot conduct our trials. Protective measures in court proceedings such as the use of pseudonyms, facial or voice distortion as well as closed session testimony, assist in securing that the witnesses appear in court. For more important and high risk witnesses, protective measures such as relocation or placement into a domestic witness protection programme may be necessary. The Tribunal's lack of enforcement agents, intelligence and its own professional witness protection programme constitute serious challenges to the ICTY. Also, it is my view, that an adversarial process which allows for aggressive cross-examination of victim-witnesses and does not provide for a *partie civile* to represent them may not be the best choice for trials of this nature. This is why I was happy to see that the ICC adopted Rules of Procedure and Evidence somewhat different to our own in this respect.

7. State cooperation

Finally, let me say a few words about the importance of State cooperation and my office's experience in this area. The ICTY has had to rely heavily on the cooperation of States in the former Yugoslavia to obtain documents and the custody of suspects and accused. Despite the Tribunal's formidable Chapter VII powers, and the deriving international legal obligation of all States to cooperate with the Tribunal, co-operation of States and international and regional organizations with the ICTY has not always been forthcoming. At times, I could sense that our work was being hampered because the political convenience of the moment was interfering with our mandate. While in certain cases, accused were arrested and surrendered immediately, in other cases, fears of alleged political and security instability permitted indictees to remain free. Indeed, clear opportunities were missed to arrest Karadzic and Mladic in the period of 1995 to 1998.

We have been more successful in securing the arrest and transfer of fugitives and the provision of documents when relying on policies of conditionality imposed by the international community and incentives for the States in question to co-operate with the Tribunal.

Milosevic was transferred to The Hague on 28 June 2001 after the US threatened to boycott a key donors' conference. The progress in the co-operation of Croatia, Serbia, Bosnia and Herzegovina, Montenegro and the Former Yugoslav Republic of Macedonia has been the result of EU policy requiring full cooperation with the ICTY. And most often, the

level of cooperation of these States was evaluated on the basis of my Office's assessments.

The conditionality to start negotiations on EU membership has been the most effective tool recently vis-à-vis States failing to cooperate. 90 % of all accused currently on trial or awaiting their trial are in The Hague as a direct result of EU conditionality.

I therefore call upon the EU and its Member States to maintain a principled and consistent position primarily in respect of Serbia. In practical terms, this means that there should be no signing of the Stabilisation and Association Agreement without the arrest and transfer of Ratko Mladic.

Without this policy, we may never see the remaining accused being brought to justice. The failure to apprehend the remaining fugitives in a timely manner would seriously undermine the ability of the Tribunal to fulfill its mandate and would have a lasting negative impact on victims as well as create a terrible legacy for the region as a whole.

Let me now conclude.

Some may argue that the Tribunal has insufficiently contributed to peace, stability and reconciliation in the region. The Tribunal has often been the subject of attacks - and it is still the case today - sometimes orchestrated by radical elements. Perhaps we should have reached out more, but we did not have the resources. The Tribunal alone cannot bring stability and reconciliation. Other actors also must contribute to this process. The Tribunal has certainly made a very significant contribution to the understanding of what happened during the wars in the former Yugoslavia.

I have taken the liberty to focus on some of the developments over the past years and current pending issues. We have made impressive achievements. Indeed, who would have thought, several years ago, that we would be this close to completing our work? Today, four accused remain at large, including Ratko Mladic and Radovan Karadzic. They need to be brought to justice as soon as possible. And only if we manage to do so, we will be able to say that we have completed our work to the credit of all those who have worked very hard to get this far.

I look forward to a further exchange of views.

Thank you for your attention.
