



UNITED NATIONS - UJEDINJENE NACIJE  
International Criminal Tribunal for the former Yugoslavia  
Međunarodni krivični sud za bivšu Jugoslaviju

# Legacy of the ICTY in the former Yugoslavia

Conference proceedings  
Sarajevo, 6 November 2012  
Zagreb, 8 November 2012

LEGACY OF THE ICTY IN THE FORMER YUGOSLAVIA

This publication gathers together transcripts of the proceedings of two conferences on *The Legacy of the ICTY in the former Yugoslavia* convened in Sarajevo, Bosnia and Herzegovina, and Zagreb, Croatia, on 6 and 8 November 2012, respectively, by the Outreach Programme of the International Criminal Tribunal for the former Yugoslavia.

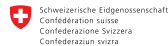
Over 250 people attended the conferences, including ICTY judges and staff, officials from national judiciaries, experts on transitional justice issues, journalists, academics, NGO representatives and international officials from across Bosnia and Herzegovina and Croatia. Participants discussed the Tribunal's achievements to date and the legacy the ICTY will leave behind to those most directly affected by its work – the citizens of the former Yugoslavia.

Four panel discussions saw participants addressing the Tribunal's role in transitional justice processes, the scope of the ICTY's legacy, the importance of regional access to the Tribunal's archives, and the future responsibilities of local and international accountability mechanisms, including the Mechanism for International Criminal Tribunals (MICT).

Co-sponsored by the European Union and the Governments of the Netherlands and Switzerland



Ministry of Foreign Affairs of the Netherlands



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra  
Federal Department of Foreign Affairs FDFA  
Directorate of Political Affairs DP  
Human Security Division  
Peace, Human Rights, Humanitarian Policy, Migration



**LEGACY OF THE ICTY  
IN THE FORMER YUGOSLAVIA**

Conference proceedings  
Sarajevo 6 November 2012  
Zagreb 8 November 2012

ICTY Outreach Programme  
The Hague  
2013

***Legacy of the ICTY in the former Yugoslavia***

The *Legacy of the ICTY in the former Yugoslavia* conferences would not have been possible without the generous support of the governments of the Netherlands and Switzerland, and the EU.

***Legacy of the ICTY in the former Yugoslavia***

Conference proceedings

Sarajevo, 6 November 2012

Zagreb, 8 November 2012

A publication of the ICTY Outreach Programme

*For the publisher:*

Nerma Jelačić

*Transcribing:*

Balkan Investigative Reporting Network (BIRN) BiH

*Editing:*

Suzana Szabo and Slavica Košča-Vrlazić

*Proofreading:*

Joanna Ellis Adwan and Nicholas Beston

*Designed and printed by:*

Amos Graf d.o.o., Sarajevo, BiH

2013

*Circulation:*

1.000

**The Outreach Programme is generously supported by the European Union**



European Union

*The following document is a transcript of live audio recordings of the Legacy of the ICTY in the former Yugoslavia conferences, 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

<b>FOREWORD</b> .....	7
<b>LEGACY OF THE ICTY IN THE FORMER YUGOSLAVIA</b>	
<b>SARAJEVO, 6 NOVEMBER 2012</b> .....	9
<b>OPENING REMARKS</b> .....	11
<b>PANEL 1</b> .....	19
<i>What is the Tribunal's legacy and its role in transitional justice process?</i>	
<b>PANEL 2:</b> .....	39
<i>Dealing with the past beyond the Tribunal – The role of the Mechanism for International Criminal Tribunals (MICT), national judiciaries and non-judicial accountability mechanisms</i>	
<b>PANEL 3</b> .....	63
<i>The future of the past: the scope of the ICTY legacy</i>	
<b>PANEL 4</b> .....	89
<i>The importance of the Tribunal's archives</i>	
<b>CLOSING REMARKS</b> .....	106
<b>LEGACY OF THE ICTY IN THE FORMER YUGOSLAVIA</b>	
<b>ZAGREB, 8 NOVEMBER 2012</b> .....	113
<b>OPENING REMARKS</b> .....	115
<b>PANEL 1:</b> .....	127
<i>What is the Tribunal's legacy and its role in transitional justice process?</i>	
<b>PANEL 2:</b> .....	149
<i>Dealing with the past beyond the Tribunal – The role of the Mechanism for International Criminal Tribunals (MICT), national judiciaries and non-judicial accountability mechanisms</i>	
<b>PANEL 3:</b> .....	173
<i>The future of the past: the scope of the ICTY legacy</i>	
<b>PANEL 4:</b> .....	195
<i>The importance of the Tribunal's archives</i>	
<b>CLOSING REMARKS:</b> .....	213



## FOREWORD

In November 2012, the Tribunal's Outreach Programme, under the auspices of ICTY President Theodor Meron's office, convened two conferences, one in Bosnia and Herzegovina and one in Croatia, entitled "The Legacy of the ICTY in the former Yugoslavia".

The conferences provided an opportunity for local stakeholders to engage in direct and constructive dialogue about the ICTY's role in the region. Topics addressed at these conferences included the Tribunal's contribution to transitional justice, its role in helping communities come to terms with the conflicts of the past, and the ways in which the legacy of the Tribunal can remain relevant to those most directly affected by its work: the citizens of the former Yugoslavia.

The first conference was held in Sarajevo on 6 November, and was followed by a conference in Zagreb on 8 November.

In addition to representatives of the Tribunal, participants included officials from national judiciaries, experts on transitional justice issues, victims, lawyers, journalists, politicians, representatives of NGOs, academics, artists and other stakeholders from the former Yugoslavia.

Each conference included four panel discussions led by moderators who encouraged an active and comprehensive debate among the panellists. The topics of the panels were the same for each conference, but the specific issues raised and debated differed depending on local priorities.

The impetus behind these events arose from two legacy conferences held in February 2010 and November 2011 in The Hague, at the initiative of former Tribunal President Judge Patrick L. Robinson. Participants at those initial conferences underscored the pressing need for discussions to be held in the former Yugoslavia concerning the Tribunal's achievements and its legacy in the region.

This book contains transcripts of the proceedings of the regional conferences, including the opening remarks, presentations from Tribunal staff, national officials, representatives of NGOs, academics and journalists. The panel discussions and questions from the audience are also included.

Nerma Jelačić  
Head of ICTY  
Communications Service





**LEGACY OF THE ICTY  
IN THE FORMER YUGOSLAVIA**

Sarajevo, 6 November 2012



## **OPENING REMARKS**

Moderator:

Nerma Jelačić, Head of Communications, ICTY

### **SPEAKERS:**

- Judge Carmel Agius, Vice-President, ICTY
- Prof. dr. Alija Behmen, Mayor of Sarajevo
- H.E. Ambassador Peter Sørensen, Head of the EU Delegation to BiH and EU Special Representative in BiH

### **Nerma Jelačić, Head of Communications of ICTY**

Good morning everyone. Welcome to the Conference on the Legacy of the ICTY in the Former Yugoslavia organised by the Tribunal's Outreach Programme with the support of the Swiss and Dutch governments and the international community

My name is Nerma Jelačić. I am the head of Communications and Outreach Programme of the ICTY. One of my tasks today is to give you an outline of today's agenda. Many of you attended the previous conferences on the legacy of the ICTY that were held in The Hague in 2010 and 2011 under the auspices of then President of the Tribunal, Judge Patrick Robinson. Our objective today is to open discussion and dialogue on one of the most important aspects of the legacy of the ICTY – its impact in the countries of the former Yugoslavia,

Following this conference in Sarajevo today, we will have a conference on the same issues, with the same objectives in Zagreb and Belgrade respectively. Today you will be hearing from international judges and other officials of the Tribunal as well as representatives from the national judiciary, victims' associations and some government sectors. In each of the four panels we will hear speakers coming from different sectors. It is our aim to have a fruitful discussion following every presentation, so we strongly encourage you to take part in the discussion.

I will pass the floor to Judge Carmel Agius, the Vice-President of the ICTY, for the official opening.

## **Judge Carmel Agius, Vice-President of ICTY**

Excellencies, Ladies and Gentlemen, good morning.

I will start by acknowledging the presence of some of our guests, greeting them and thanking them for joining us today. Particularly I am referring to the Mayor of Sarajevo, Professor Alija Behmen. Thank you, sir. I also refer to and greet Ambassador Sørensen, the Head of the EU Delegation, and Ambassador Kraak, of the Kingdom of the Netherlands, and the Ambassador of Switzerland to Bosnia and Herzegovina, his Excellency André Schaller. I also acknowledge the presence of the Chef de Cabinet of the Tribunal, Ms McIntyre, and also of Elisabeth Baumgartner, Head of the 'Dealing with the Past' Programme on behalf of the Swiss Peace Foundation. Last but not least, I also greet my colleague, Judge Pocar, the former President of the ICTY, as well as the various judges from the region that are present here.

In particular, I salute Hilmo Vučinić, Judge of the Court of BiH, and of course, I salute Ibro Bulić, the prosecutor from the BiH Office of the Prosecutor. It is a great privilege for me to address you today, at the start of this conference on the legacy of the International Criminal Tribunal for the Former Yugoslavia. I start by expressing my warmest thanks to the Tribunal's Outreach Programme, which made this event possible. My gratitude goes to the European Union and the governments of Switzerland and the Kingdom of the Netherlands. Your long-term commitment to the work and mandate of the Tribunal has been outstanding. Once again, we can see at this event how you have been supporting the Tribunal and the events that it has been organising.

Based on the information I have received, I see a remarkable gathering of people from all occupations and all corners of Bosnia and Herzegovina. You may well disagree on issues amongst yourselves. There is, however, one thing that unites you all: your deep commitment to justice and your keen anticipation that the work of this unique institution the ICTY, where I have had the honour to serve, will continue to be a model for change in Bosnia and Herzegovina on its path to recovery. I am especially honoured to open this meeting in Sarajevo and I thank the President of the ICTY for giving me this opportunity.

Sarajevo is a city to which I am always very pleased to return. It is the capital of Bosnia and Herzegovina and one of Europe's heroic cities. Sarajevo's citizens endured, as you know, three and a half years of siege and terror while the rest of the country witnessed some of the worst atrocities and

violence in Europe since the end of World War II. As I pay tribute to all the victims of all ethnicities, I would like to express the hope that the Tribunal's achievements have brought a degree of solace to the brave people of this city and this country. Our aspirations for this conference are to foster this very spirit of focussing on the future. However, just as a house cannot be built on crumbling foundations, the future of this country and its people cannot be constructed without an honest confrontation with the past.

As the Tribunal approaches the 20<sup>th</sup> anniversary of its establishment, and is preparing to close its doors and retire from the stage, we are constantly asking the question: what are we leaving behind? I personally feel a great sense of pride having been part of this institution for more than half of its existence, an institution that has truly changed the way people all around the world think about accountability for international crimes. Twenty years ago, many doubted that the Tribunal would be able to conduct a proper investigation, let alone hold a trial. I remember, at the time, the expectations were that the Tribunal would wind up its work within a year, maximum two, and that this would be the end of the story. Here we are, 20 years later, with the legacy that we are discussing together here.

Today the Tribunal is a leader in the global fight for justice, having indicted and accounted for 161 individuals accused of war crimes in the former Yugoslavia. These individuals would have never faced justice if it were not for the ICTY. The Tribunal has guaranteed the highest standards of international justice and fair trial rights to all of its accused. It has created groundbreaking jurisdiction to ensure that, in the future, perpetrators of the most horrendous crimes will be tried based on a sophisticated body of criminal law and procedure. Please remember that the legacy of the Nuremburg and Tokyo trials was profound when it came to substantive criminal law, but when it came to procedural law, these two tribunals left us next to nothing. It is thanks to the ICTY and its sister tribunal, the ICTR, that a body of the Rules of Procedure and Evidence has been developed to ensure the trial rights of the accused, forming the basis for the rules of evidence and procedure of the International Criminal Court amongst others.

All this being said, for me the greatest accomplishment of the Tribunal, where I serve, is that it has shown the world that justice works. Gone are the days when war crimes could be committed with absolute impunity. However, for justice to be meaningful, it has to have an impact outside the courtroom too. That is why, at this stage of the Tribunal's life, we are asking ourselves how we can ensure that the people in Bosnia and Herzegovina and the entire region of the former Yugoslavia have access to, and understand and nurture the legacy of this institution. The Tribunal is very aware

of this need. The conference today in Sarajevo follows in the footsteps of two legacy conferences held in The Hague in 2010 and 2011. Those two conferences laid the groundwork of the ICTY thinking about its heritage, and allowed it to take stock of the needs of various stakeholders.

This dialogue now continues in the region. After this conference, we will hold similar meetings in Zagreb later on this week and in Belgrade later on this month. At each location, the leading role will be played by local experts, victims' associations, judges and prosecutors, human rights activists, leaders of academia and politics, and the media. The ICTY representatives are here to listen and learn: to learn what tools and information you, the people of Bosnia and Herzegovina, need and what we can do together to assure that the Tribunal's legacy lives on and acts as a catalyst for change.

The legacy of the ICTY, the facts it established, its archives, and its contribution to the rule of law in the region will certainly prove to be a decisive facilitator in the process of facing the past and securing reconciliation not only in Bosnia and Herzegovina but also in the entire region. The Tribunal's legacy will be fulfilled when it inspires this and future generations to transform Bosnia and Herzegovina through the rule of law, accountability, and equal justice. If we all succeed, it will not only be the Tribunal's legacy but also your legacy. After what happened in this country in the '90s, you owe this to yourselves, your country, your children, and your loved ones.

### **Nerma Jelačić, Head of Communications of ICTY**

Thank you, Judge Agius. I will now invite the Mayor of Sarajevo, Mr Behmen, to address the gathering.

### **Alija Behmen, Mayor of Sarajevo**

Ladies and gentlemen, your Excellencies, national and international officials, my dear colleagues and friends, allow me to greet you and welcome you to Sarajevo.

First, I would like to express my gratitude to the ICTY, the government of Switzerland, and the Kingdom of the Netherlands for facilitating the organisation of this conference, which only proves their sense of responsibility and dedication to the mission of the ICTY. I am glad that I can offer my contribution to the work of this conference as the Mayor of Sarajevo. I am especially pleased to have another opportunity before this country to af-

firm the honest dedication of Sarajevo and its citizens to contribute to the legacy of the ICTY. I entirely agree with the Vice-President of the ICTY, Mr Agius, who talked about the essence of the legacy of the Tribunal and, from the practical point of view, advised us to use this legacy to deal with the past in order to build trust, to achieve transitional justice, and to teach the young generations about the evils of war and violence. I wish you a fruitful conference and good results.

This conference is a unique opportunity, which we have to take, to achieve co-operation between stakeholders and agree on the future of the ICTY's legacy. Therefore, I invite everyone to refrain from general comments about how we will use this opportunity to spark debates and discussions. We should be more ambitious. We should deal with and reach important conclusions that will help us in our future work. These conclusions are necessary to prepare adequately for the implementation of public policies for which we politicians are responsible.

When we talk about Sarajevo, I usually refer to our decision to take an active role in the world peace movement and to make our town a classroom where people will learn and be inspired. Therefore, we are very ambitious to establish in our City Hall, where at the beginning of the war extensive archives of our National Library were burned, an institution whose mission will be to enable permanent access to the public in their pursuit of truth in the archives of the ICTY. We will pay special attention to co-operation with academia to improve education and scientific research.

Dealing with the tragic events that were the subject of trials in the ICTY, the citizens of Sarajevo were heroic in their resistance to the aggression, which was destructive in every sense. We are still recovering from that destruction. This year marks the twentieth year of the siege, the biggest in the modern history of Europe. Unfortunately, many will, remember us by that. We have used that opportunity to remind the world about the loss of 11,000 of our citizens, or to be precise, 11,541 persons. Their tragic fate is a warning that we should not allow another aggression to happen, aggression against the truth. That is the legacy of the ICTY. We have to defend ourselves against that kind of aggression and the legacy of the ICTY will help us in that effort. Let me assure you that we will do everything we can to protect our right to life, to promote the truth about the evil that happened to us, and we will use it in our eternal fight against any form of violence and crimes, hoping that it will never happen to anyone again. This legacy is teaching us about life and humanity.

Thank you.



## **Nerma Jelačić, Head of Communications of ICTY**

Thank you, Mayor. I will now give the floor to the Ambassador Peter Sørensen, the Head of the EU delegation.

## **H. E. Ambassador Peter Sørensen, Head of EU Delegation to BiH and EU Special Representative in BiH**

Mayor Behmen, Judge Agius, Excellencies, highly esteemed judges and prosecutors, ladies and gentlemen, it is a profound pleasure for me and a great honour to be with you here today, to give a short introductory remark for this seminar on the legacy of one of the most important institutions that came into existence as a consequence of a very bad situation that occurred here.

The ICTY has had an immense beneficial impact on this country, as well as the rest of the region we call the former Yugoslavia. There can be no doubt that its ability as a catalyst and its ability to establish facts, as the Judge mentioned, are important legacies that the ICTY leaves behind. Without the ICTY's commitment to fight impunity and deliver justice to all those who suffered during the conflict, our combined efforts now to establish democratic rule and states where the rule of law governs, would have been extremely difficult. Cases prosecuted and tried in The Hague have been instrumental in the development of peace. They represent a milestone for international justice.

However, responsibility now falls to the national judiciaries. The ICTY has been a guiding example for the local judicial systems that have been progressively taking up the burden to prosecute and try very complex war crimes cases. The local judicial systems have been supported by the ICTY in this process. That also is a very important legacy.

The European Commission has consistently supported the efforts of the local judiciary through its sizeable investment with the Instrument for Pre-Accession. Just note that for 2012–2013 over 90 million Convertible Marks have been allocated to the justice sector, out of which 34 million are allocated as a direct support for the processing of war crimes cases. The European Union support to the local judiciary has not been limited to financial assistance. It has also focused on the reforms necessary to uphold an efficient judicial system that guarantees the highest standards of independence, impartiality, and accountability.

Challenges to this goal are many, but we should all be clear on the point that without developing a fully independent judiciary, a country will stand little chance of making progress on the road of European Union integration. Processing war crimes, regardless of its importance, cannot stand alone as the only pillar in the reconstruction of a justice system in transition. Justice is a goal, but at the same time, it is also a means to achieving a progressively reconciled society co-operating in peace and prosperity.

In this context, I believe and hope that this conference will help us understand how to best use the lessons learnt by the ICTY and, by extension, the local judiciary in identifying means and activities necessary for the process of reconciliation. These are some of the reasons why the European Union continues to give so much importance to Bosnia and Herzegovina's efforts to co-operate with the ICTY.

As stated in the recently published progress report by the European Commission's on Bosnia and Herzegovina, co-operation with the ICTY is generally satisfactory. However, the report also emphasises the EU's expectation to see further progress on continued efforts to process war crimes cases at an accelerated pace. Additionally, special emphasis was also put on seeing progress in co-operation between courts and the prosecutor's offices from Bosnia and Herzegovina, Croatia, and Serbia. The protocol for sharing information and evidence in war crimes cases between the prosecutor's offices of Bosnia and Herzegovina and Serbia is an important element in this co-operation and we very much look forward to seeing this agreement signed. This will represent a significant step forward in terms of regional co-operation and the fight against impunity. We remain committed to the BiH judiciary and to supporting the ICTY through the future Multi-beneficiary IPA programmes for the countries of the former Yugoslavia.

I therefore wish all the participants a fruitful and successful discussion. Once again, thank you very much for your time. Thank you very much for listening.

### **Nerma Jelačić, Head of Communications of ICTY**

Thank you to our speakers for leading us into the main part of this conference. I will now ask the keynote speakers of panel one to join me here: Judge Agius, Judge Vučinić, Edin Ramović, Zarije Seizović, and Aleksandar Trifunović.



## **PANEL 1**

### **WHAT IS THE TRIBUNAL'S LEGACY AND ITS ROLE IN TRANSITIONAL JUSTICE PROCESS?**

Moderator:

Nerma Jelačić, Head of Communications, ICTY

#### **PANELLISTS:**

- Judge Carmel Agius, Vice-President, ICTY
- Hilmo Vučinić, Judge, Court of BiH
- Edin Ramulić, Activist, Izvor NGO, Prijedor, BiH
- Dr. sc. Zarije Seizović, Professor, Faculty of Political Sciences, Sarajevo University
- Aleksandar Trifunović, Editor, Buka media project, Banja Luka, BiH

#### **Nerma Jelačić, Head of Communications of ICTY**

Judge Agius, Vice President of the ICTY; Hilmo Vučinić, Judge of the Court of BiH; Edin Ramović, NGO activist from Izvor Association in Prijedor; Zarije Seizović, Professor at the School of Political Sciences in Sarajevo; and Mr Aleksandar Trifunović, editor of Buka Media Project in Banja Luka.

I would like to give a few introductory remarks: next year the Tribunal will mark the 20<sup>th</sup> anniversary of its establishment. Its founders, initial staff, judges, and final beneficiaries could not have known at that time how long the Tribunal would exist for and what its true impact would be in the region. This calls for a quotation of Ms Madeline Albright, the US Ambassador to the United Nations at the time of the establishment of the Tribunal. A few years after the establishment of the ICTY, she spoke about what her colleagues in the Security Council thought at the time. She said that when the establishment of the Tribunal was decided by a unanimous vote, there was general disbelief that the Tribunal would truly come into existence. Once it did, there were doubts that an indictment would ever be issued. Once it had been, there was doubt that a trial would ever be completed. Therefore, there was general scepticism, not only in the region but in the

international community as well. I can recall similar scepticism when the War Crimes Section of the Court of BiH was established.

Dealing with the past and accountability would undoubtedly look different if it were not for judicial proceedings in Bosnia and Herzegovina and the region. Opinions on the achievements and results of the Tribunal are divided, especially in the former Yugoslavia where the past still divides people. What is actually the legacy of the Tribunal? What is its role in transitional justice and dealing with the past? We will hear answers to these questions from the perspectives of different stakeholders and interest groups including representatives of the national judiciary, victims' associations, academia, and the media. What is the opinion of the Tribunal itself?

We will first hear about that from Judge Agius.

### **Judge Carmel Agius, Vice-President of ICTY**

My message number one is never be discouraged and never lose hope. Do not look behind when the journey lies ahead. It is easier said than done and many of you will say, "It is impossible. You were not here with us, living the terrible times we passed through during the war in the '90s." It is true. I was not here with you, but I have been sitting in trials and I know what happened, and I know that very well. I also contributed in my small part as one of the judges of the ICTY to try to establish the truth. We tried to establish the truth because it is always the point where you need to start from if you are going to embark on a journey of reconciliation and rebuilding of society where the fabric has been very badly torn. I tell you not to get discouraged. Just think about it.

We were created, the ICTY, in 1993. Obviously, the message of the Security Council of the United Nations was very clear. Now you have a serious Tribunal, which will try war criminals. The message was that there is not going to be impunity. Yet, what happened? Barely two years later, we had some of the worst atrocities committed here in the former Yugoslavia. However, maybe the message had not yet reached the hearts and minds of the perpetrators. It was too early, maybe, but now it is 20 years past the creation of the ICTY, 18 or 19 years past the creation of the ICTR, 12 years past the adoption of the Rome Statute of the ICC, eight or nine years since it was set up as a functioning court. Yet, what do we see? Do we have a situation where war crimes are not committed? Far from it.

War crimes are still being committed in many regions of the world. I do not need to waste your time mentioning any specific place. As I speak now, war

crimes and atrocities are being committed not very far from here. This is why I tell you not to get discouraged. Do not get discouraged because there is a difference. You may not think about it when you stop and ponder what I just told you, but there is a big difference between now and 20 years ago. Now there are courts, there are tribunals, there are institutions that will investigate, and when the evidence is there, they will prosecute in some instances even *in absentia*, as is the case of the Special Tribunal for Lebanon.

Therefore, the message that the United Nations sent loud and clear back in 1993 that henceforth there would not be any impunity for those who commit war crimes, now is even louder and clearer. It has been strengthened by the record set by the ICTY and the ICTR. In the ICTY, as I said before, we have prosecuted 161 alleged war criminals; some were acquitted and many were convicted, the great majority. The message now is much clearer. There is no longer impunity. This is, in my opinion, the greatest, most fundamental and most important legacy of the ICTY.

The second most important legacy, according to me, is that we have shown the way, we have made it obvious, we have made it clear for everyone interested in prosecuting war criminals that this can be done. It can be done efficiently and with due respect to the fair trial rights of the accused. Ideally, there would not have even been the need for an international tribunal, had the system, the structure, the circumstances prevailing in the republics of the former Yugoslavia were such that they could allow for prosecutions to take place domestically. Nevertheless, the situation was not ideal at the time. As time passed by, now you yourselves see – from your experience here in Bosnia and from what is happening in Serbia and, to an extent, in Croatia – that what we started, namely prosecuting war criminals for war crimes committed during the conflict, can be done even at the domestic level. The legacy of the ICTY is that it has made this clear, but we have also created a structure by which we have assisted you and continue to assist you in various ways with all that is needed for these cases to be constituted and tried. We are proud of what we have done because when we come to Bosnia, Serbia or Croatia and see the special courts operating, we know that we have played albeit a modest but definitive role in setting up and getting this system going.

There is another substantial contribution, which forms part of our legacy. Again, what one can speak here a lot in favour of and quite a bit against relates to the victims and victims' rights. The Statute of the ICTY is not exactly the ideal statute when it comes to victims' compensation in particular. I think the ICC Statute is better in that respect, although I myself am sceptical about parts of the ICC Statute and how that system works. However,

we have been a platform that otherwise would not have existed, that gave the opportunity to victims to travel to The Hague and tell their story. It is fundamentally important and it is part of our legacy.

Victims are perhaps one of the most salient features in the whole context of our discussions today. Either they are victims themselves or they have had victims in their families. We have helped, in our small way, to give them the opportunity to be heard. We have not provided a good system for compensation to victims. That is, however, an important role that you here in Bosnia, and others in the other parts of the former Yugoslavia, have. I am sure we will be discussing this later on. I have other things to say, but my time is up so I will give my colleagues an opportunity to speak.

### **Nerma Jelačić, Head of Communications of ICTY**

Judge Vučinić, you may take the floor.

### **Judge Hilmo Vučinić, Court of BiH**

Thank you very much. I am very pleased that I can talk today about the elements of the ICTY's legacy from the perspective of the judges trying war crimes cases before the Court of Bosnia and Herzegovina.

Since the enactment of the Criminal Code of Bosnia and Herzegovina on 1 March 2003, which defined the processing of war crimes and crimes against humanity, and protection of international rights as falling within the exclusive competence of the Court of Bosnia and Herzegovina, it became clear that co-operation between the Court of Bosnia and Herzegovina and the ICTY and the jurisprudence of the ICTY would be an important link in trying the persons suspected of these criminal offences before the national courts of Bosnia and Herzegovina. We should not disregard the fact that many cases remain within the jurisdiction of the entity courts and the prosecutors' offices, so the issue of co-operation involves all courts in Bosnia and Herzegovina. The legacy of the ICTY is undisputed. It becomes especially important in the cases before the Court of Bosnia and Herzegovina, and I will focus on a few important aspects.

The first one is the normative aspect. The conditions for trials before the national courts are defined by the laws in the field of international humanitarian law taken over from the ICTY's Statute and the Rules of Procedure and Evidence and the relevant laws dealing with crimes against humani-

ty and values protected by international humanitarian law. The criminal offences which were not defined under the Criminal Code of the SFRY, which was in force at the time of perpetration, are now defined in the new Criminal Code of Bosnia and Herzegovina dating back to 2003. The Court of Bosnia and Herzegovina is also applying the general principles of international law and international common law. This means that crimes against humanity are now criminal offences in the new legislation, as well as command responsibility in the form accepted in international humanitarian law, which as such is an integral part of the ICTY Statute. The laws also adopted solutions from the ICTY and the provisions are now an integral part of national laws. Examples include the Law on the Protection of Witnesses Under Threat and Vulnerable Witnesses; the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in Bosnia and Herzegovina. This legislative aspect of the ICTY's legacy has created the necessary legal framework and the basis for the effective processing of war crimes in the courts of Bosnia and Herzegovina.

Another important aspect is jurisprudence. Theoretical research and extensive analysis of the status of certain criminal offences has been very useful to the Court of Bosnia and Herzegovina, which relies on the conclusions of the ICTY and other authorities in the field of humanitarian law like the Commission for International Law, the ICTR, the Red Cross and others.

Defining the key elements of certain acts, of certain acts of perpetration and the standards established by the ICTY is a very important source that the Court of Bosnia and Herzegovina relies on in the trials against those accused of these criminal offences. Based on the jurisprudence of the ICTY, the Court of Bosnia and Herzegovina started to apply the concept of joint criminal enterprise, which is a form of criminal liability. This is a novelty in our legislation, not only in Bosnia and Herzegovina but also in other countries of the former Yugoslavia.

As regards the status of joint criminal enterprise and its forms, the Court of Bosnia and Herzegovina in great part relies on the jurisprudence of the ICTY, and first-instance judgements in which this concept was applied have been finalised. We should also mention the jurisprudence of the ICTY in terms of command responsibility, especially the standards required to prove the fact of command and the factors that are taken into account when assessing the existence of this type of liability.

The third aspect is procedural. Regarding the procedural instruments and procedural characteristics in proceedings involving these criminal offen-



ces, there are many similarities between our procedures and those applied by the ICTY. We should mention here the framework that defines the protection of witnesses and the procedure for protective measures. The Law on Protection of Witnesses under Threat and Vulnerable Witnesses is, in essence, Rule 75 of the Rules of Procedure and Evidence of the ICTY. This law protects victims and witnesses because witnesses are the most important means of evidence before the courts of Bosnia and Herzegovina. Their role in the proceedings is of decisive importance for the successful conclusion of our cases. All these measures are a novelty in the legislation of Bosnia and Herzegovina, which originates from the jurisprudence of the ICTY.

As for other procedural characteristics that are part of the legacy of the ICTY, we have to mention the use of evidence obtained by the ICTY and the facts established as proven in the judgements of the ICTY as part of efforts to increase efficiency in criminal proceedings in war crimes cases. The Law on Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and Use of Evidence Collected by the ICTY in Proceedings before the Courts in Bosnia and Herzegovina has been enacted. This law is a novelty in the criminal legislation of Bosnia and Herzegovina. It prescribes the transfer of ICTY cases to the Court and Prosecutor's Office of Bosnia and Herzegovina and the use of evidence obtained in other cases before the ICTY. This is a decisive contribution to the processing of war crimes before the Court of Bosnia and Herzegovina and enables us to use all evidence obtained by the ICTY in accordance with the Statute and Rules of Procedure and Evidence in the Courts in Bosnia and Herzegovina.

This law pays special attention to the provision that defines that the court may use as proven the facts established in another case before the ICTY considering the legislative norms only provide for this instrument in the criminal legislation of Bosnia and Herzegovina. Generally, the Court of Bosnia and Herzegovina has to rely in practice on the criteria established by the ICTY concerning eligibility of certain facts to be accepted as proven without violating the right of the accused to a fair trial, which is guaranteed under national legislation and many international conventions.

In the majority of the verdicts passed in Section I for War Crimes in the Court of Bosnia and Herzegovina, many parties dispute the accepted facts. I have to mention that the defence is also using this instrument so it is being used in practice and some issues are no longer a matter of dispute. It is accepted that the evidence obtained by the ICTY can be used before the national courts. The use of evidence obtained by the ICTY and accepting the facts proven by the ICTY are not contrary to the European Convention, on the condition that the use of such evidence does not compromise the overall fairness of the proceedings.

The court now needs to introduce the same jurisdiction to the entity courts to ensure that these procedures in the Court of Bosnia and Herzegovina also take place before other courts that will try war crimes for years to come.

We can conclude the following: I think that the legacy of the ICTY is undisputed. Its importance is huge for the jurisdiction of Bosnia and Herzegovina. The increase in efficiency is immense if we take into account that from 2005, when the War Crimes Department was established, until September 2012, ninety cases of war crimes were finalised involving 122 accused, while, before the ICTY 126 persons were accused, and the ICTY needed the period from 1993 until 2012 to complete the trials in these cases. The efficiency of the proceedings is also contributing to dealing with the past.

When we speak about the ICTY legacy and its importance for the victims, it is particularly important that the archives are made available to the citizens of Bosnia and Herzegovina to preserve the legacy, not only in terms of its professional importance but also for the general public. The legacy also pertains to the issue of the state war crimes strategy. In this regard, the Court of Bosnia and Herzegovina is highly interested in defining the partnership between the ICTY and the Court of Bosnia and Herzegovina in terms of digital and physical availability of archives and jurisprudence to the Court of Bosnia and Herzegovina.

All of what I have mentioned marks the contribution of the ICTY to the capacity building of the Court of Bosnia and Herzegovina which needs to face the challenges of processing war crimes cases that even now remain complex. Let me remind you that there are 1,316 cases before the prosecutors' offices in Bosnia and Herzegovina, 653 of those being before the Prosecutor's Office of Bosnia and Herzegovina. This means that great challenges lie ahead for us in the processing of war crimes cases.

### **Nerma Jelačić, Head of Communications of ICTY**

Thank you very much. We will now hear Edin Ramulić.

**Edin Ramulić, Activist of Izvor NGO, Prijedor, BiH**

I will speak today from the perspective of victims' associations.

Given the fact that the Tribunal was at a great physical distance from the victims, not many of them had the opportunity to get in contact with the Tribunal officials, including those who visited the region. Therefore, the influence of the political community and the media was very important for the establishment of the relationship between the victims and the Tribunal here. Most frequently, we hear criticism about the number of the cases processed before the ICTY, the lengthy proceedings, and, from the perspective of certain associations, the problem of the ethnic makeup of the accused appearing before the Tribunal. This is the result of the general lack of understanding of the mission and the Statute of the Tribunal; it is an *ad hoc* body that could not have tried all the war crimes cases.

Certain parts of the country were reluctant to co-operate in the beginning. There are still victims' associations that have never even tried to act in partnership with the Tribunal. That is perhaps one of the reasons why the visibility of the Tribunal's activities was not particularly high in certain parts of the country and why certain victims' associations did not take a more active role in co-operating with the Tribunal.

The contribution made by the Tribunal is undoubtedly immense, spanning from the war crimes trials to the establishment of new courts in the region, and other aspects of transitional justice. In my presentation, I will focus on the negative aspects because I am sure there will be many other speakers today who will talk about the positive aspects of the Tribunal.

What we can say first is that the Tribunal put victims in the background. All resources were directed towards ensuring the full observation of the procedural and statutory rights of the accused, whereas the victims as the aggrieved party remained in the background without any significant effort invested either in reparations to victims, or in informing them in a timely and adequate manner of developments at the Tribunal. The majority of aggrieved parties do not even receive the judgements of the Tribunal and the only source of information for them is the media.

In terms of justice for victims, the judge from the Tribunal talked about the importance of giving the opportunity to the victims to speak and have their voices heard before the Tribunal. However, what about victims who were not included in the cases processed before the ICTY, or who were part of those cases but were not summoned? What about those who were con-

tacted as potential victims but were never summoned, or those who were considered as witnesses but then abandoned in the course of plea bargaining and admission of guilt? Numerous victims have not had the opportunity to have their voices heard before the Tribunal or to have direct contact with justice delivered by the Tribunal.

Within the context of justice for the victims, unfortunately, there is a big issue regarding the lack of standardised punitive policies, along with the short sentences that were often further shortened after two thirds had been served. Many of those sentenced by the Tribunal are already free. That is something that the victims view very unfavourably. Many accused persons who appeared before the ICTY now walk freely and meet the victims of their crimes.

Victims were generally not made a priority before the ICTY also in terms of their identification. Not enough effort was invested in identifying all the victims at a certain location and as far as the problem of missing persons is concerned, the Tribunal has not done enough to shed light on what happened to these people. Plea bargaining was not sufficiently used to identify victims. The four accused in the *Keraterm Camp* case entered into plea agreements. However, more than 100 missing prisoners from that detention camp remain missing to this date. We believe that the plea bargaining could have been used better to resolve questions over their fate.

The proceedings currently pending before the ICTY are extremely important. In terms of the ICTY's legacy, I believe that the public will judge the entire work of the Tribunal according to its final cases. That is why the recent decisions, such as the decision to drop the genocide count in the *Karadžić* case, suggest that the Tribunal is trying to accelerate the proceedings in order to complete them as soon as possible.

I think that the basic problem, generally speaking, is that everything that happened in terms of the ICTY, all those practices are now applied by the national courts, and the courts do not pay much attention to the injured parties, to the victims. They do not focus on finding the missing persons, and they just enact jurisprudence in accordance with the norms established by the ICTY. Perhaps the biggest problem is this incorrectly conveyed the message to the national courts that not everyone can be prosecuted, meaning that they should not be prosecuted because of limited capacities, because of the large number of war crimes, because of the large number of serious complex crimes. It creates the impression for the public and in media and political circles that not everyone can be prosecuted, which in this context of the struggle against impunity is very important. It is not suf-

ficient only to say that those were crimes committed *en masse*. That would be, in summary, my presentation.

### **Nerma Jelačić, Head of Communications of ICTY**

Thank you, Edin. Now I will give the floor to Professor Zarije Seizović.

### **Zarije Seizović, Professor at Faculty of Political Sciences, University of Sarajevo**

I would like to thank the Tribunal for inviting me to attend this conference. My colleague, Judge Agius talked about the initial scepticism that accompanied the establishment of the ICTY. Allow me to tell you something that happened during a visit to the permanent International Criminal Court in The Hague. We talked with a senior legal advisor there who told us about when he had previously worked at the Ministry of Justice and the Minister of Justice asked him whether he had ever been to New York. He confirmed that he had not and the Minister went on to ask him whether he would like to see New York. The Minister explained that there were rumours that a permanent criminal tribunal would be established. The Minister added that of course nothing would come of it, but that he could take his wife and spend 15 days in New York. Fifteen years later, we were sitting in the court that had started processing these cases and is now the guarantee of the prevention of war crimes. This is just a short introduction. The same scepticism accompanied the establishment of the ICTY.

I was an idealist and believed from the very outset that the Tribunal would achieve the results that it did achieve eventually and that we are discussing today. I am here representing academia and this topic is significant for us academics. That is why I suggested the topic: The Facts Established by the ICTY as an Important Means of Fighting against Impunity – Revisionism in Academic Discourse. The ICTY considered the following important topics. The personalisation of guilt – individuals who are standing trial are persons with identity numbers, with addresses, with a full name, with fathers' names indicated – meaning specific individuals. The ICTY has made the guilt personal. This means that political leaders cannot hide behind the people or groups to which they belong based on the concept of collective identity. Furthermore, the Tribunal has an interesting role as a historian, as a recorder of history.

Lawyers know what “*res judicata*” means: - a tried thing which has been decided upon. Adjudicated facts constitute historical facts and as such should not be discussed, but rather accepted. Established facts or adjudicated facts have been established in final court judgements which have been established beyond reasonable doubt. That is a standard from the Anglo-Saxon legal system, which our legislation here did not recognise. However we can say that these facts have been proven.

Admission of guilt, as a legal instrument, was taken over from the Anglo-Saxon system and has been in force since 2003 in Bosnia and Herzegovina—for example in the *Plavšić* case. In general, admissions of guilt are very important because they do not include the presentation of evidence. A person admits to having done something, to having committed a war crime and regardless of whether that person regrets it or not, his or her admission is important because it is not a result of the presentation of evidence, but the expression of the person’s free will.

Finally, establishing or adjudicating the facts of crimes committed in the former Yugoslavia is very important in fighting against the practice of denial of guilt and revisionism. I would like to say a few things about revisionism as a tool to deny something that cannot be denied, that is to say facts established in the national and international courts. Historical revisionism is the re-examining of the existing facts about the event or the negative distortion of a historical record through which someone is trying to portray those events in a better light. Denying the facts of a crime is often called negationism. It is usually linked to war crimes cases, and uses different techniques of revisionism.

The reasons for that are as follows: First of all, revisionism attempts to influence ideologies or policies with national or state goals in order to transfer guilt for war, to demonise the enemy, to affirm illusions about the victory etc. In a broader context, there are two basic motives for historical revisionism: to control ideological and political forces. Talking about ideological forces, the revision of history enables the creation of an ideological identity or matrix. Revisionists create a pseudo-history that is placed within a certain political, social, or ideological context with relevant goals. Regarding political influences, revisionists usually introduce myths that are self-proclaimed, amateur or dissident approaches that manipulate and distort historical events to support political goals.

There is a whole series of different techniques, and I will mention a few. All of them rely on being misleading and provoking misconceptions. These techniques would portray false documents as originals, raise doubts about

certain documents, manipulate statistical facts, incorrectly translate certain texts and documents, etc. Nowadays the global use of the Internet facilitates the use of these techniques. Some states even incorporated this negationism, revisionism of historical facts. Historical revisionism, used to influence public interpretation, can be considered a form of propaganda.

Finally, revisionism operates within the sphere of intellectual activity to ensure a certain interpretation or perception of history. Denial and relativisation are two key techniques that use incorrect information, lies, manipulation of the truth, opinions or information to further political or ideological goals. Credible sources and peer reviews are used in proper criticism, whereas those aiming at misleading use improper techniques. In this context, the ultimate goal would be to prevent the publishing of information or to claim that the information published is not correct. Preventive techniques can be used, such as transfer of guilt, censorship, distortion, media manipulation, and so on.

Finally, relativisation or trivialising would be comparing historical atrocities with, so to say, lesser crimes as an instrument of revisionism. Relativisation does not offer any new facts or evidence, but rather establishes moral opinions and standpoints on a certain atrocity and results in ultimate equalisation between crimes, such as crimes in Japan and the bombing of Hiroshima and Nagasaki, Turkey and genocide against the Armenians, and the crimes of Stalin's regime in the USSR.

Ideally, in an objective and emotionless environment, lessons in schools and universities would be based exclusively on facts established by the final judgements of the ICTY. Any other approach would be considered as revisionism. Special emphasis in that regard should be placed on educating people about the non-existence of collective guilt.

Thank you.

**Nerma Jelačić, Head of Communications of ICTY**

Thank you. Mr Trifunović.



**Aleksandar Trifunović, Editor of Buka Media Project, Banja Luka, BiH**

I may have a different view on this topic and conference today than my fellow panellists. I think that 20 years on, we should talk about the effects, the impacts, the achievements, the results, about our understanding of what is happening to us now, what happened to us in the past and whether we can prevent this from happening in the future. The ICTY is the most powerful institution judging war crimes. Did it contribute to making sure that the past will not repeat itself in Bosnia and Herzegovina? In my opinion, it did not.

In my opinion, the Tribunal was exclusively the instrument of the international community and the politicians in Bosnia and Herzegovina. It benefited the victims least of all. When Carla Del Ponte, who strove to appear as Mick Jagger in her public appearances, was here once, she remained in the room during one of the conferences while all the media were there. She left soon after, and with her the media and the majority of participants while victims remained alone to exchange their painful experiences. Today we see the representative of the European Union leaving immediately after his introductory speech.

Most of those convicted before the ICTY, upon their return to their native countries, were welcomed with honours by their political leaders, by officials of that country. No one mentioned their established guilt or the sentence they served.

The ICTY could have done much more to prevent this, but I am afraid that 20 years from now the influence and impact of the ICTY will not be as strong. I believe that resources should have been used better to advance dealing with the past. In addition to the judgements, people should have dealt more not only with crimes against us, but also with crimes committed in our name. It seems to me that the judgements were only used as instruments to divide the society further.

Now we see a society divided to its roots and left to the generations that hate each other more than their parents did back in the '90s. There is a web portal in Serbia that published a piece on the hysteria following Gotovina's sentence, suggesting satirically that countries in the region should agree on whether the ICTY was anti-Bosniak, anti-Serb, or anti-Croat, because everyone used it as their punch-line for daily political talks.

Twenty years later, when I ask myself if the Tribunal could have done more,



I would say yes; not in every way, of course, but co-operation with other institutions should have been better. The Tribunal should have played a greater role in the reconciliation process. I hope that today's gathering will be a forum for a discussion about what else can be useful for tribunals like this. However, as I said, I believe the early departure of the EU representative this morning demonstrates the position of the international community towards the legacy of the Tribunal and what it can do in this country.

### **Nerma Jelačić, Head of Communications of ICTY**

Thank you.

As we have heard, opinion is divided about the legacy of the Tribunal and its impact. We have heard from the victims, the judges and the media about the relationship of the Tribunal with the efforts of revisionism and negation. We can use the half hour we have left to encourage you to ask questions.

### **Kada Hotić, Association of Mothers of Srebrenica and Žepa Enclaves**

I would like to greet honourable judges of the ICTY and judges of our Court in Bosnia and Herzegovina and everyone present.

We are talking here about the ICTY legacy and about what will remain after the ICTY for our future. As a victim, I can be partially satisfied and on behalf of our Association, I can be partially satisfied. I come from Srebrenica. Genocide was committed in Srebrenica, as proven before the ICTY, which is very important for Bosnia and Herzegovina in general. This being said, 20 years after the establishment of the Tribunal and 17 years after the genocide in Srebrenica, the war that occurred in the former Yugoslavia does not have its proper name yet. That is why I am not satisfied. Not one institution or state that initiated the war has been prosecuted or tried, nor is it known who the initiators of the war were. Is it possible for an individual to commit genocide? Is it possible for an individual to start a war? Was it possible for this evil to happen and only to have individuals tried? It is unacceptable for the victims. These individuals are many. Only in Srebrenica, the Commission established that about 24,000 persons were involved in the crimes. Of course, not everyone can be prosecuted, but the initiator of that evil has to be identified and held accountable.

That will be the legacy for the future, to warn everyone not to cause a war like this one and not to have casualties. Even those who were sentenced received mild sentences and I do not see what will come out of it. As for the regret that Plavšić expressed to get a shorter sentence, when she was released, she made it clear to her people that she would do it again, which means she was insincere in her regret.

We are not satisfied as victims! This has involved the whole of Europe, the Security Council, and the United Nations, so it is not surprising that the rules in the ICTY are as they are.

### **Nerma Jelačić, Head of Communications of ICTY**

Thank you, Mrs Hotić. I think we will first hear all three questions and opinions and then I will give the floor to the panellists to answer. I wrote down your questions and your comments, Mrs Hotić. Now we will move on to others.

### **Nedeljko Mitrović, Organisation of Families of the Captured, Killed or Missing in RS**

My name is Nedeljko Mitrović and I am the President of the Organisation of Families of Former Detainees and Victims in the Republic of Srpska. I would like to express my deepest respect to the organisers who are trying to include the victims of war to contribute to the efforts of the Tribunal's legacy.

Allow me to give a few remarks since we have not had the opportunity to respond to the persons who made introductory remarks, who had confirmed they would be present throughout the conference, but they left after giving official introductory remarks. The mayor expressed his opinions without giving us the opportunity to ask certain questions and get answers. Even though the mayor is not present, I will say a few words for the sake of the record that will be made of this conference.

The Mayor cannot talk about the tragic events, tragic conflict, and then say "aggression" and then refer to the siege. I want to make some comments: the entire Bosnia and Herzegovina was under siege and the entire Yugoslavia at the time. We have to understand and accept that. Who imposed this siege? Who initiated this blockade? That is another question. Mr Mayor cannot say "20 years of shameful siege."

Let us recall that there were 20 years of constant outvoting of one of the constituent peoples. I will also refer to the referendum. Even before the war, no one was held accountable for the murder of Gardović in the wedding ceremony. Sarajevo is portraying itself as a multi-ethnic, apolitical town for all citizens. So, how are we going to call this Sarajevo? Rump Sarajevo, as we referred to Yugoslavia as rump Yugoslavia? Is Sarajevo not also Istočno Sarajevo? We should also have the Mayor of Istočno Sarajevo present with us in order to perceive Sarajevo as a whole.

That is my first impression. It suggests that not all persons present at this conference have the best intentions in the approach of this programme to make the legacy available to the persons who need it the most. However, the Vice-President of the Court, I apologise for my words in this presentation, what you say about there being comfort for the victims in Bosnia and Herzegovina is disputable. I will tell you that, as representatives of some organisations, we do not see that comfort. Mr Dukić is a former prison camp inmate. My colleague sitting next to me, his mother and his brother were killed, on 26<sup>th</sup> March.

I want to respond to Mr Ramulić. For a great part of his presentation, he was right. He cannot represent the victims of war as a moderator because in his comments he only mentions the *Karadžić* case. There are *Karadžić* cases on the opposing side as well. We have to have authentic representatives of all people to discuss the consequences of war. I will have many comments, but I know that I cannot take all the time.

### **Fikret Grabovica, Association of Parents of Killed Children in Besieged Sarajevo**

I would like to greet everyone present. I am Fikret Grabovica, President of the Association of the Parents of Killed Children in Sarajevo from 1992 to 1995.

I attended similar conferences in the past and I always attend with the intention to discuss about justice, to talk about something that can create conditions for future generations so that what happened here in the '90s never happens again. However, I am under the impression that often some persons who attend such gatherings come for different reasons and I have a feeling that some political connotations are introduced through their comments. Mr Trifunović said what I had in mind, and he summarised it perfectly, so I do not want to repeat what he said.

However, I would like to follow up on that and ask the representatives of the Court and Prosecutor's Office what was done with reference to General

Tomislav Šipčić who was the commander of the Sarajevo-Romania Corps and who kept this city under siege. He was the commander from May to September 1992, and during that four-month period, 138 children were killed. This is what has been established, and the true number, which does not include the number of adults killed, is much greater.

I would like to ask everyone present at this conference how they would feel if, God forbid, one day someone killed the purpose of their lives, the one they love the most – their child, in such a brutal manner, with snipers or shells, if parents would lose both their children at once, and if their entire family perished. That is what we need to think about to prevent this from happening again. We, the parents who suffered those losses, do not hate. We do not want to retaliate. We only want justice and a better future for new generations.

Thank you.

### **Branislav Dukić, Association of Detainees of RS**

Ladies and gentlemen, my name is Branislav Dukić and I am the representative of the Association of the Former Camp Inmates of the Republic of Srpska. I would like to greet everyone.

I attended a similar conference in The Hague. Unfortunately, the same stories are told. I see the same setting, more or less. I had to react to the panellists. Our compatriot from Banja Luka shared completely different views, disagreeing with the discussions. I do not want the international community to intervene in Bosnia and Herzegovina any more. I want to tell them that what we have suffered for 20 years, we had suffered for 20 years before that because they wanted to destroy Tito's Yugoslavia and they were successful.

Behmen comes here, gives a nice speech and says “we in Sarajevo.” I am a person from Sarajevo. I want to see people who lived in Sarajevo during that time. So, five of us, dear ladies and gentlemen, out of the hundreds. That is the story of Sarajevo. They come here and talk about Sarajevo and then they say there were 11,000 victims.

Please, Madam, do not interfere. This reminded me of the Assembly of Izetbegović in 1992 and the outvoting. Do you want that to take place again?

Mr Behmen said, “Let us put these documents in the city hall.” However, it should also be placed in Banja Luka and in Mostar because all cities house

criminals who committed crimes. Not just those here. Who set the city hall on fire, Mr Behmen? Probably Karadžić, probably him! Did we do it? Yes, I was the one who set it on fire together with others who were in Sarajevo with you! This is reconciliation. This is Bosnia and Herzegovina. I would like to say more, but we do not have enough time, so we will move on.

### **Nerma Jelačić, Head of Communications of ICTY**

Would panellists like to respond to the questions?

### **Judge Carmel Agius, Vice-President of ICTY**

To be frank, very little was addressed to my intervention. I think it would be much better if the other members of the panel would deal with the issues that have been raised.

My concern, more importantly than answering questions asked regarding the Tribunal, is how it is emerging very obvious that, rather than embarking on a journey of reconciliation, on a journey to avoid another conflict, a journey to bury the past and the hate and to embrace forgiveness and determination to move ahead, we have a tragedy developing before our own eyes. This is of great concern. This is not the legacy that we left you. This is not what we would like to see in Bosnia and Herzegovina and in other republics of the former Yugoslavia, for that matter. This is not what should be happening.

You should not be arguing about the past! Let the judges decide about who is guilty and who is not guilty of the crimes that were committed in the former Yugoslavia during the war. Let the prosecutors investigate and bring people to justice before the courts you have instituted here. Let the judges decide. You should embark on this social and political journey towards peace, reconciliation, and nation rebuilding. This is what you need. You do not need another conflict, and you do not need to continue arguing amongst yourselves. We may have left you the legacy, but you are throwing it to the dogs. I think I should let my colleagues speak.

### **Judge Hilmo Vučinić, Court of BiH**

I noted two questions. Regarding the question about the general whose name was mentioned, I can tell you about the indictments that were confirmed before the Court of Bosnia and Herzegovina. That name is not among

the confirmed indictments, referring to the person you mentioned. As for the pending indictments, I cannot comment on that.

Regarding the question of the nature of the war, it is correct, Madam, what you said, that both the ICTY and the courts in Bosnia and Herzegovina failed to name the conflict in any of their judgements. A simple reason for this is that there were no indictments raising the issue of the nature of the conflict, and there was no need for us, *ex officio*, to establish its nature. If some case should arise in the future raising the nature of the conflict, the Court will deliberate on that. For the time being, there are no cases where the nature of the conflict was raised as an issue whose adjudication was required. We refer to the Geneva Convention III; we take care of the categories of protected persons without deliberating on the nature of the conflict.

With regard to all that has been said here, I will say that three or four years ago I attended a large conference in Belgrade. It was an impressive gathering of many international representatives, lawyers, judges, prosecutors and representatives of victims' associations. One day the delegation from Bosnia and Herzegovina sat at a large table during lunch and no one spoke to anyone. They were people dealing with the protection of victims. I wanted to tell them this: "If you are all dealing with the same issues," and they are but from different perspectives, "my suggestion to you is if you are doing the same job is to try to reach a common standpoint to use as a baseline for your approach to the institutions." They all attacked me as if I was the bad guy there. So, having heard the comments here today, it seems, unfortunately, that not much has changed.

### **Zarije Seizović, Professor at Faculty of Political Sciences, University of Sarajevo**

The first thing I mentioned was the personalisation of guilt. I think that its perception in BiH society and the societies of the region is not quite clear and proper. When we use the notions of "us" and "them," when we use these pronouns to mark collectiveness, we fall into the trap of discussing collective guilt, whereas guilt is something established by the court referring to someone with a name and surname.

Why would a person of a certain ethnicity have any problem with a crime committed by someone of the same ethnicity? Why would a Croat from West Mostar feel any guilt for crimes committed by Tuta or Štela? Why would someone from Banja Luka be concerned with someone sentenced by the ICTY? This is not the perspective we should have.

I understand the pain and sorrow as emotions buried deep inside. It is tragic when someone's child is killed, but the first step, 20 years after the establishment of the Tribunal, would be to understand that it was not a crime committed by *them* against *us*. It is a crime committed by a person with a name and surname against an individual. Mothers are mothers everywhere: in Banja Luka, in Mostar, in Sarajevo. Their interests are the same: to find the remains of their children and bury them. Of course, there are national interests. However, for example, the interests of a university professor from Sarajevo are similar to the interests of a university professor from Banja Luka or Zagreb.

To make a long story short and to avoid being emotional, which is difficult in circumstances like these, I would like to underline that crime is a legal notion having a legal definition with key statutory defined elements, and that crime was committed by a person with a name and surname. "Us", "them," and counting the years of prison sentences is meaningless and it cannot be discussed in the context of collectivity. Whoever has any evidence or criminal charges to offer, should bring it before the relevant authorities.

### **Nerma Jelačić, Head of Communications of ICTY**

Thank you. Now, Mr Trifunović.

### **Aleksandar Trifunović, Editor of Buka Media Project, Banja Luka, BiH**

I will only follow up with a few sentences on what Mr Vučinić said a while ago. Where are we now, 20 years after '92? Can we do better than this? What makes us different from animals is compassion for other human beings. Once we start respecting another person's pain as a human being's pain, once we go beyond the ethnic circles and communities that limit us, that is when we will be able to be humans again. We have to discuss what happened. We have to live together here; we have no other choice. However, can we do better? That is my concern. My disappointment is greater than it was 15 minutes ago.

### **Nerma Jelačić, Head of Communications of ICTY**

Thank you.

## **PANEL 2:**

### **DEALING WITH THE PAST BEYOND THE TRIBUNAL – THE ROLE OF THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS (MICT), NATIONAL JUDICIARIES AND NON-JUDICIAL ACCOUNTABILITY MECHANISMS**

Moderator:

Aleksandra Letić, Helsinki Committee of Republika Srpska, Bijeljina, BiH

## **PANELLISTS:**

- Martin Petrov, Chief, Immediate Office of the Registrar, ICTY
- Ibro Bulić, Prosecutor, BiH Office of the Prosecutor
- Nidžara Ahmetašević, Journalist and Analyst, BiH
- Doc. dr. sc. Goran Šimić, Professor/Member of the Expert group on Bosnia's transitional justice strategy, BiH
- Dino Mustafić, Film and Theatre Director, BiH

### **Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

This panel will closely relate to the topic discussed in Panel 1. If some questions have remained unanswered, we will have time to discuss them during Panel 2. This panel will discuss the future of dealing with the past, a rather complex issue. We will talk about dealing with the past after the ICTY has finalised its operations and after national judiciaries continue the effort to facilitate dealing with the past, because it influenced the establishment of facts and the processes of dealing with the past in other countries where conflicts occurred.

People sitting in this conference room deal with this every day. Those processes within the broader context are in their initial phase. During this panel, the panellists will discuss the issues and activities that can contribute to this process, including the activists. We will address the issue raised in Panel 1 as to whether we can do better than this.



Today with us is Mr Martin Petrov, Chief of Immediate Office of the Registrar of the ICTY; Ibro Bulić, the prosecutor of the BiH Prosecutor's Office; Ms Nidžara Ahmetašević, journalist; Goran Šimić, professor and member of the expert group on Bosnia's transitional justice strategy; and Mr Dino Mustafić, film and theatre director.

Mr Petrov, we will start with you. You are here representing the ICTY whose mandate will soon end. What do you think will happen in the future in terms of the dealing with the past?

**Martin Petrov, Chief of Immediate Office of the Registrar,  
ICTY**

Thank you, Aleksandra. Good morning, everyone.

It is a pleasure for me to be here and to address you today in the framework of this particular panel, dealing with the past beyond the Tribunal, and to share some of the most recent institutional developments relevant to this topic.

We have heard in the previous panel that there have been many expectations about the things the ICTY could have done and should have done better. We have heard a lot of disappointment about what the ICTY did not achieve, according to some.

I think it is very important to remember that the Tribunal was never intended to be a panacea and to resolve all the problems that arose as a result of the conflict in the former Yugoslavia. The Tribunal has a very specific, discrete mandate, and more importantly, it has always been intended as a temporary institution—as an institution that would try the most serious perpetrators of war crimes committed in the region of the former Yugoslavia, which would then close its doors, leaving space for national prosecutions for such crimes to be prosecuted at the state level in all the countries of the former Yugoslavia.

This is what I would like to touch upon today. As most of you have heard, the Residual Mechanism for International Tribunals has been established. This is how the Security Council has provided an institutional platform to continue the work of the ICTY, which will enable national jurisdictions to continue prosecuting and trying war crimes cases.

The institutional development that I would like to share some views about is relatively new. The Mechanism was established in December 2010. It will

continue the essential functions of the ICTY and its sister tribunal, the Tribunal for Rwanda. This development obviously does not come as a surprise because it is clear that once the tribunals, in particular the ICTY, no longer exist, there are a number of functions that need to continue being carried out, in particular assistance to national judiciaries. As such, the two tribunals worked closely with the Security Council, and now there is a new body that has already been established on 1 July 2012. Many of you have heard about it, but I do not know how many of you know about its function.

Briefly, it is a body that will be a single institution but with two branches: one for the ICTY which will commence on 1 July 2013 and its seat will be in The Hague, and one for the Tribunal for Rwanda and its seat is in Arusha. The Mechanism's branch in Arusha opened on 1 July 2012. In terms of structure, it will be very similar to the ICTY in the sense that it has one president, one prosecutor, and one registrar, but it will be a very small, efficient organisation, which will also be temporary, in the same way the ICTY was a temporary institution.

What are the main characteristics of the Mechanism? First of all, we should not be looking at the Mechanism as a mini ICTY because, as I mentioned, the Mechanism only has the mandate to carry out the essential functions of the Tribunal. In addition to that, it will be a temporary institution and the need for it will be assessed every two years. Importantly, as I mentioned, the Mechanism will commence its operations while the Tribunal is still in existence, so for a period of time the Tribunal and the Mechanism will coexist, but in a way that only one of the institutions will have jurisdiction to deal with a certain matter. Importantly, for most of you, the Security Council has decided that countries shall make arrangements to take all the necessary measures to implement the Statute of the Mechanism in their respective national legislation.

Let me now turn to the essential functions. There are some purely judicial functions that the Mechanism will carry out. They include: - the trial of fugitives for the ICTY - that is no longer relevant because of the fact that all our fugitives have been apprehended and are currently on trial; appeals against ICTY judgements and any notice of appeal filed after 1 July 2013 will mean that the Mechanism, and not the ICTY, will have jurisdiction to deal with that appeal; retrials of persons indicted by the ICTY since the cut-off date is 1 July 2013, and if there is a retrial ordered after 1 July, then the Mechanism will try that individual and not the ICTY anymore.

The same goes for review of final judgements. If such an application for review is filed after 1 July 2013, then the Mechanism, and not the ICTY,

will deal with these review proceedings. Finally, referral of cases, in terms of purely judicial responsibilities of the Mechanism; for the ICTY, as you are aware, all cases have now commenced, and so none is considered, at present, for referral.

In addition to the purely judicial functions, however, there are a number of very important functions that I guess will be of the biggest significance to you. The need to protect the witnesses obviously does not end with the closure of the ICTY. That includes not only maintaining existing protective measures, but also responding to requests to vary or rescind such protective measures in order to use such evidence, for example, in national trials. The ICTY will only remain in charge of such protective measures for cases that are ongoing before it, until their completion. In all other cases protection of witnesses in completed cases will be in the hands of the Mechanism as of 1 July 2013.

Another important point is the supervision of the enforcement of sentences. As you know, the ICTY has an agreement with several countries for the enforcement of sentences, and the President of the ICTY is responsible for supervision of these sentences. On 1 July 2013, the jurisdiction passes on to the President of the Mechanism, so from 1 July 2013 onwards any request for early release, for example, or commutation of sentence will be dealt with by the Mechanism and not by the ICTY.

The last two functions are assistance to national jurisdictions, and that has to do with the provision of evidence that is necessary for national trials, making persons arrested and being under the authority of the Tribunal available to testify in cases before national jurisdictions and similar. On 1 July 2013, that power will be with the Mechanism and no longer with the Tribunal.

Finally, I will talk about a topic that was touched upon this morning—the management of the archives of the Tribunal. The Security Council has decided that the archives of the Tribunals will be collocated with the Mechanism. That means that, at least for the time being, there is no doubt that the Mechanism will have the power to manage these archives, to preserve them, to secure access to them for the countries of the former Yugoslavia and the public at large.

What does it mean in practice? It means that as of 1 July the Mechanism will be your point of contact for all these issues that I just mentioned. It essentially means that the functions that are currently ICTY functions will move on to the Mechanism and the Mechanism will have the sole authority

to deal with them. That is a very important change to recognise because these residual functions, which I have mentioned, will be how the Mechanism, that the Security Council has put in place, will continue assisting the process of dealing with war crimes and those atrocities in the region of the former Yugoslavia. In other words, the Mechanism will be there to assist national jurisdictions to carry out that work.

This is the last thing that I am going to say: the Security Council actually specifically recognised the need to have such a Mechanism in place for that very purpose – to continue the work that the ICTY has started by enabling the national jurisdictions of the countries of the former Yugoslavia to continue that work. Let me stop at this for now.

### **Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

Thank you, Mr Petrov. Considering the context, without any further delay I will give the floor to Mr Ibro Bulić from the Prosecutor's Office of Bosnia and Herzegovina.

### **Ibro Bulić, Prosecutor of the Office of the Prosecutor, BiH**

Ladies and gentlemen, allow me to express my gratitude and to also extend the gratitude on behalf of the Prosecutor's Office in Bosnia and Herzegovina for inviting us to attend this important conference.

Over the past years the Prosecutor's Office in Bosnia and Herzegovina received a number of reports regarding the persons suspected of committing criminal offences. All of these reports require a thorough analysis before indicting individuals. These are very lengthy proceedings, which often require several years because prosecutors search for evidence to prove each fact beyond reasonable doubt in order to ensure fairness and justice.

The victims exert continual pressure to expedite the proceedings and have the perpetrators punished, which is understandable. In Bosnia and Herzegovina, we have to create an atmosphere in which people who commit crimes will not be considered national heroes, the atmosphere where people can testify before the courts without fear. There has to be support to witnesses so that they can come to court and testify without fearing retaliation. In building trust between people, other factors and not only judiciary have

to be included, such as non-governmental organisations and other social sectors.

The establishment of the Prosecutor's Office of Bosnia and Herzegovina and the Court of Bosnia and Herzegovina, which started operating at full capacity in 2005, marked the shift towards the prosecution of war crimes. We are prosecuting war crimes whilst adhering to the standards and respect of human rights. The national strategy for the prosecution of war crimes deals with all the problems that might prevent efficient prosecution of war crimes. The courts and the prosecutors' offices in the Federation of Bosnia and Herzegovina, the Republic of Srpska and the Brčko District have also contributed significantly to the investigations and trials in less complex and less sensitive war crimes cases.

Despite positive developments in trying war crimes, there is a series of problems that prevent greater efficiency, such as very complex legislation in Bosnia and Herzegovina, about which my colleague, Judge Vučinić talked earlier this morning. The key mechanism for the implementation of the national strategy is referral of less complex cases to the entity jurisdictions, which will enable the Court and Prosecutor's Office of Bosnia and Herzegovina to dedicate their resources to the most complex cases.

Administration of justice takes time because perpetrators who were holding key positions in the military and police force were already in their fifties or even older, and many of them are no longer alive. The same applies to witnesses who passed away in the meantime or now reside in different countries in the world and cannot be reached. Even when you have a perfectly functioning judicial system, the ethnic tensions in Bosnia and Herzegovina can contaminate the judiciary and obstruct its efficiency.

There is a lack of political support in certain circles for the prosecution of war crimes in Bosnia and Herzegovina, which manifests itself in campaigns attacking judicial institutions, interfering with the cases and undermining the reform of the judiciary, and in denying war crimes that have been established in final decisions. There is a lack of trust despite these efficient reforms and all this creates a negative impression for the public and prevents the judiciary from adequately responding, and working and communicating efficiently with the public.

The Prosecutor's Office and the Court have international members, including international prosecutors, judges, investigators, people working with witness support section and other professionals. They shared their valuable experience with our national prosecutors and judges. The witness support

section is offering support and assistance to the witnesses.

It is important to emphasise that the ICTY has prosecuted the top ranking political, civil, and military officials – senior officials and generals who held the highest positions, who issued orders and made decisions. The ICTY has been working on establishing contacts with different stakeholders in the national jurisdictions in the countries of the former Yugoslavia. The OSCE has extended adequate support, as well as other organisations interested in strengthening local capacities dealing with international humanitarian law. The contacts between national experts and their international colleagues, and between national and international experts in judicial systems in general have offered them the opportunity to share experiences, which should be continued in the future.

Opening up to society is crucial for better understanding and will help different groups understand the events that took place. The lack of adequate access to information about the events that took place during the war only leads to speculation and misunderstanding. International humanitarian law is an extensive legal body, which has been developed before the courts of different countries and in international tribunals such as the International Military Tribunal in Nuremberg, and The Hague Tribunal as well.

The legal standards are now part of the criminal legislation of Bosnia and Herzegovina, which will ensure the protection of human rights in the whole of Bosnia and Herzegovina. The application of the current Criminal Code in Bosnia and Herzegovina is in accordance with the general criminal policy of the ICTY, according to which crimes can be punished even if they are not specifically defined in the law that was in force at the time of commission, and if the accused was aware of his acts at the time of the commission and of the consequences of the acts. The example of this is crimes against humanity.

The jurisprudence of the Court of Bosnia and Herzegovina and national courts dealing with war crimes cases relies substantially on the jurisprudence and standards of evidence of the ICTY including, for example, command responsibility, which is a mode of responsibility where the superior is responsible for the crimes of his subordinates if he failed to prevent or punish them, as distinct from the crimes he ordered. The command responsibility doctrine was made part of the Protocol Additional to the Geneva Conventions pertaining to international armed conflicts.

The jurisprudence of the ICTY also established the standards for joint criminal enterprise as a mode of guilt appearing in three different forms. Jud-

ge Vučinić also talked about that. To end my presentation, because Judge Vučinić already elaborated on this, I will not go into the specifics of the joint criminal enterprise or the issue of established facts originating from the panel judgements of the ICTY, which are a valuable instrument of evidence for prosecutors in Bosnia and Herzegovina and are used in practice before the national courts very often. Standards of proof for crimes against humanity and crimes against international law will also be used in practice together with the notions of command responsibility, joint criminal enterprise, persecution, widespread and systematic attack, unlawful attack on civilians, ethnic cleansing, nature of armed conflicts, discriminatory intent, sexual abuse, etc.

There are many standards applied and adopted by the courts in Bosnia and Herzegovina originating from the ICTY. Prosecutors in Bosnia and Herzegovina also have access to databases of the ICTY, which are a rich source of information and evidence. The only problem is that many prosecutors still do not have the password to access the database, but I hope that this issue will be resolved in the future.

Allow me to tell you something about the problems that prosecutors in Bosnia and Herzegovina face in their everyday work regarding the co-operation with the ICTY. Prosecutors' offices have problems with the use of evidence, namely witnesses who testified under protective measures before the ICTY. The use of such transcripts is limited once they are translated into the official languages of Bosnia and Herzegovina. They are not considered relevant unless the witnesses appear for cross-examination. Not enough has been done to date in terms of witnesses who were given protective measures. They have to give their consent for the use of transcripts before national courts and many of them refuse it. This issue needs to be resolved.

Records of the ICTY, specifically those from closed sessions, are a special problem because they contain some potential subjects and the names of potential witnesses or certain facts relevant for the prosecution of cases here. There will be a huge body of documentary evidence left after the Tribunal closes. We believe that the Court of Bosnia and Herzegovina should be the venue where all these documents will be kept in the future. There are several arguments in support of this proposal, but due to limited time, I will not go into further details.



## **Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

Thank you, Mr Bulić. I am sure that you will have the opportunity to speak again during the discussion. The ICTY, as well as the courts in the region and courts in Bosnia and Herzegovina have a very important role in the establishment of facts and dealing with the past. What we see in everyday life is that the dealing with the past is not dependent exclusively on the courts. I am sure that Nidžara Ahmetašević, journalist, can tell us something about the local media in this process.

## **Nidžara Ahmetašević, Journalist and Analyst, BiH**

Thank you, Aleksandra. Good afternoon.

I see the role of the media as the most important after the courts because if the media does not cover the trials sufficiently, it is very difficult for the general public to gain access to information about what is going on in the courtrooms. The role of the media is frequently disregarded by judges and prosecutors. They find it difficult to appreciate the role of the media as a channel to direct information about the trials.

Also, political structures present a problem. We have seen many examples where politicians used information about trials and verdicts to advance their own hidden agendas and for their propaganda. We know that politicians in the region are still in close contact with the media. Many media here and in the region, I believe, are under direct control of certain political structures. When such media report on the proceedings, they usually write what they are told to write. Therefore, 20 years since the beginning of the war and so many years into the existence of the Tribunal and the Court of Bosnia and Herzegovina, we can frequently hear the politicians' propaganda denying verdicts and court decisions.

It is difficult to distance ourselves from such influence as long as the role of the media is neglected. I know it is difficult for judges and prosecutors to work with journalists. That is how it is supposed to be in many cases. When it comes to war crimes, however, judicial officials need to be more open towards the media. The State Court and Prosecution had a very important lesson to learn from the ICTY. I am afraid that they failed to learn that lesson: the Tribunal lost five or six years trying to develop a visibility strategy, on opening up to the public. At that point they realised that they needed



to be more transparent and started to work with journalists. However we were being drip-fed information by individuals who didn't know the region or its languages. Many journalists had difficulties with their work. The Tribunal was also playing a game of mass propaganda with the public. Many things were lost during this period and I believe that politicians, at least in Bosnia and Herzegovina made the most of it.

As of recently, we have seen the enactment of certain laws limiting the activities of the media in covering war crimes trials, which makes our job difficult. I do not think it helps the Court or the Prosecutor's Office much, but the journalists will find a way to get the information they want, or they will simply abandon coverage. The politicians will profit from that and the public will be the ones who lose out. I believe that this is a very important issue, and that the courts and the non-governmental sector that is also frequently unaware of the role of journalists must open up more.

Journalists, on the other hand, have to maintain their professional standards. The more information they have, the greater will be their professionalism and ability to defend themselves from political pressures. We will have at least one part of the media community breaking through all the obstacles that make us talk about "us" and "them" and make us forget that war criminals, as well as the victims are individuals with a name and surname.

Thank you.

**Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

Thank you, Nidžara. What other mechanisms do we have to see in Bosnia and Herzegovina in addition to war crimes trials? Professor Goran Šimić.

**Goran Šimić, Associate Professor and Member of Expert Group on Bosnia's Transitional Justice Strategy, BiH**

Thank you. Allow me to greet you, ladies and gentlemen. I will try to summarise my points because many of them have already been said.

Being involved in transitional justice, I would like to start by giving my own opinion on the 20-year long work of the Tribunal, which in a way follows up on the previous discussion. I do not think the ICTY is a perfect Tribunal

at all. I do not think everything they did was great. However, I do not think the world would be a better place without the ICTY. Do I think that we have to drop public transportation and cars simply because they pollute the environment? No, I do not. We have to bear in mind that the ICTY started from scratch, if we are to believe what Carla Del Ponte wrote in her book—that this is a Tribunal which many wanted never to come into existence.

We have to consider to what degree we contributed to the Tribunal and to what degree we made the work of the Tribunal more difficult. We did much less in terms of positive contribution. We also have to be honest and say that the ICTY set up very important foundations for the establishment of other courts and tribunals. I do not think that the victims are only the direct victims of crime. We are all victims, us living in the former Yugoslavia. The citizens of Bosnia and Herzegovina are a special category of those victims because the past is obstructing our way to the future.

We are living in a country where the past keeps us in shackles. Without the Tribunal, it would have been very difficult for us to face our past, to see all the political, military, and civil leaders before the court facing their responsibility for what happened.

Do we need more than the courts? I am a lawyer and in the next 10 minutes, I may say something sacrilegious for lawyers: I do not think that the courts alone are sufficient. I think that Bosnia and Herzegovina, just like any other country in the world – and there are hundreds of places in the world today where people are suffering the same or even worse than we did – needs courts.

However, I am convinced that the work of the ICTY over the past 20 years has shown us that trials are not sufficient. Trials will not raise monuments and courts will not identify every victim by name. The court will deal with every case brought to it, but not with all potential cases. If you read the Criminal Procedure Code of Bosnia and Herzegovina, you will realise that the courts will not establish the truth but rather the state of facts to determine the criminal liability of an individual. I am glad to have heard this from the Vice-President of the ICTY that the ICTY has never created a foundation for redress and reparation of victims. The courts will not name the streets, raise the monuments or deal with the names.

In Bosnia and Herzegovina, there are four serious flaws that we have to remove if we want to have fair trials for everyone. First of all, I believe that here we have an incredible situation preventing serious work. It seems incredible to me that we still do not have a sound statutory framework for

the work of our courts. The Court of Bosnia and Herzegovina operates under one code, the entity courts under another. What we have is chaotic. I believe it is absurd and it undermines the social effort to establish the accountability of everyone involved. On the other hand, everyone brought before the court has the right to a fair trial regardless of what he is suspected of having done.

Then, there is the matter of inadequate punitive policies. I do not think six years in prison should be replaced with 20 years, or that this would achieve much. I am glad that the Vice-President of the Tribunal is here as he may convey my thoughts further to UN colleagues. I believe that the international community should consider expanding the punitive policies. A prison sentence alone is inadequate to sanction someone who killed whole families, raped girls and took part in atrocities. Even 600 years would be insufficient. Why? Because the victim is not recognised in that.

My main objection to the ICTY and national courts is that the victims are marginalised. We are here not because we are perpetrators, but because we are victims. It was the victims who started the discussion about what happened and considerations of guilt and responsibility. Out of some 400 articles of the Criminal Procedure Code of Bosnia and Herzegovina, 90 per cent of them refer to the perpetrator and his rights. The perpetrator has the right to presumptions of innocence, for example, right to a fair trial, right to defence, right to communication, right to this, right to that...

That is fine. However, let us consider this from the victim's perspective. Let us consider the number of articles referring to the victims and their rights. I believe you will stop counting very soon because victims are mentioned only in terms of property claims. I would like to hear an example where any such property claim was brought to a conclusion and actual redress. I believe that the focus should be on the victims. The victims are the reason why we are here.

I would like to say another thing before my time expires: plea bargaining is a huge issue in Bosnia and Herzegovina. It is a useful instrument, but highly questionable in war crimes cases.

The last issue I want to talk about is the establishing of the truth. Trials are fine, but we need the truth. Society is not built on trials only, but on justice and truth. Without truth and justice for all victims, not for Serb, Bosniak, Croat and other victims but for all victims, we will see no progress. What else can we do in addition to trials?

Over the past ten to fifteen years, it became quite clear that trials are insufficient. Trials, of course, are a great thing. They determine a certain segment

of the truth, and the position of the criminal and the victim. However, they do not lead to reparation, to the institutional reforms, to vetting of officials, to school lessons, to history books, to rehabilitation of Post Traumatic Stress Disorder (PTSD) victims and so on.

In future, I hope we will recognise in Bosnia and Herzegovina the importance of other mechanisms and activities, often referred to as transitional justice, of dealing with the past. Other processes will enable all Bosnian citizens, regardless of their ethnicity and religion, to find satisfaction, redress, and reparation for what they have suffered. Without that, I believe that the future is uncertain. If you have a look at the history of Bosnia and Herzegovina, you can see that we have frequently referred to historical events. What happened between 1992 and 1995 was not an isolated event in the history of this nation. There were a series of factors that led to that, but the courts will not deal with that.

Other mechanisms should deal with that. There is a need for a new category, other mechanisms of transitional justice, which will include reparations, restitution, institutional reform, and a forum for victims where their stories and voices will be audio or video recorded for posterity.

Thank you.

### **Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

Thank you, Mr Šimić. Certain activities have been undertaken to deal with the past of Bosnia and Herzegovina. We can see that in our theatre and films. Mr Dino Mustafić.

### **Dino Mustafić, Film and Theatre Director, BiH**

Thank you for inviting me to speak on behalf of the artists who certainly bear their share of responsibility for the future and the past.

Since I come from an emotional sphere, valuing life as the most important in the global order of things, I will talk about what my colleagues and I do for the progress and good, for reconciliation and acknowledgement of the truth. In that regard, we have to recognise that the past comes back from the future.

We should not neglect the future. I know we have all had harrowing experiences in our past. I know that the past here is most often used to support ethnocentric perspectives on history, which in turn is used for daily political agendas. Writing history is always characterised by organised innocence, where no one is a perpetrator, and everyone is a victim of the 'others'.

But that is not the road to a historical memory that will not see facts as relative categories or falsify our history. The only way for us to comprehend the role of individuals and institutions in the horror that happened in the former Yugoslavia is to stop manipulating the facts and celebrating criminals as our heroes, but rather to fight against collective amnesia and nurtured oblivion and act responsibly for the future generations. Literary works, films, theatre plays represented a creative memory and liberation from the past of blood and anxiety. Such works, acting in a humane way, to capture the perspective of an individual victim, pass through the walls of hatred. They awake contrition and compassion. In that regard, I believe that the artistic community in Bosnia and Herzegovina has its battles to fight.

Something that has always upset me, as a human being, as a father, as someone who survived the siege of Sarajevo, is indifference towards human tragedy. I know I am one of the rare and fortunate people who have not lost a loved one. I know it is difficult to live through personal tragedy and forget and forgive. I know that people here will not be able to forget, but they will have to forgive. That is our moral priority.

That is why the victims in this war bear the greatest responsibility of us all. They will carry the heaviest burden of forgiveness. It is up to us to take notice of each tear shed, of each drop of blood spilt, of each person lost. That is how we will maintain our respect for people regardless of their ethnicity, religion, etc.

That is what will make us aware of what we have been through and what lies ahead. That is why it is not humane, not ethical, to draw differences between victims as if some victims were entitled to more than others were. All victims deserve equal amount of respect. However, to consider victims as equals does not mean that the reasons and causes of hardships are equal.

I hope that we will be able to create an atmosphere of moral catharsis. To reach that atmosphere we have to know that the truth, albeit a subjective category, is the starting assumption. That is why everything that has been established has to be part of our consensus from which we will build on the future of Bosnia and Herzegovina, and in which the legacy of the ICTY plays an important role.

## **Kada Hotić, Association of Mothers of Srebrenica and Žepa**

### **Enclaves**

We have listened attentively to the presentations of the panellists in Panel 2. Allow me to make a few comments about the media complaining that they are not well informed and that they cannot get to something that is being hidden from them, so they have to dig deeper in their investigations, but then they also acknowledge that they are under the pressure of certain political agendas. What political agenda are they talking about? We know that the media contributed to the crimes during the war, spreading crimes, manipulating people, and no one has been prosecuted for that.

The gentleman, the lawyer, Goran, gave a very nice presentation and I liked it very much. It is all true. It is exactly as you said. We are all victims, as you said, but those who committed crimes are also victims of their policies that pushed them into committing crimes. I regret that there are no mechanisms to prosecute people who organised and motivated the crimes.

Hitler never stood trial but fascism did. Fascism stood trial because it tried to annihilate everyone. The same situation was here, under the pretext of a greater Serbia. It would have been better if people stood trial for that. It would contribute to the reconciliation to acknowledge that crime. I am not saying that entire nations are criminals, but only those among them who led their people to commit crimes. Maybe Mladić would have been a good person and a good general if there were no policy to push him into doing what he did.

I would like to say one more thing about art. Zoran Stanković worked in the cemetery exhuming graves, and sent photographs to some filmmaker. He made this terrible movie blaming it all on the Muslims. Filmmakers and directors should do more, create something that we can read, something that we can look at, especially young people, to help them gain perspective on things.

## **Zijad Smajlović, Citizens' Association for Justice, Peace and**

### **Return**

I would like to greet everyone, especially Mothers of Srebrenica and Žepa Enclaves.

A gentleman here talked about the Residual Mechanisms. I did hear something about that, and I have some information about this Mechanism.

I have a question, since he also talked about the archives, although that is the topic of Panel 4. Has the decision been reached in the Security Council? Please just yes or no. Then I will join the discussion during Panel 4.

I would like all the participants of this conference to acknowledge that this is not a political gathering. If you want to deliver political speeches, you can go to the building across the road. All victims yearn for justice and every victim has his or her own truth. If we are going to discuss individual cases, we will have to go back to 1991 and go through every year until 1995.

**Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

We have time for one more question and then we will give the floor to the panellists to answer them.

**Mirsad Duratović, Association of Prijedor '92**

My name is Mirsad Duratović and I am the President of the Prijedor '92 Former Camp Inmates Association. I have a question for all panellists and everyone present here and I will give a short comment.

Do you think that the Hague Tribunal fulfilled its primary task to send a message that crime does not pay? As a victim of war, and the victims whom I represent, we believe that the ICTY did not fulfil this main task and now, in the final stages of the operation, we tend to conclude that crimes do pay. I will try to explain this in a few short sentences.

For example, there is ample evidence in favour of my conclusion that crime pays. These people did what they did during the war, and most of them generated enormous wealth. After the war, in their national circles, they held high-ranking positions and, through those activities, they again amassed a lot of wealth. If one of them was accused and indicted, he received all the possible material and financial support he could get. If sentenced, he is usually released after serving two thirds of his sentence and receives the support of his relevant entity. He is given an apartment, his family members get jobs, his children and children of his family members receive scholarships and what not. So, do you think that the Hague Tribunal fulfilled its main mandate of sending the message that crime does not pay?



**Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

Who would like to go first? Goran?

**Goran Šimić, Associate Professor and Member of Expert Group on Bosnia's Transitional Justice Strategy, BiH**

Does crime pay? I do not think there is justice in this world. There is no justice in this world that would be an equivalent to a grieving mother, to people who suffered in detention camps. There is no sentence for that.

However, if we did not have this imperfect mechanism, then all criminals would gloat over their victims. We have to move forward. The ICTY has done its share of work. We were, unfortunately, the ones to whom these things happened. It is a message to everyone – the United Nations and all those who will establish courts in the future for other geographic locations, I hope never for the former Yugoslavia again – to use this experience and be critical in their work, to take what is best and be critical of what has proved to be bad.

I do not think that crime pays, in the sense that I was a criminal and now I have 1 million Convertible Marks in my account. My humanity and honesty cannot be traded. Maybe the crime pays in economic terms, but as a society, we have to invest effort to characterise people who committed crimes as criminals, not heroes. We all need to be honest with ourselves.

I agree that what happened in Srebrenica was a horrendous crime against Bosniaks, but what happened in Srebrenica is not a paradigm of what happened in the whole country. I was not forced out of my house by Serbs, but by Bosniaks, by members of the Army of the Republic of Bosnia and Herzegovina. Should I hate Muslims because of that? Fortunately, that did not happen. I live in Sarajevo, where Muslims are the majority. I am not bothered by the fact that there are hundreds of mosques, because I look at people as human beings.

We should look at people as human beings and not as members of ethnic communities because that prevents us from seeing a broader perspective. Once a crime is committed, people cease to be human beings. There is no material compensation that can right the wrong done to another human being. As a society, we are not aware and we are still looking at each other



in terms of Serbs, Bosniaks, Croats, etc. At some point, we have to overcome that.

**Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

Thank you, Goran. Would you like to answer briefly?

**Martin Petrov, Chief of Immediate Office of the Registrar, ICTY**

Yes, of course. In my view, the ICTY has achieved its main purpose. I am just not sure that its main purpose was to send the message that the crime does not pay. The ICTY was obviously established to try those found to be the most responsible for what had happened in the former Yugoslavia.

Unfortunately, and I think that is what I tried to say at the beginning of my presentation, it looks like the expectations towards the ICTY were very high, and perhaps unreasonable to a certain degree. We have heard a lot today about the need to achieve justice for all victims. I am all for it, but I just do not think it is realistic for an international criminal tribunal to be expected to achieve that goal for every individual victim of these horrendous crimes.

This is why there is still some dissatisfaction with the work of the ICTY, but there can be no doubt that the establishment of the ICTY was indeed the beginning of the end of impunity. There is no doubt that had it not been for the ICTY, we would not have seen any of the other international criminal tribunals set up since then to try those crimes.

Like Goran just said, I fully agree that, unfortunately, there is no possible material or other compensations that can compensate victims for their suffering. Certainly, the trials alone, be they conducted by the international and national courts, will never be able to achieve that goal. That is yet another reason why a mixture of various elements and mechanisms needs to be used essentially to try to turn the page and move on to the future.

My answer to the last question on the archives is: yes, the decision has been taken. It is very clearly stated in Security Council Resolution 1966 that the archives of the ICTY will be collocated with the Mechanism branch that deals with the ICTY in The Hague.

### **Dino Mustafić, Film and Theatre Director, BiH**

What Mirsad just asked is very important from the victims' point of view, because many who had served sentences, when they rejoined our community, were rehabilitated even in a material and financial sense, which is horrible. We have seen high-ranking officials receiving with greatest honours the persons who served their sentences. These people should not again be allowed to stand as Members of Parliament, as people representing certain official policies. I think we have to act together. It is in our own interest that people who committed war crimes should not hold any official functions. Unfortunately, that is not the rule prescribed by our electoral law.

That is the issue that leads us to the question as to whether justice exist. We believe in cosmic justice, in what goes around comes around. People who lose the feeling of compassion for other people are people who have given up on life. As I can see, you have not given up on life.

### **Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

We can give the floor to Ms Nidžara Ahmetašević because I think this would be a good opportunity for her to follow up on that.

### **Nidžara Ahmetašević, Journalist and Analyst, BiH**

Maybe. Organisations that work with victims often do not read what our media publish, or they only pay attention to what they, so to say, like or sometimes dislike.

I want to respond to the question whether the Hague Tribunal fulfilled our expectations. No, it did not. We expected justice from The Hague. Of course, that is what we expected because we have seen terrible things happen to us, and that was not a lot to expect. It was what we should expect. In judicial aspects, yes. It is important to have The Hague. The sentences and verdicts they rendered were important, but they were not properly communicated to the public.

We have laws allowing people who were sentenced for war crimes to run for public office. What is more disappointing is that there are people in this country that would vote for them. The Hague Tribunal did not send the

message that people sentenced for the most horrible crimes are murderers. Thousands of people across Bosnia and Herzegovina voted for murderers who will hold different functions at municipal levels.

That is not only the case in the Republic of Srpska, or with the Tribunal, but the same mistakes are made by the national courts, which are not open to the media. That is also accepted by local politicians and they, I am specifically referring to the politicians in the Sarajevo Canton, decide to provide a group of persons who are indicted for war crimes with financial support so they can defend themselves before the Court of Bosnia and Herzegovina. I did hear some comments from the media but I did not hear any reactions coming from victims' associations. That person that I am talking about is indicted now. We want everyone to be treated equally and we want information so that we can figure out what has been concluded and what has been done.

## **Šaćir Srebrenica, Association of Concentration Camp**

### **Detainees in BiH**

My name is Šaćir Srebrenica and I am representing the Association of Camp Inmates in Bosnia and Herzegovina.

I would like to make a few comments and I have three questions concerning the Hague Tribunal. I would like to say that it did justify its existence and without it we would not have the situation we have today. I am asking myself a question, and all of you too, and the representatives of the Hague Tribunal: how to ensure that the facts established by the ICTY and the truth proven there are accepted by everyone in Bosnia and Herzegovina? Until that happens, I do not think that any will be progress made.

Another question concerns individual and collective responsibility. I have seen many examples in the past showing me that we did not move forward since 2005 or 2006. Everything is the same and I do not know if it will be the same after 2012. We have a man who committed a war crime, but he is celebrated by his ethnic group, he is received as a hero, he is given money, and people will vote for him again in the elections, as journalist Ahmetašević said. The people who enable that to happen are the worst because that goes beyond individual responsibility. How can you allow a person who committed a war crime to be a candidate of a political party and receive votes? I need answers to those questions.

My third question is: what will happen to the victims after the Tribunal closes its doors? Mr Brammertz mentioned the other day the Protocol of

co-operation between Serbia and Bosnia and Herzegovina. I told him that as long as the victims are against that, and as long as that Protocol does not introduce mechanisms ensuring that criminals who committed crimes in Bosnia and Herzegovina will be tried in Bosnia and Herzegovina – and they need to be prosecuted in Bosnia and Herzegovina, although they are citizens of Serbia – I am afraid that by signing this Protocol without these mechanisms, we will give a mandate to the Republic of Serbia and its judiciary to arrest Bosniaks and Croats in Bosnia and Herzegovina.

Thank you.

### **Branislav Dukić, Association of Detainees of RS**

I apologise for standing up, but I will stand up to say that Serbs should not be compared with Hitler. I originate from a family of Partisans and my uncle was a national hero. Out of 23 monuments in Bosansko Petrovo Selo none exists any more. I will ask this lady not to offend me and my family by comparing Serbs with Hitler. The conflict here was tragic. Those who committed crimes will be held accountable, but you cannot say that Serbs are equal to Hitler. We know where we were and where you were. Thank you.

### **Nura Begović, Association of the Women of Srebrenica**

My name is Nura Begović. I am from the Association Women of Srebrenica and I come from Srebrenica. May I ask the moderator of this discussion to interrupt every question and comment that is not related to the topic of discussion.

My question is: I am very interested in what we have heard today about the Residual Mechanism that was presented by the Registrar. 1 July 2013 was underlined several times as a very important date. Can you tell us more about the work of this Mechanism? Where will it be seated? I think another question about this Residual Mechanism was asked earlier. So, can we talk more about this, rather than listen to various provocations? We are victims who are still searching for the remains of our family members. We want to know what this Mechanism will do. Will there be any statutory changes or will it follow up on the work of the ICTY? What kind of co-operation will it maintain with the rest of the courts? Can you tell us more about that?

**Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

Mr Mirsad Tokača and then we will hear from the rest of the panellists.

**Mirsad Tokača, Research and Documentation Centre**

I will be very brief. I do not want this gathering to ignore an essential question raised by Mr Bulić. What he said is very important and it pertains to the use of documents, parts of testimonies of protected witnesses. I will kindly ask the representatives of the Tribunal to take serious account of what Mr Bulić has said. If we do not resolve this issue, the entire legacy of the ICTY will be put in question. The use of documents is crucial for us, for the prosecutors, and for the general public. Can Mr Bulić tell us what the Prosecutor's Office plans to do in this regard?

**Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

Mr Bulić, perhaps we can start with you then.

**Ibro Bulić, Prosecutor, BiH Office of the Prosecutor**

I, of course, did not go into details regarding this issue and I will not be able to go into details now. But generally speaking, in practice prosecutors face serious problems with regard to this. When we seek amendments to protective measures for individuals who testified before the ICTY, we regularly receive a negative response because that person did not accept the disclosure of his identity to the court or the Prosecutor's Office in the given case. Even if this is a key witness to a certain event, without cross-examination of that witness, the transcript is not a piece of evidence that can be the basis for a court verdict. That is a huge problem.

Another problem relates to transcripts from closed sessions. We learn from people who testified, that they spoke about certain people. They tell us, "I told the Hague Tribunal that this person participated in the commission of a crime." But we have no documentary confirmation of that because of the lack of access to the transcripts from closed sessions. In certain situations it

is understandable that the ban is placed, but it would be reasonable to grant the prosecutors access to such transcripts.

**Martin Petrov, Chief of Immediate Office of the Registrar,**  
**ICTY**

Well, let me start with the last question about the Mechanism. I will confirm that the Mechanism will have two seats, two branches: one in Arusha for the ICTR, and one in The Hague for the ICTY. The Arusha branch already started working on 1 July 2012. The ICTY related, the Hague branch will start on 1 July 2013.

The important message to pass on at this moment is that after the closure of the ICTY, there will be a body, a mechanism that will enable access to ICTY archives, ICTY evidence, necessary documents, and the entire case record in all these cases. Requests for assistance will be addressed to that body and that body will be dealing with such requests for assistance. In other words, this is the Security Council's response to the need to continue with national prosecutions. There will be something that stays behind after the ICTY closes.

Having said that, by no means will that be enough on the path of dealing with the past. As we have heard from all the panellists today, judicial proceedings are only one element of this process. As I was listening to many of the people today, I kept thinking: it is a question of ownership. It is really a question of who has the ownership of this process. It is my view that it is you; it belongs to you. It cannot be that the ICTY or the future Mechanism will do it for Bosnia and Herzegovina. There is only so much it can do in assisting essentially in that process.

A very good question was asked: how to ensure that the facts established by the ICTY can be accepted in Bosnia and Herzegovina? That is exactly the point. The Tribunal could have done better, and definitely we are to blame to a certain degree for not being able to communicate well enough our judgements and facts established by the Tribunal. But, at the end of the day, answering this specific question how to make sure that people in Bosnia accept the facts, I think that this is something that no tribunal can reasonably be expected to contribute to.

Thank you.

**Goran Šimić, Associate Professor and Member of Expert Group on Bosnia's Transitional Justice Strategy, BiH**

I will say something very briefly about how to ensure respect for final decisions. We have to be aware that war crimes trials are not regular trials for, e.g. minor traffic accidents. This is something that carries a broader context. A medieval philosopher said that people should be forced to do what they do not do if it benefits the society, and over time they will realise it is a good thing to do.

We had the opportunity to pass laws on the denial of genocide and crimes. But, I believe that we cannot accept trials against our own people because we in Bosnia and Herzegovina have not reached yet this stage in the development.. My proposal is to have provisions incorporated into the criminal codes where we had similar provisions about, e.g., failure to enforce court decisions. I am certain that legislators in Bosnia and Herzegovina could define a new offence pertaining to the issue of calling into question judicial verdicts.

**Aleksandra Letić, Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

Thank you for taking part in this discussion.

## **PANEL 3:**

### **THE FUTURE OF THE PAST: THE SCOPE OF THE ICTY LEGACY**

Moderator:

Refik Hodžić, Director of Communication, International Center for Transitional Justice (ICTJ)

#### **PANELLISTS:**

- Judge Fausto Pocar, ICTY
- Branko Todorović, Head, Helsinki Committee for Human Rights in Republika Srpska, Bijeljina, BiH
- Alma Mašić, Head, Youth Initiative for Human Rights in BiH
- Anisa Sućeska-Vekić, Director, Balkan Investigative Reporting Network (BIRN) BiH

#### **Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Let me welcome you all. My name is Refik Hodžić and I am the moderator of this session which will discuss what Bosnia and Herzegovina, as a society, can do with the legacy of the Tribunal in the future for the benefit of us all.

Before I give the floor to Judge Fausto Pocar from the Tribunal, I would like to give a brief introduction to this session. I would like to honour a great and renowned expert, late Professor Vojin Dimitrijević. He who was once, asked by a Serbian journalist, “Why us? Why did the gavel of the international law have to hit us? Why was there no tribunal for Korea or Vietnam, for those crimes? Why are we the ones subjected to international law?” Professor Dimitrijević, calm as he was, responded, “We should be grateful for this fact, my son, instead of struggling against it.”

The fact that an international body has been established to investigate the most serious crimes committed in the area of the former Yugoslavia, to



bring those most responsible to justice, and to shed light on the facts, puts us in the position to think about how we can benefit from this, how our societies can benefit from this? But, as we all know, much more effort is being invested in undermining the work of the Tribunal and minimising and disparaging the facts established.

We will start with a question for Judge Fausto Pocar, former President of the ICTY. I will ask him to share his point of view on the facts and judgments rendered by the Tribunal in the context of benefits for the society in Bosnia and Herzegovina. What could be other benefits of the work of the Tribunal in addition to the fact that criminals were apprehended and tried? What is your perspective on possible uses of the achievements of the Tribunal in dealing with the past in this region?

### **Judge Fausto Pocar, ICTY**

Thank you, Refik. Thank you for leading this panel, which seems to be very significant for the success of this conference. I will keep in mind your questions and try to answer them as best I can. But I would like to first start with something that was said this morning, which, I believe, should be taken care of if we want to maximise the positive elements we can draw from the experience of the ICTY.

When the Tribunal was established, it was entrusted with a number of tasks. First, the judicial one, of course and everything rotated around the judicial task. But if we look at the resolutions of the Security Council, we find a number of other aspects such as reconciliation, rebuilding societies, that are contained in the preamble parts of the resolutions of the Security Council, and they have been interpreted as if the Tribunal had been given all these tasks. That would have been a little strange from a political body to think that a court can do some activities, but not other ones because of its nature.

Sometimes there is the idea that all the problems should have been solved, or should be solved, by the ICTY. This is not the case and cannot be the case. I say that because if we take the attitude that the Tribunal should have done everything, at the end we end up saying, “Well, the Tribunal has not done it, so there is no way of doing it.” We should appreciate what the Tribunal has done but within the limits of the activity of a court. For instance, when we consider that the Tribunal should have adopted measures of reconciliation, this is fine in a way, and we can say it. But the fact is that the judicial activities of the Tribunal can help with reconciliation. However, re-

conciliation needs other measures, a number of other interventions: political, from the international community, on one side, and, more importantly, the people concerned on the other side. In a way it is more than natural – I am not blaming anyone for giving the wrong assessment of the role of the Tribunal – that the ICTY is seen as the institution that has to achieve all the goals of efficient transitional justice and the rebuilding of a thorny society ravaged by war. But there is a limit to what the Tribunal can do.

Those working in transitional justice understand very well the number of measures that have to be taken to achieve justice and reconciliation. Even the judgements of the Tribunal cannot be taken as – I heard this morning someone saying – the truth against the false assessment of the situation. There is always, as someone else said, judicial truth which does not necessarily cover all the truth, because it depends on how a case is prosecuted and whether the right witnesses are found that will provide the information needed. If that does not happen, the final decision may suffer some problems. It would be wrong, for instance, to make it a criminal offence to state that a decision of the Tribunal does not reflect the entire truth.

There is the risk here of going into another problem: to build a society where the freedom of opinion and expression is not allowed completely. We know this has been a problem in many countries: to criminalise the speech of those who negate the crimes committed by the Nazis during World War II. In any event, the criminalisation is never done in a way that should completely affect the freedom of expression. So we should not say we have to take the ICTY fully, or go against it fully. It is a problem of finding a balance in saying that what the ICTY gives is a contribution, and I think a good one, to the assessment of a situation as a basis for reconciliation. It is not that everything is doubtful. I am not saying that everything that the Tribunal has done was questionable. I am saying that in instances where the facts have been established beyond a reasonable doubt, as is the standard of the Tribunal, and have received as certain legal qualifications, the fact that qualifications come from an authoritative body does not prevent someone from saying that this qualification is wrong.

In fact, the authority of a court that gives a certain qualification has to be respected. I mention this because the question of Srebrenica has been discussed in various fora. The issue of Srebrenica is clear. There are certain facts that have been assessed, there are no doubts about the facts that have been assessed by the ICTY, they have been accepted by the ICJ. This is clear. The facts are there. The qualification that has been given by the ICTY as genocide in the *Krstić* case is a qualification that comes from an authoritative body. The ICJ could have gone for another qualification but they decided

to make the same qualification. They accepted another authoritative body that had accepted the issue being regarded as genocide. Now there are legal doubts that this is the qualification. Anybody can go and say something else, but the force of the qualification given by these two courts is extremely important. I believe that we should take into account all these things. I take the point made by my good friend Vojin Dimitrijević when he said, “When you are under the attention of international law, you should make use of that and try to follow what international law decides.”

For instance, one issue that is extremely important, about which the Tribunal did a lot, because it was within its authority, is entering a partnership with the local judiciary in order to apply the same standards. It is for the domestic judiciary at this point to make use of these international standards, import them in its jurisprudence, which would put the country completely in conformity with international law. This is one of the examples of what can be done, but it needs the co-operation of the country. I do not want to abuse my time, but I want to talk about one more issue.

### **Refik Hodžić, Director of Communications, International Centre for Transitional Justice**

Can we come back to it after we go through the panel? Thank you.

I will follow up on what you have said. Even though decisions of international tribunals, such as the ICTY, do not present the absolute truth, but rather the judicial truth, they are very important in polarised societies like ours. Let us face it: even though the war has ended, there is a desperate fight going on for the ultimate truth. It is my truth against yours, “I will never acknowledge genocide in Srebrenica,” and vice versa. So what we can stick to are the facts established before the Tribunal exactly because of the standards you just discussed, the highest international standards of adjudication, of establishing the facts beyond a reasonable doubt.

I have a question for our next panellist Branko Todorović, the President of the Helsinki Committee in the Republic of Srpska. Can you foresee a future situation where facts established before the Tribunal and judgements of the Tribunal are accepted as such in the Republic of Srpska and made part of the school curriculum so that the children, for example, living in and around Srebrenica will know about what happened. It is not my intention to put the Republic of Srpska in any kind of focus, but since you live and work there, I am asking you about that particular location.

## **Branko Todorović, Head of Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

I will try to be as concise as possible. I did prepare a presentation for today, but I just put it aside. I think the dynamics of this conference place a new challenge.

My answer to your question is: no. I do not think that the situation you described will ever happen because certain requirements have not been met in the Republic of Srpska and Bosnia and Herzegovina, and even in the region, for something like this to happen. We are far from dealing with the past, accepting the truth and the facts. Why is that so? It does not require much knowledge or expertise to explain the reason for this. Like you said, the versions of the truth are mutually exclusive and the societies are still in open confrontation. It is only a question of how willing we are to acknowledge the existence of such confrontation. The fact is that none of the leading political platforms in Bosnia and Herzegovina have abandoned the wording used in the early '90s.

In addition to the disappointing fact that we are still involved in a sort of combat to which I see no end, we have to wonder about our own humanity. Let us revisit 1992. Let us think about a policeman who is 40 or 50 and who rapes a 12-year-old girl. That happened in Bosnia and some of those people were convicted before courts. My question for you in this room, and outside this hotel, and in Bosnia and Herzegovina is: is there anyone who supports such a vicious deed? Everyone is unanimous in rebuking that.

But let us go back to '92. I worked with a group of students and read part of a war crimes indictment to them and I mentioned the location. The location led to the context about who the perpetrators and the victims were. It was a mixed group of students from the region: Croatia, Serbia, and Bosnia and Herzegovina. Then I noticed discomfort with students who were part of the ethnic group of the perpetrators, and the feeling of victimisation on the part of the group of students that belonged to the ethnic group that was the victim of this crime. It was a distressing scene. A group of paramilitary members led out a son and father and tortured them in the most brutal ways. Then they asked this father if he had any more children. The father answers no. The member of the paramilitary grabs the rifle, kills the son, and tells the father, "Now you have no children." Then they take out two brothers and force them to engage in most brutal sexual acts and then killed them. Once the location of this event was established any further communication was impossible.

When I worked with another group of students, I did not mention the location or the context. They could assume it was in Bosnia and Herzegovina, but it could have been in Rwanda or anywhere else. When I asked them what they thought about that, the students were shaken. They all agreed that it was a horrendous crime, and that those who committed the crimes deserved the most serious punishment, and that they could not disregard this horrific context of dehumanisation that was present in abundance in Bosnia and Herzegovina.

I know many of us here cooperated in the past, but we now find ourselves in different positions. We have to think about how the citizens of this country, through our work, have recognised very well what a crime is, what should not be done, what kind of crimes were committed against civilians. We know the difference between building a house your entire life and destroying it with dynamite in a matter of seconds. If we can tell the difference between right and wrong, why do we allow the elements of our identity to draw us into this cycle and carry the burden, and start justifying something consciously or unconsciously and try to justify one crime by comparing it to another? What is happening?

The Tribunal has done its share of the work. We can agree or disagree on its success, but lawyers will discuss its legacy and results for years. What the Tribunal cannot do is make people in this country become human beings and awaken their humanity. We should not say, “I know better than others. I know you too would do the same.” I ask myself why, today, we have victims on an equal footing and whose ethnic origin should not be in the forefront. The politics that made them victims and did not try to avoid victimisation, the politics that created ethnic cleansing and horrendous crimes, is the same politics which uses and manipulates them.

### **Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Dialogue is the only hope for the recovery of this society, because enough time has passed. We all know what the problem is. We should not waste time trying to cloak that problem. However, the politicians in the region are using the hardships and suffering of the ‘90s for their narrow political interests that are a mask for large-scale corruption and thievery. This discourse has been formed by politics.

There was hope, at one point, that civil society together with the Tribunal and the Court of Bosnia and Herzegovina would take control of that dis-

course, but that hope was quickly lost. We had very constructive debates about what Milorad Dodik said, how he claimed that there was no genocide and that Markale incident was fabricated, who told him what, and that is the whole discussion about crimes. There is no discussion on this human level that you mentioned. The sooner we admit that to ourselves, the sooner we will start dealing with it.

This is a very good introduction to the next question I will ask of my colleague Alma Mašić who comes from a great organisation that gives me hope when I become depressed. It seems to me that my generation is lost and that opinions and perceptions are so petrified that it is almost impossible to shake them in any way. When I feel like that, I know the only hope is in young generations. When I see disparaging and insulting banners at football matches invoking Srebrenica crimes, I lose all hope of positive change.

Alma, tell us please of your work with young people throughout the region. Is there any hope that young people will be able to use the legacy of the Tribunal? What is that hope? What does it consist of? Is it still alive? What can we hope for in the future? What are the paths to assist the young generations to free them of this evil burden that we placed upon their back?

### **Alma Mašić, Head of Youth Initiative for Human Rights in**

#### **BiH**

Thank you, Refik for those encouraging words. I am an optimist and I always hope for the best. I would not be doing what I am doing now if I were not an optimist. I would not be the head of the Youth Initiative for Human Rights in my 40s. There is still hope. There are still possibilities for the young people to leave this situation behind. The process is a difficult one. All social and political sectors do not help; rather they make our work more difficult.

But I can mention a few examples about our activities in Bosnia and Herzegovina. There are, of course, ways to address our problems. As we are constantly present in the field, we have concluded that the young people are divided among themselves. It is terrible how these young people are being divided. Poor communication among the youth from different parts of Bosnia and Herzegovina has a negative effect, as well as the lack of financial means to provide the young people with opportunities to travel and meet other people. Also, because of the stereotypes, there is no motivation among the young people to leave their communities which are usually monoethnic.

Another problem is the divided educational structure. Children are taught different versions of history, which creates a very dangerous potential that these young people might become perpetrators of crime because they do not understand people who are different. Different interpretations of history and genocide, war crimes, crimes against humanity, and serious breaches of human rights continue to burden young generations creating division among them, especially among those who were not even born during the war. They learn about the past from their families, from teachers, from religious institutions without hearing the other sides.

This is a big problem in Bosnia and Herzegovina society. Because of the inherited past, children learn to label people and treat them with prejudice that they inherited from their elders. This is very important when we talk about the past and its interpretations that might result in negative consequences. There is a need in each post-conflict society and country to face its past violations of human rights. Each post-conflict society has to establish the responsibility of the perpetrators, especially those most accountable. If they are found guilty, they have to be punished to prevent the violation of human rights in the future.

**Refik Hodžić, Director of Communications, International  
Centre for Transitional Justice (ICTJ)**

I am sorry Alma to interrupt you. I apologise, but you only have a few minutes left and I would like to hear about your specific activities, like the project in Kozarac and many others you are working on. I want to hear from you what kind of feedback you get from the young people.

**Alma Mašić, Head of Youth Initiative for Human Rights in  
BiH**

The legacy of the ICTY, which we are discussing today, also concerns the ways of bringing that legacy to young people. What we do in our Youth Initiative for Human Rights is informal education to explain to the young what facts were established beyond reasonable doubt at the ICTY.

We use a programme of non-formal education to achieve that goal, like schools of civil liberties and activism where people from Bosnia and Herzegovina come to attend this programme for three weeks discussing the past and transitional justice, and other topics that they cannot discuss as



part of their formal education. Also the legacy of the ICTY is discussed at the traditional camps in Kozarac where people from Croatia, Bosnia and Herzegovina, and other countries in the region have the opportunity to hear about the judgements of the ICTY, about the crimes in Prijedor, to talk with the survivors of the Omarska and Keraterm concentration camps, and to directly receive feedback which they cannot receive in their own communities, and simply to hear both sides of the story. Thus they are able to make their own decisions and form their own opinion about that information.

Let me conclude by referring to one specific example how we used archives, and that will be discussed in the next panel, in the Youth Initiative for Human Rights. The archives of the Hague Tribunal, TV Sense, and the video recordings of the trials and admissions, and other proceedings before the ICTY were used as an educational tool in Srebrenica – Mapping of Genocide to present young people the facts of what happened in Srebrenica in July 1995. The reactions of young people, that you have mentioned, were incredible; some heard about it before, and others took the DVD from us and said, “I am going to take this back home and watch it with my parents.”

We are sometimes in a situation where young people have to re-educate their parents and show them how some truth has been denied and how such misconception of truth does not contribute to the building of a stable and peaceful society, which is what we are trying to do through our efforts in the Youth Initiative for Human Rights.

### **Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

I believe your conclusion is an excellent introduction to our next panellist and what she wants to talk about, and what I want to ask her about: the role of the media. I know my colleague Nidžara talked about the role of the media, which is a key issue here, especially when we talk about young people. Regardless of how much we strive to disseminate information about what happened, such as this project of mapping the genocide in Srebrenica, just imagine the influence of prime time information containing completely different narratives: convicted war criminals are invited to studios to give their alternative version of events. The destructive role of some of the media outlets is incomparably stronger than anything that a non-governmental organisation can do.



We all saw a need to capitalise on the possibility of social networks, but the media remains very important. One of the media groups reporting on war crimes cases most consistently, I would say, is BIRN. Anisa, what are the obstacles you have to overcome in your work. What are the necessary changes, in your opinion, to increase the impact of your activities? What are the problems of the approach of the media to the issues of war crimes?

### **Anisa Sućeska-Vekić, Director of Balkan Investigative Reporting Network, BiH**

Thank you, Refik. Good afternoon.

We talked at the previous panel for an hour and a half about the importance of the media in informing the public on the facts. Even though there are different aspects of the truth, a fact is still a fact. It remains a fact after the judgement. Media are indeed influenced by the ruling political parties in Bosnia and Herzegovina. According to the latest research, over 95% of all printed and electronic media is completely owned by the political parties. It is therefore unrealistic to expect some change in editorial policies.

What are the obstacles faced by those who want to report differently, distant from commercial and political influences that aim at denial of all judgements and strong criticism of everything achieved by judicial institutions? What is left are a few media houses that would like to cover trials objectively. When they want to do so, in the way that BIRN and Sense do, they face the problem of the denial of the Tribunal's legacy which is based on transparency.

We are all aware of the criticism directed at the Tribunal regarding its poor Outreach policies. We are also aware, however, that ICTY has a rich archive of open public documents available to everyone interested, and that it has recently launched a very strong Outreach programme. Judge Pocar mentioned that it is impossible to say that the Tribunal should have done everything and I agree with that, especially because the Tribunal had some good practices, including transparency.

During the day we have been discussing the idea of collective responsibility, and how we deal with it as organisations and individuals? Personalisation of guilt is one of the biggest achievements of the Tribunal, but one of the biggest problems is how to make those achievements available to the public. Early this year, the Court of Bosnia and Herzegovina made a new decision on anonymity, thus seriously limiting the access of not only

the media but also of the general public to judgements and verdicts of the Court.

In February this year, the Prosecutor's Office of Bosnia and Herzegovina withdrew public access to all indictments. The verdicts have been made anonymous and only the initials of private and legal persons are used. Since then five second-instance and four first-instance verdicts were published with anonymous information. We do not know the names of the convicted persons and we will never learn them. The courts also decided that only 10-minute portions of recordings can be issued, made anonymous and edited by the presiding judge; these are usually the recordings of the beginning of the hearings. The court explained they referred to the Agency for Protection of Personal Information founded by the EU.

However, such practice is in contravention of the practice of the European Court of Human Rights, especially when we talk about genocide and crimes against humanity. This is no longer a matter of influencing public perception, but this fact also violates the laws of Bosnia and Herzegovina. I will refer to Article 10 about the freedom of expression of the European Convention of Human Rights, an integral part of the Constitution of Bosnia and Herzegovina, and also the International Covenant on Civil and Political Rights. Finally, these instructions also undermine the entire purpose of the Court of Bosnia and Herzegovina and the ICTY in that respect.

If the accused had a fair trial and if the trial was open to the public, there is no reason to hide the identity of the perpetrators of the crime. Why would the location of the crime be hidden? Why would the institutions involved be hidden, especially when we talk about personalisation of guilt as not being the final instance, as there is a need to prosecute the institutional structure behind every crime.

This restriction of information also encourages speculation about the actual identity of the perpetrators. This will seriously undermine further activities of the Court and the legacy of the ICTY. It will negatively affect public perception of the activities of the Court of Bosnia and Herzegovina and the ICTY as public trust in the courts is already fragile.

Those who will profit the most from this are manipulators or political stakeholders. This is a somewhat peculiar strategy by which the court chooses to protect itself. We are talking about the future here, and this is something that will definitely not assist future generations.

Limiting access to information on current cases negatively affects the judiciary and makes the legacy of the Tribunal devalued for future generations.

A serious position should be taken on this issue both by the ICTY, the Residual Mechanism, and the Court of Bosnia and Herzegovina. Serious analysis is required of the recent decisions of the BiH judiciary because they call the Tribunal into question. What will be held behind the locked doors of national institutions? The lack of relevant instructions by the Tribunal will aggravate things further.

A hypothetical verdict stating that the Holocaust was masterminded by A. H. who commanded the army in municipalities A, T, D, and others, is quite nonsensical. I will leave it to you to discuss this topic further.

**Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Thank you, Anisa. Since we have seen some similar problems in other societies, we can say with confidence that this is an unprecedented practice where in cases of such an enormous importance for the society, judicial records resulting from a trial are swept clean of any information. If there are any productive results of this conference, at least there has to be an initiative for something to be done in this regard. Something has to be changed. I see judges of the Court of Bosnia and Herzegovina here, and I would like to hear from you.

If the law is violated, there are legal mechanisms that should be addressed. This, however, is unacceptable, especially when we talk about the Tribunal's legacy. Let us not forget that the Court of Bosnia and Herzegovina tried a certain number of the Tribunal's cases, which will then be cleansed of all the facts as any other case. The Tribunal plays a very important role in addressing this issue. I could talk a lot about what the panellists have said, but I will open the floor for discussion.

I have to pass on Amir Tikveša's apologies; he could not join us today due to health issues. I hoped that he would join us because the perspective of peace building institutions is very important. I can see Aco Trifunović from Banja Luka and maybe we could hear from him later on. I see several hands raised. I will take five questions and then we will discuss them. You will have two minutes for your questions.

## **Hatidža Mehmedović, Association of Mothers of Srebrenica and Žepa Enclaves**

Thank you for the two minutes! I came here all the way from Srebrenica for two minutes! I do not know whom to ask.

I am Hatidža Mehmedović, President of the Association of Mothers of Srebrenica. I come from Srebrenica. You know that Srebrenica is a symbol of hardship and that the Memorial Centre is a shameful reminder of what could have been prevented from happening in the enclave

It was said that the definition of war in Bosnia and Herzegovina is not known. It is very well known, only it is contained in documents that were subject to an agreement with Goran Svilanović and Carla Del Ponte which were marked as classified. These documents contain the truth about Bosnia and Herzegovina and genocide.

It was said it was not important how much the criminal would get. It is important. What is the message from the court if criminals are awarded with short prison sentences? That it pays to commit crimes.

We know that we cannot bring the past back, but we can do whatever we can to build a future for the future generations. We can do something to prevent that any mother in the future would find herself standing before a dark pit, looking for the remains of her child. I would not want this to happen not even to the one who did it to me.

Everyone should know the truth about Srebrenica. The schools are so close to the Memorial Centre and yet so far away. We have visitors from the US and from all over the world, but not from the schools in Srebrenica. They learn one version of the truth at home and another at school.

It is very important to store the archives of the Tribunal not in a single location, but also in backup locations because they can be easily destroyed or falsified. Much of what belonged to us victims has been destroyed in the Tribunal. Carla Del Ponte destroyed evidence in the ICTY, but this is the subject of legal proceedings that were initiated.

**Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Thank you, Hatidža. You mentioned that someone here had said that the definition of the war is not known and that the length of sentences is not important. Did you have in mind someone from the previous panel? So you did not have questions, basically, for the panellists, but for those who spoke earlier.

**Milosava Jakovljević, former deputy of the National Assembly of RS**

I am Milosava Jakovljević. I come from Banja Luka.

If we can have joint armed forces, why cannot we function together? I always compare these times with those in the former Yugoslavia. No one denies the number of victims in the former Yugoslavia. We are all brothers here. There were more victims in the former Yugoslavia in World War II than there were in the previous war. There has been so much progress made between 1945 and 1962, and look at the regression we have experienced over the past few years. You from the NGOs who are officially registered, who have the opportunity to speak publicly, you should invite the politicians to stop taking us backwards. I, as a Serb, am a member of a non-Serb political party simply because to contribute to reconciliation.

History is terrible and war is terrible. We should not allow the repetition of this. We should have permanent peace. So everyone who has the opportunity to appear and speak publically should criticise all those who prevent us from progressing.

**Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

I absolutely agree with this.

## **Zijad Smajlović, Citizens' Association for Justice, Peace and Return**

My name is Zijad Smajlović. This is the third time I am introducing myself. I will be very brief.

We spoke about judgements. Judgements have to be accepted; they were rendered based on facts. But we also spoke in the previous two panels that victims of the past aggression or genocide should be put in focus. In order to do that, we have to bear in mind that the judgement that you spoke about contains one trap. It is only a judicial judgement, which does not contain a legal sanction in its reasoning. If it had legal sanctions, then we would not have war crimes convicts, who had served the sentence, coming back to their place of origin and being exalted as war heroes. If certain sanctions were contained in the judgement, then things like that would not be happening. Practices like these do not contribute to transitional justice.

Those among us who represent the victims are frequently in the situation, as we are today, of dealing with repetition. Some of us come here ready to accept diversity, whereas others come to spread hatred and confusion. I was not raised in hatred. I was raised in love. I am also a person whose 35 family members were killed. I still do not hate anyone, but I am forced to listen to hatred here today.

Victims want justice. They know the truth, but they want justice and satisfaction through that justice. That is imperative. If I see from the Court of Bosnia and Herzegovina, which is some kind of a successor to the ICTY, that the persons brought in direct connection with the murder of my father are sentenced without any satisfaction for me as a victim of their crime, then I do not need such a judgement at all.

## **Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Please tell me if I understood you correctly. When you say “legal sanction,” you are referring to the judgements of the Tribunal and asking for a mechanism to prevent questioning the judgements?

**Zijad Smajlović, Citizens' Association for Justice, Peace and Return**

Yes, to make it part of the verdict regardless of whether it is a judgement of the Tribunal. None of the ICTY's 161 judgements contain any sanction that would say this or that person as a convicted war criminal has no right to run in the elections, and so on.

**Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

The answer to this is very clear: it is not up to the judgements, but to our own laws. The Tribunal cannot order in its verdict that a person cannot run in the elections in Bosnia and Herzegovina. It is a matter of our legislation, of our laws. I am not a lawyer, so I will give the floor to Judge Pocar to answer this.

**Zijad Smajlović, Citizens' Association for Justice, Peace and Return**

It is the problem of the ICTY judgements as well, and everyone will agree with this: the scientists, sociologists and lawyers.

**Zumra Šehomerović, Association of Mothers of Srebrenica and Žepa Enclaves**

I come from the Association of Mothers of Srebrenica and Žepa Enclaves. I am a bit shaken by Mr Branko's presentation who said that the recent events will not soon become part of the curriculum in schools. For as long as the children are unaware of our past, I believe our future looks bleak.

I am moved by what Alma Mašić does with the Youth Initiative, and that is commendable. I was there in Belgrade when they fought to prove the truth about what had happened in Bosnia and Herzegovina. I witnessed their efforts and I would really wish for all governmental and non-governmental organisations to work with the youth to bring them closer to the truth. Without truth there will be no reconciliation and no peace.

### **Fadil Redžić, Association of Detainees of Brčko District**

My name is Fadil Redžić. I am the President of the Association of the Former Camp Inmates of the Brčko District.

I want to join in the discussion. Having heard what others said, I am upset about different events that had taken place in Bosnia and Herzegovina and Brčko: the aggression on Bosnia and Herzegovina and on Brčko, camps and mass grave sites, then exhumations, then collective burials, 275 people, women and children were buried, and more than 3,000 people were detained in the camp in Brčko, and so on.

I am saying this because what I recently undertook is something that we should all do in Bosnia and Herzegovina. I established a memorial room which is a permanent exhibition in the hangar building, at the Luka camp in Brčko where the genocide took place. Immediately afterwards I received a visit and a letter from the Helsinki Committee for Human Rights of the Republic of Srpska. Ms Aleksandra and Ms Tanja brought around 20 school high-school students from Brčko, Bijeljina, and Tuzla to visit the memorial room. The children were impressed by what they saw. The very fact that they could learn from that exhibition about what had happened in Brčko, proves that we can do something to foster reconciliation.

My question to Judge Pocar is this: how long will the people in the government, military and police structures in the Brčko district remain unprosecuted, if we know that there was genocide in Brčko? I want the people who are still at large to be prosecuted as soon as possible. I do not know who is responsible for that. Is it the High Judicial and Prosecutorial Council, the Court of Bosnia and Herzegovina or the Prosecutor's Office of Brčko District? I do not know, but I want these people to be prosecuted as soon as possible. I want all war criminals in Bosnia and Herzegovina to be prosecuted as well.

### **Nedeljko Mitrović, Organisation of Families of the Captured, Killed or Missing in RS**

I will introduce myself once again for those who were not here this morning. My name is Nedeljko Mitrović. I am head of the Organisation of the Missing Persons of the Republic of Srpska and Former Camp Inmates. I do not want to repeat what I have already said. I am not provoked, but I am inspired by previous discussions. We hear some stories about reconciliation



and then you hear statements like “built on genocide, created in blood.” Are we going to go back to the year of 1389 or 1941 and then discuss genocide?

Just a second, please. I listened to you.

### **Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Please, let us maintain the dignity of this conference and not go back to 1389. If you have something relevant to say, please do so.

### **Nedeljko Mitrović, Organisation of Families of the Captured, Killed or Missing in RS**

Why am I saying this? I am going to say something of my own. My grandfather was killed on the Thessaloniki front. In 1942, as you can find information in the German archives, in the village of Drakulić near Banja Luka, 2,300 people were killed in one day, out of whom there 551 were children, 74 were my closest relatives. Because my father moved in 1939, I am here with you today. In one day, 74 of the Mitrović families were killed! Is that genocide?

We constantly hear statements that the Republic of Srpska was created on genocide. The Republic of Srpska was created where genocide had taken place in the past. If the Serbs had not defended themselves, as Bosniaks did, there would not have been any Serbs here.

### **Marko Grabovac, Head of Association for Search for Imprisoned and Missing Citizens of Brod Municipality**

I apologise and I would like to greet everyone. My name is Marko Grabovac, the Head of the Association for Search for Imprisoned and Missing Citizens of the Brod Municipality.

My brother and my mother are missing. One of them was detained in the camp. “Did I kill them,” I ask myself. “Was I the one?” All the stories I have heard since this morning have so many gaps. You did not mention at all the dozens of camps where Serbs were detained. What I know, working in this line of business, there were ten camps for Serbs in Brod. More than 2,000

persons were detained in those camps. There were large-scale rapes. I can provide you with a list of women or children who were raped. I have the proof of that.

In 2002 we handed over to the Hague Tribunal the list of crimes committed in the territory of Brod municipality where an aggression was committed by Croatia, assisted by the Muslim and Croatian paramilitary units. They tied their flags, looted, pillaged, and set our homes on fire. We returned to our homes, all people, Serbs, Croats, and Bosniaks, and no one is preventing them from doing that. No one is harassing them. We have come across at least 10 mass grave sites and we are still looking for others because we know the Sava River is the biggest mass grave site. I may never find the mortal remains of my mother.

I personally handed over, together with my team, to David Schwendiman, the set of documents recording crimes that were committed in Brod. I do not see that criminal report anywhere. They asked us to bring it to the Prosecutor's Office in Sarajevo again, to make copies of that document. Where is it now? I have the certificate confirming that it was handed over to Mr Schwendiman in The Hague.

Do not insult us with these stories disregarding the Serb victims. Let us not talk about who started the war first, who did what to whom first, and what happened in Bosnia and Herzegovina. Will anyone be held accountable? We should tell each other that we will have to treat the victims, and each other, with respect. We need to remember that mothers are still crying for their children, that families are looking for their lost family members. We have to be firm in our resolution to maintain this course and not succumb to the pressure of politics.

**Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Before I give the floor to Mervan, I must respond to Mr Mitrović. I hope he was not offended. I grew up learning about the massacre in Drakulić. I know everything about what happened there and that is exactly what this lady said. How come that until 1962 we made so much progress, but have not taken any steps further in the recent past? That is because we have not been learning about the events in the recent past. Mr Mitrović, you have a responsible role in the Republic of Srpska. Have you ever stood up to say something against the denial of genocide by Mr Dodik?

I have never heard you make such presentations. We are still fighting against each other with our versions of truth. There is no common effort to reach the minimum consensus so that we can leave our children some legacy that they will not fight over in the future. That is why I cannot listen about the year 1389, but rather I want to listen to your views about how we should deal with the present situation.

### **Mervan Miraščija, Open Society Fund, BiH**

I am representing the Soros Foundation in Bosnia and Herzegovina. The crucial problem is that cases in the BiH judiciary have been made anonymous. Please explain this initiative to us. Also I would follow up on what Mr Refik Hodžić said about taking certain initiatives to remedy this practice and invite everyone to join in the discussion.

### **Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Before I give the floor to the panellists, I will invite Judge Vukoja to explain to us what the case here is from the perspective of the Court of Bosnia and Herzegovina.

### **Judge Dragomir Vukoja, Court of BiH**

I am Judge Dragomir Vukoja from the Court of Bosnia and Herzegovina.

At this moment I will not go into details about this practice. It is a complex problem and I do not know if I am the best person to answer this question since I was not personally involved in it. What I can do is convey your remarks. I do share your opinion, Refik, about this and I will convey your remarks. We will consider it because the citizens and the victims are entitled to have information available about the perpetrators of crimes, especially those who were convicted by final court decisions. I will inform my colleagues in the Court of Bosnia and Herzegovina about the results of this conference. I apologise if I did not provide more information in my response, but I hope you will understand my position.

**Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

I will now give the floor to Judge Pocar for final remarks and to answer questions, but I must say we did not hear so many questions as we did comments.

**Judge Fausto Pocar, ICTY**

There were not so many questions, but a number of issues have been raised. I would like to take at least three myself, but without taking away from my colleagues. Stop me when you want because I may have another opportunity to talk at the end of the day.

First, the question of the victims has been raised again. I fully understand the frustration of the victims if their personal question has not been taken up fully in certain cases, or has not been taken up at all. Even in cases of mass crimes, inevitably a number of victims are hurt. What is a sufficient number, according to the prosecutor and the bench, to make the case? But then, this does not go beyond that. Inevitably, a number of victims are not mentioned individually, and their specific case is not taken up. If the case is to be kept manageable, this is, unfortunately, unavoidable in these mass crimes trials. I understand the frustration.

That's why, two or three years ago, the Tribunal under the leadership of Judge Robinson has taken a number of steps in order to make the international community aware of these problems and push the UN to take measures which were not envisioned at the moment in which the Tribunal Statute was adopted by the Security Council. There are some initiatives on the way, but I do not know how far they will go. This is simply to express my sympathy with the victims for their frustration.

The second point I wanted to make is the question of the cases that have not been prosecuted up to now. Who is responsible for that? The Tribunal had certain facilities, it was given certain powers to investigate and prosecute. It took some time for the prosecutors to identify possible perpetrators, and the famous 161 cases were brought before the ICTY. At a certain point in 2004, the Security Council decided to stop the investigations. That does not mean the cases should not be prosecuted. They should be prosecuted by domestic authorities. No more cases as of 2004 can be brought before the ICTY. But the ICTY transferred the information it had to domestic ju-

diciaries so that they could take advantage of all the investigations already conducted by the ICTY and to aid local judiciaries to continue with the cases. It is extremely important that these cases be prosecuted.

The last point is education. There were a number of comments on the education of young people. Only on a couple of occasions, the accent was put on children. One thing is to educate general public, and another thing is to educate children. In my view, this is something that has to be done. I understand it is terribly difficult to do it in the situation where schools are divided. It is very hard to make the same programmes to be applicable to all schools, but it has to be done because education has to start early. I do not believe that children have to be protected from the past, because the past is difficult or horrible in certain cases. Children have to be educated from an early age.

I do not have time to give you my experience I had with children, but I believe that at primary school children have to be exposed to the past, of course with the caution. This is important because children have a very, very deep sense of justice; they understand immediately what is right and wrong, much more than adults. If they are educated correctly and exposed to the facts, their reactions will be correct. If it is done after they have been exposed to doctrines, and to hatred, then it is too late. It is terribly important that initiatives be taken to bring about early childhood education.

### **Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Probably the other organisers will be mad at me, but I will give you another minute just to comment on the issue of the practice of the Court of Bosnia and Herzegovina and the removal of all references to the identity of the accused or convicted, or to the locations of crimes. How do you see this practice? You do not have to give the official position of the Tribunal, but from your personal perspective what do you think this could result in?

### **Judge Fausto Pocar, ICTY**

I think my lady colleague answered the question. I fully agree.

---

**Branko Todorović, Head of Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

I think that we have pessimists and optimists in Bosnia and Herzegovina. We need an objective assessment of the situation in all spheres of society. I must say that the Outreach programme is something that the Tribunal lacked, and that is exactly what it needed: the communication and connections with the communities where the crimes happened. That only came later. The lawyers think that if they apply the law and do their work, that this is all they should do. They failed to consider the importance of that process for the local community.

I would also like to mention two proceedings pending before the Tribunal: the *Karadžić* and *Mladić* cases. The public in the Republic of Srpska and, I would say, in the rest of Bosnia and Herzegovina, and the region is not too interested in these trials. The impact of these trials on the expert community or professionals or various other circles is practically nonexistent.

Let me mention that the Helsinki Committee has worked to get donor support for an Outreach conference in Banja Luka and Sarajevo regarding the legacy of the Tribunal. There was no interest shown by the EU and the international embassies, which means that the focus of the international community, which was a very important facilitator for developments in Bosnia and Herzegovina, has diminished. It seems Bosnia and Herzegovina has been left to its own resources now. We lack the initiative, desire and motivation to face all these issues. We are now faced with general distrust, ethnic and religious hatred, and a vicious cycle in the dark civilisation that we are spinning in.

**Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Let me add to what you said. I think we identified the problem a long time ago. There is not much that we do not know about the problem, but what we need to discuss is the solution to this problem. In this spirit, can you tell us something about the position of the Helsinki Committee regarding the way in which the verdicts of the Court of Bosnia and Herzegovina have been made anonymous?

**Branko Todorović, Head of Helsinki Committee for Human Rights in RS, Bijeljina, BiH**

We have already reacted to this and joined the position of other NGOs. We find this highly disturbing and of a great concern. We had an excellent co-operation with the Court of Bosnia and Herzegovina before and we believe that this practice will pose a challenge for the future.

**Alma Mašić, Head of Youth Initiative for Human Rights in BiH**

The Youth Initiative for Human Rights in Bosnia and Herzegovina will continue with its activities nurturing the culture of memory. We will encourage young people to take a critical standpoint with respect to their environment and the circumstances they live in. When people say that the youth will bring about change, I am highly sceptical. I do not think young people will bring about any change by copying their political leaders, and seeking career opportunities by blindly following them.

Only young people with developed critical thinking and individualism will bring change, fight prejudice and overcome differences. We allow young people to travel and return to Bosnia and Herzegovina as a valuable resource for the building of a better society. Such people will have a great responsibility in the future, not for the crimes that happened in the '90s, but for the decisions they will make, based on the understanding of history and acceptance of facts so that the decisions they make are understandable, reasonable and proper. That will prevent the horrors like the ones in the '90s from repeating themselves.

Anisa and I exchanged some notes during this discussion. The Youth Initiative in co-operation with the Human Rights Centre in Sarajevo implements the project Youth for Justice. It is a project of law school students from Banja Luka, Istočno Sarajevo, Sarajevo, Mostar and Tuzla that will make recommendations for the judicial reform. The important issue of anonymous judgements will be included as one of the proposals for lobbying before the Constitutional Court and the Court of Bosnia and Herzegovina and other stakeholders.

## **Anisa Sućeska-Vekić, Director of Balkan Investigative Reporting Network, BiH**

Before I answer Mervan's questions, let me underline the importance of what I have said. As we could hear from the comments following our presentations, the transparency of war crimes trials is crucial for future generations. It was not only today that we referred to the year 1300 odd or to the '40s in the former Yugoslavia, but rather we keep referring to those years all the time.

Diana Orentlicher, who wrote a book 'That Someone Guilty Be Punished' on her experiences in the ICTY, spoke of the problem of lack of transparency about the events from World War II, where different families would interpret the events differently and generations grew up on different narratives of the crimes committed in World War II. We did have an excellent educational system and educative films about the events from World War II. However, this narrative offered by the system frequently differed from the narrative offered in families. This is why the trials for the crimes committed in the '90s have to be made transparent. We need to know the identities of the perpetrators, the location where the crimes happened and the institutions involved in the commission of the crimes.

Let me revisit Mervan's question about why the cases have been made anonymous. BIRN was the first to notice, because we look for all recordings of trials on a daily basis, that we could not receive recordings any longer. We were informed about the Instructions and Rules on Anonymity. The Prosecutor's Office informed us of the internal decision to withdraw all indictments from their website and we sought an explanation. It took two months to receive consolidated information about the reasons for these decisions.

In order for us to react and do something, we hired legal analysts and insisted that both the Agency for the Protection of Personal Information, the Court, and the Prosecutor's Office provide us with the documents they used as the basis for this decision. The Agency said it was never their intention to influence war crimes cases and that they had not issued any instructions in that regard. The Prosecutor's Office explained that they made an internal decision based on the guidance of the Agency. The Court was the only one to pass official documents: Instructions on Anonymity and on Rules on Regulating the Relationship with the Media citing, in one of the articles, as the legal foundation, that the duty of the President of the Court is to manage the affairs of the court. That was quite vague.

However, the first verdict was sufficient for BIRN to file a complaint with the Ombudsman's Office due to the violation of the Law on Access to In-



formation, and we hope that the expert opinion from the Ombudsman's Office will provide us with an explanation about this. The paradox about this is that the documents were drafted upon the guidance of the Agency. There can be a negative or positive consequence of the opinion of the Ombudsman's Office. The Court and Prosecutor's Office can take the opinion into consideration if it is positive and, if they want, revert to their previous practices; or they may not. This would then be another paradox, because why would they listen to the guidance of the Agency, but not the Ombudsman's Office. We will certainly seek the assistance of all organisations to use all legal remedies available in Bosnia and Herzegovina to resolve this.

What is worrying is the lack of reaction of the international community and the groups supporting the work of the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina. This was noted in the first panel today: we have members of the international community who are always here, I will not name them, but at one point they will get tired. There are not many who are brave enough to support the judiciary over a long period of time. We have to gain support for the provision of the European Convention, the part of the Constitution of this country that reflects the practices of the European Court for Human Rights, the UN Charter of Human Rights, and other documents. That is something we will have to work on together. If the message of this gathering is only conveyed to the Court President, that will not be sufficient, because the Court President has not commented on this issue at all.

### **Refik Hodžić, Director of Communications, International Centre for Transitional Justice (ICTJ)**

Allow me to say two things. My personal opinion is that we should stop referring to the international community expecting it to resolve our issues. We should rely on our own resources. We should always discuss things with dignity and honesty. This panel, at least, resulted in the fact that everyone had the opportunity to say what they wanted.

But, enough talking. We are constantly talking about the same thing. The same stories circulate for years. Anisa, Mervan, let us do something about this! Let us have at least one tangible result of this, which is the use of all legal mechanisms sending the public message to the courts of Bosnia and Herzegovina that the deletion of information from indictments and judgements has no positive effects on this society.

Thank you.

## **PANEL 4:**

### **THE IMPORTANCE OF THE TRIBUNAL'S ARCHIVES**

Moderator:

Thomas Osorio, Advisor on the Rule of Law and Human Rights, UN BiH

### **PANELLISTS:**

- Gabrielle McIntyre, Chef de Cabinet for ICTY and MICT President
- Saša Madacki, Head, Human Rights Center of University Sarajevo
- Miroslav Živanović, Deputy Mayor of Sarajevo
- Elisabeth Baumgartner, Head, Dealing with the Past Programme, Swiss Peace Foundation

### **Thomas Osorio, UN Rule of Law and Human Rights Advisor,**

#### **BiH**

Thank you and welcome to Panel 4: The Importance of the Tribunal's Archives.

My name is Thomas Osorio. It is my distinct pleasure and honour to moderate this panel because I made use of the information we are speaking about and facilitated the handling of the archives of the ICTY for about 14 years, so I am also here to tell you that this information is valuable. You, as practitioners, have to find the appropriate ways to access this information. The task of this panel is not only difficult because it is nearing the end of the conference, but because somehow we would like to compliment or tie in all the important notions and concepts that were discussed earlier.

My first question would be are there any remaining questions from the last panel that needed to be asked, or can we leave them for the end? Good, we can leave them for the end. Allow me a few initial remarks.

I am sorry, Madam, I did not see you. Can we get a microphone?

## **Kada Hotić, Association of Mothers of Srebrenica and Žepa Enclaves**

I apologise for interrupting this session. I wanted to ask something. I am somewhat confused about this decision of the Court of Bosnia and Herzegovina to give anonymity to the convicts and the accused. What is the purpose of the trials and the prosecutions? Who will benefit from this confidentiality? Who will benefit from not disclosing the identity of the perpetrators to the public? Where are the victims in this context? Are the victims completely disregarded and unimportant? The prosecutor is doing his job, and the defence counsel is doing his. They are arguing their cases, and someone will win. Is that the purpose? This is very strange to me. I find it hard to accept this as a victim. I think that if this practice is adopted, you should stop spending the money to indict and try cases.

We still have not raised that issue. We know that the ICTY referred to the Court of Bosnia and Herzegovina some 800 cases that had been investigated and that the Court was to arrest some people and bring them to justice. We still have not heard that any person on that list was tried before the national judiciary. How long will the victims have to wait? Fifty-six members of my family were killed. How long will I have to wait to see that justice? That is the only thing that I live for. I want to see this country in the future with my grandchildren living in it with hope. If all this information will remain anonymous, then all this work has been done for nothing.

Thank you.

## **Thomas Osorio, UN Rule of Law and Human Rights Advisor, BiH**

Thank you.

We have to go back to the importance of the archives. I think it is essential that we provide a definition in order that you understand what is meant by the archives of the ICTY. The Tribunal records are divided into three categories: the judicial records that are directly related to the cases: video, audio, as well as transcripts; there are records that are not a part of the official judicial record, but are generated in connection with those cases; and there are the administrative records of the Tribunal. The most important part of those records, which I believe are the most interesting, are those that are dealing with witness statements and other evidence that may be used in

domestic prosecutions. The Tribunal has long assisted the national jurisdictions. I do not wish to speak on behalf of the ICTY in this regard, but I am quoting the information that has been provided by the ICTY in relation to these documents. What is important is that the making of a decision about this information is underway. Certain decisions have been made, and there will be subsequent decisions about the archives in the near future. I think that it is very important to distinguish between the information that is now being held by the Registry and the information being held by the Office of the Prosecutor. Today we would like to discuss and to provide you with the opportunity to ask questions about how you, as potential users of this information, as practitioners, will access this information.

I think we could start with Saša and Elisabeth as potential facilitators at the national level. Saša will explain how this information may be indeed made available to you.

### **Saša Madacki, Director of Human Rights Centre of University of Sarajevo**

Thank you, Thomas. Good afternoon, everyone.

Before we begin discussing this very important issue of the legacy of the Tribunal and its archives, we should raise several important issues, such as the accessibility, usability, and protection of the archives of the ICTY.

When we talk about Tribunal's archives, we refer to the ownership of the documents, and at this point we have to separate two key issues. The first issue is the material that was generated through the work of the Tribunal, including financial, administrative, and other records. That material is owned by the Tribunal, and they can store it in some kind of storage place in New Jersey; it would be all right.

However, when it comes to materials that were generated during the prosecution of war crimes, like evidentiary material and testimonies, the ownership of that material needs to be seriously considered. Two proposals were given, but I do not want to talk about the modalities of the transfer. I would like to ask several questions that remain unanswered but are very important.

First of all, the archives of the Tribunal include an extensive body of documents. These records are managed by the archivist of the Tribunal, Madam Elisabeth Emerson. This concerns the persons managing the archives. The

question is how we are going to treat these archives. We were witnesses of an unpleasant event in 2009 when more than 1,000 pieces of evidence were destroyed because they were a health hazard. It was one hard decision made by the Tribunal.

The question remains: are the archivists of the Tribunal sufficiently trained in terms of the cultural and historical context of the materials that should be preserved and kept permanently? What represents archives that are not classified as something that should be permanently stored? If we are talking about millions of documents, what is the final number that will remain as permanent documentation of the Tribunal? Do the archivists consult each other about which materials should be kept? Do they have doubts about what to do with some materials? To whom should they talk? These are all very important questions.

Then, there is the issue of the availability of the archives. There is a large body of documents that were digitised, and we also need to discuss the access to these digitalised archives. We should not build a place where the archives will be stored and preserved as a museum, but rather as something that people can access and use for educational purposes. If we want to learn the facts, and if we want our children during their education process to learn the facts and get answers about who did what to whom and where, we have to ensure access to that information so that it could be presented and used for writing textbooks.

Another issue that has been raised by historians and recently by the professor at Michigan University is access to this information by scientists. Then, there are museum and pedagogic activities, namely exhibitions that would display documents which would attest to the historical events which occurred in this country. So, this discussion is very broad, and it also includes the issue of protection. Archives material that will be put in digital form is no longer just a matter of digitalising and storing. We need to also consider curatorship. You know that we do not have floppy disks where you can store some materials. The formats change. We cannot even anticipate in what form these archives will be kept 50 or 100 years from now. We have to ensure the protection of hard copies, and digital copies have to be migrated from one platform to another almost on a daily basis to make them available to persons who will search them 100 years from now. First, we have to discuss whose archives they are. As a former archivist, I do not think it is the ownership of the United Nations, but Gabrielle McIntyre can tell us who the owner of these archives is. Are they yours or ours, Gabrielle?

## **Gabrielle McIntyre, Chef de Cabinet for ICTY and MICT**

### **President**

The Tribunal is a subsidiary organ of the Security Council. So, the work product of the Tribunal as a subsidiary organ of the Security Council is owned by the United Nations. The United Nations exert ownership of the archive. Basically, if you understand the archives, you know that the importance to the region lies in the judicial records and the facts that were established by the Tribunal through its judgements. But, the evidence in the archive came from many different places. It did not come from the region only; it came from many states that had evidence that they could share with the Tribunal, such as their intelligence information gathered during the conflict about what was going on. Many other entities provided information to the Tribunal. Therefore, the information is international; it is not just national information that came from people in the region. In obtaining that information, the Tribunal gave various undertakings to the providers of information. It undertook to protect the identity of the providers of information, especially when it came to third states that were providing information to the Tribunal. It is, basically, the concern about maintaining confidentiality; it means that the Tribunal is given the responsibility or the mechanism that will take over from the Tribunal for maintaining and preserving the archive.

In the Security Council resolution which established the Residual Mechanism, the Tribunal was also instructed to make sure that the information that is collected during its work is accessible to people from the region and all over the world. The Security Council resolution instructed the Tribunal to assess the feasibility of establishing information centres to ensure that the public record would be accessible. The Security Council Statute that established the Residual Mechanism also placed an obligation on the Residual Mechanism that was not placed on the Tribunal: to co-operate with national judiciaries in relation to requests for assistance. The Tribunal was giving that co-operation when it began transferring 11 *bis* cases through its Office of the Prosecutor and its Chambers, but the right of national judiciaries to petition the Tribunal directly for materials was actually the brainchild of Judge Pocar, who understood that the work of the Tribunal was to be limited, that most of the work would be done by national judiciaries, and that there needed to be an objective way for the prosecution and defence to access confidential materials of the Tribunal. So, the emphasis that the Tribunal, the Security Council, and the United Nations are now placing with regard to the archives is to make sure that they are accessible to as many people as possible in a form that will be usable to them.

With respect to your question if we are keeping the information, anything that went into the judicial record will be preserved. But the Prosecutor has his own huge evidentiary collection. Many of those documents have not been placed into evidence. The documents that were destroyed by the Prosecution were part of that evidence collection, although they took photographs that could be used in place of actual physical objects. But, they are still coming to terms with their policies in relation to that evidence collection. It is deemed that it should be retained as a whole. The basic archival principle is to retain the archives as a whole. If you understand the archives, they are the work product of the Tribunal, day to day work of the Tribunal. It is the international communities' reaction to the conflict through the organ of the Security Council.

**Thomas Osorio, UN Rule of Law and Human Rights Advisor,  
BiH**

I think that Elisabeth might be able to add other practices with similar collections.

**Elisabeth Baumgartner, Head of Dealing with the Past  
Programme, Swiss Peace Foundation**

I might need to explain quickly why I am on this panel. Our organisation is running a program on archives and dealing with the past. We are working in different contexts with different transitional mechanisms, truth commissions, tribunals on the issue of archives and how to use documents and archives, how to open them and make them accessible to the public.

I would like to broaden a bit the view. There is an ongoing discussion on establishing international judicial archives somewhere, most probably in The Hague, to have this material in one place and to regard it as heritage which belongs not only to one country but to the world community as a whole and which should be accessible not only to the victims or judicial authorities but also to research and the public. This is guaranteed not only for the archives of the ICTY but also the archives of the ICTR, and the archives of the Special Court for Sierra Leone have already been transferred to The Hague. There was a discussion on where they belong. In the end the decision was reached that the safest solution would be to have them in The Hague. It is really important to give consideration to all the possibilities of



access of people concerned who would have different levels of access to different information, more or less confidential information. This is then up to the reference services handled by professional archivists. The discussion is still ongoing, but I just wanted to broaden a bit the view on archives of different international tribunals.

The other issue is how the archive is used. We heard a lot in the previous panels about education and excellent programmes that are in progress. Alma talked about how she is already using material from the archives. Plenty of material is already available. I saw things done by the Outreach that I also use in lectures in Switzerland to teach students about what is going on here. Plenty of material is available, and it can be used in educational programmes; there is plenty of experience from Latin America on how archives of truth commissions, judicial archives of national judicial authorities are used and made accessible to educational programmes and the media.

This is one of the issues that should also be discussed: how do we use the material that is open to the public, and how to use it to foster dialogue and to discuss the context of histories. This is done in other contexts, as well. Contested history is not something that exists only here; it exists in other countries. Archives are and can be used to foster discussions. I have just seen this really impressive picture on this postcard. Things like this can personalise stories and touch emotions. Even if an archive looks boring from the outside, it contains plenty of material that can really touch people. It can tell stories about individual victims, and this is something that we should think about. We should also look at other examples and see how it is done in other contexts.

### **Thomas Osorio, UN Rule of Law and Human Rights Advisor, BiH**

I think it might be a good time to pass on to the Deputy Mayor since the Mayor of Sarajevo has made an interesting proposal that is under discussion. Please, you have the floor.

### **Miroslav Živanović, Deputy Mayor of Sarajevo**

Thank you. I would like to greet all the participants in this very important gathering.



I will try to touch upon the topic of this panel: the importance of the archives of the ICTY. Let me say in that regard that, from the perspective of the city of Sarajevo, the importance of the archives has been long recognised, which has been also reflected in our communication with the ICTY during which we expressed our willingness to be host to an institution that would allow the archives of the ICTY to be accessed by the broader public. We are aware of the fact that these are extensive materials, and that is why we carefully followed discussions and debates about the final fate of the ICTY materials.

Today we have been given a very important handout titled “ICTY Global Legacy Assessment”. I certainly support everything that was said earlier regarding the manner in which the materials have to be handled and the type of services to be offered by certain institutions or agencies that would be entrusted with the management of the archives. However, what should be emphasised here is the motive. Why are we thinking about this? Why do we want this?

### **Sejdalija Gušić, Archival Service of BiH**

Good afternoon. My name is Sejdalija Gušić. I have something to say on behalf of the Archival Services of Bosnia and Herzegovina. I have a question regarding Panel 2.

During Panel 2, we spoke about the Mechanism that should become operational in July next year. Its mandate will be renewed every two years. In the resolution of the Security Council from late 2010, it has been declared that the archives of the ICTY would be operationally managed by the Mechanism that will be subject to renewal every two years. Is there any limitation placed on the number of renewals for this Residual Mechanism? Was it decided in the resolution upon the ultimate location of the archives of the ICTY?

If I may add something else, I will allow other archivists to say something, as well. With regard to the ownership of the archives, Mr Madacki inspired me to say a few words. In late December 2007, a delegation headed by **Mr Tetler** and **Ms Celia Aptal** from the archives was here. The archivists of Bosnia and Herzegovina shared a unique position at the time, and, if you allow me, I would like to read something about the ownership of archive materials originating from Bosnia and Herzegovina that are being kept at the ICTY in The Hague.

**Sejda lija Gušić, Archival Service of BiH**

“Under the provisions of the national legislation and international legal instruments the principles of ownership and use of archives have been clearly established. The principle of functional pertinence and unity of archive materials is promulgated, meaning that the archives are the property of the area from which the materials originated. Something taken from an area is to be returned.

“Based on the said facts, it is clear that the archive materials used or in use before the ICTY are the ownership of Bosnia and Herzegovina. Therefore, upon the completion of the activities of the Tribunal they should be returned to the institutions of Bosnia and Herzegovina, where they were taken from, as a valuable legacy that belongs to Bosnia and Herzegovina.”

I would like to hear comments from Madam Baumgartner on this.

**Thomas Osorio, UN Rule of Law and Human Rights Advisor, BiH**

Thank you for your question. I believe that it is very important. I am really glad to have Madam McIntyre here with us. She deals with these issues, and I believe she will be able to answer your question.

**Gabrielle McIntyre, Chef de Cabinet for ICTY and MICT President**

With respect to the mandate of the Residual Mechanism, it has a first mandate of four years, and then it is to be renewed every two years. We anticipate that it will have a lengthy life because it is mandated to protect witnesses and victims, to monitor the enforcement of sentences, and to initiate contempt proceedings if anyone violates protective measures. We do not know how long it will last, but until these people are still living, there needs to exist a mechanism to deal with issues that may arise. The delegation that you referred to predicted that in 2090 no one of those involved in some way in the Tribunal proceedings would be still alive.

With respect to the ownership, one of the reasons why the United Nations exert ownership of the material is that it is part of the judicial record, and

you cannot just take it out of the judicial record. That would violate the integrity of the judicial record. There is much evidence in the possession of the Prosecution that was not used in evidence, and they are still developing their policies as to what they will do with it. I am not sure how many of the documents that we have are originals. I read in one of the reports that plenty of the material that the Tribunal had, are copies of the originals and that the originals were returned at the time. So, I am not sure how much of the material is actually original.

### **Elisabeth Baumgartner, Head of Dealing with the Past Programme, Swiss Peace Foundation**

I agree that a solution has to be found for original documents or exhibits that are of importance to the history of the country. But it is important to keep the archive as a whole; even if copies have to be used. One has to check what we are talking about, what records, what artefacts you are referring to. That is probably something that has to be decided together with the national authorities. We are not talking only about Bosnia but also about other countries that have an interest to get these materials back. As for the persons involved, their protection is the most important, and that is what has to be kept confidential.

### **Izet Šabotić, Director of Archives of Tuzla Canton**

Good evening. My name is Izet Šabotić. I am the director of the Archives of Tuzla Canton and a professor at the Faculty of Philosophy at the University of Tuzla. I have been working in this field for some 25 years. I feel a professional obligation to join this discussion on this important topic and share my views.

My colleague Gušić made some remarks, and I will try to briefly respond to what colleagues Madacki, Gabrielle and Elisabeth said. What is crucial, in my opinion, and it has to do with the archives of the ICTY, is the respect of and adherence to the international documents that clearly defined this issue. In our contacts and conversations we always insisted on adherence to these documents. They concern several crucial issues that were raised here: the ownership, protection, and use. I am not so sure that what we heard today offers the best answers or solutions. Why? Because in resolving this issue, we should have involved the institutions and professionals, such as International Council on Archives as the umbrella institution as well as na-

tional institutions from the territory of Bosnia and Herzegovina. If we involve such institutions, we will come closer to the resolution of these issues.

Saša mentioned usage and protection. We should always say first protection and then usage. The protection of archives is a complex issue. How to protect them? How to use these archives practically is another complex issue. This is a part of our memory today, and in five years, and in 150 years. We want to have clear mechanisms that will make this memory of ours available in the next 100 years or more. We need that information for processes that will be initiated in different institutions in Bosnia and Herzegovina, but these archives are important for science and society as a whole.

**Thomas Osorio, UN Rule of Law and Human Rights Advisor,  
BiH**

I will ask Saša to comment on this.

**Saša Madacki, Director of Human Rights Centre of  
University of Sarajevo**

I entirely agree. I never really focused on what should come first and second. I always spoke from the perspective of the beneficiaries and people who are most interested in gaining access to the archives. We are talking to the interested parties here. The safekeeping of the material will be discussed through the Residual Mechanism, as well.

As for the International Council on Archives, I am surprised to hear that they have not been involved in the process, although they are familiar with the topic. You raised an excellent question as to why the International Council on Archives does not join these processes. We should seek their opinion. This association has no authority other than advisory. They provide advice. They do not have legislative or executive powers to mediate or regulate, but they shall provide opinions and advice on certain issues. It is in the statute of the International Council of Museums, International Federation of Library Associations and Institutions, and International Council on Archives.

**Elisabeth Baumgartner, Head of Dealing with the Past Programme, Swiss Peace Foundation**

I have to say that there is actually a study provided by the most known archivist; she is the President of the human rights working group of the International Council on Archives. She has proposed the idea of having judicial archives maybe in The Hague, or another place. The Hague already has many archives of international tribunals: the International Court of Justice, the International Criminal Court. The idea comes, actually, from a member of the International Council on Archives for different reasons: to foster research, to secure the archives in a very professional manner, to have them managed by professional archivists, and to have them in one place. Managing these kinds of archives is really expensive. Many resources are required to secure them properly, to have the backup properly done, and to have all these archives physically in one place. Having them physically in one safe repository does not say anything about who the owner is and who has access; that is another question. So, there is advice from the International Council on Archives, and I recommend the study. It is advice; they do not have decisional power.

**Janko Velimirović, Republic Centre for War Crimes Investigation, RS**

Good evening. My name is Janko Velimirović, Centre for War Crimes Investigations in Banja Luka. I will follow up on what my colleagues said about the legal definition of ownership and management of archives.

In 2008, the Presidency of Bosnia and Herzegovina gave an order, advocated the idea or advice to start resolving these issues through the Archive of Bosnia and Herzegovina and the Ministry of Justice of Bosnia and Herzegovina. The National Assembly of the Republic of Srpska considered this idea and the point of view of the member of the Presidency of the Republic of Srpska who blocked this order, and it was concluded that this matter was of interest to national security. The position of the Government of the Republic of Srpska is to return the archives to those from whom they were seized. In the years after the war, the Hague Tribunal, with the assistance of SFOR, entered the facilities in the Republic of Srpska several times, seized certain archives and took them to the Hague Tribunal. Those archives included plenty of materials that were not used during the prosecution of cases, but they are important for the functioning of the archives

in the Republic of Srpska in terms of one's affiliation with certain military units and the exercise of specific rights arising from that membership. They also include some materials from the radio and television of the Republic of Srpska. They are no longer available to us because they are still at the Hague Tribunal. We request that these archives be returned to the Republic of Srpska. There was a proposal that the archives be returned to Sarajevo. We propose that two centres be established: one in Banja Luka and one in Sarajevo. Sarajevo can take what belongs to them. We made a similar presentation at the conference in 2010, and we will stand by our position on the return of archives to their original owners.

### **Zijad Smajlović, Citizens' Association for Justice, Peace and Right of Return**

Thank you for allowing me to speak again.

I think that we have somewhat sidetracked from the very essence of this conference in the last three panels. The archives that were generated in the ICTY are of key importance. We know that these archives came into existence based on the statute, conventions and rules governing the work of the Tribunal. These archives were obtained from various sources and used as evidence. The archives also include the evidence used by the Office of the Prosecutor to document war crimes and genocide. These archives can have the character of public archives. They came into existence upon the order of the prosecutor or the court. That material should be given to Bosnia and Herzegovina. Those of you who work at the International Court know that the International Court, as of 2005, initiated a series of expert research projects on this topic.

I would like to quote one of the conclusions of those researches: "Research on modality of the transfer of archives of the ICTY to the national jurisdictions in the region by the regional office of the United Nations Development Programme in Belgrade, with the assistance of four regional offices. As the result of the research, a large number of experts recommended that the archives of the Court, upon its closure in The Hague, should be preserved in Sarajevo in Bosnia and Herzegovina. This recommendation was based on the fact that the Court of Bosnia and Herzegovina has its Department for War Crimes that was formed in 2004 and 2005 and that should continue prosecuting the remaining cases. The number of 16,000 cases has been mentioned. This Department is thus the legal successor of the Tribunal."

Having in mind this and other research, this conference should put forward recommendations. It is already too late for recommendations because the decision has been taken in the Security Council, and it will be implemented. However, Bosnia and Herzegovina has to become the formal owner of the archives for only one reason: if someone thinks that transitional justice will achieve its purpose without completing the prosecution of war criminals, they are terribly mistaken. I come from Srebrenica, and every day I look at the man who took my father off the truck. My father was 70 years old, and he has never been found ever since. If that is transitional justice, you should tell it to my face.

### **Zijad Smajlović, Citizens' Association for Justice, Peace and Return**

If I may say one more thing: this is a professional issue, and professionals should deal with this issue together with all relevant institutions in Bosnia and Herzegovina, primarily scientific and legal institutions, religious institutions, police authorities and other organisations, for the benefit of the victims. For us, the victims of the genocide, the archives are very important for historical research, and to show how gravely human rights were breached so that Srebrenica never happens again. It is important for our families and others who need to deal with these events and what happened in the region. The governments in the region can make progress only if they admit to the crimes and apologise. This is the only way for them to successfully deal with the past and build democracy in their countries. I know that there are other parties interested in the archives and the legacy of the ICTY, and their right to access these archives should also be taken into account. Thank you.

### **Haris Zaimović, Director of Historical Archives of Sarajevo**

Good afternoon. My name is Haris Zaimović. I am the director of the Historical Archives in Sarajevo.

When we talk about the taking over of the archive materials by Bosnia and Herzegovina, I have to say that it requires certain conditions. It is very expensive. We are directors of various archives, and we are well aware of how difficult it is to place archives in a suitable facility. Currently, in Bosnia and Herzegovina there is no facility that is physically big enough and no technology for storing and preserving this amount of materials. It would



be better to invest in the existing facilities in Bosnia and Herzegovina so that we can represent ourselves as persons who truly care about the archives. Only then we will be able to talk about the potential transfer. It is my honest desire that the materials be returned to Bosnia and Herzegovina. Realistically speaking, we currently do not have conditions for that. This is a topic that requires a conference of its own that would bring together experts from various countries from the region and the world who would discuss the accessibility to the archives of the ICTY and its future. The experts should have the last word about this. Thank you.

### **Hasan Nuhanović**

Good afternoon. I was not here the whole time during the conference, so I hope I will not jump to another topic.

An hour and a half or two ago, I was here when the representatives of the Tribunal talked about the issue of ownership. If we, and I am referring to the three constituent nations of this country, had been able to agree on the ownership of things, we would not have needed the ICTY. So, I would like to ask the Tribunal and the international community to include in their exit strategy all available mechanisms to ensure that the prosecution of war crimes in Bosnia and Herzegovina and the entire region does not stop when the Tribunal closes its doors. That would be my message and my demand, I would say.

I demand from the Tribunal not to leave us. Had there been an intervention in 1992, we would not have needed the Tribunal. The Tribunal was a remedy for the consequence that could have been prevented. This is my message to the Tribunal representatives, the UN Security Council, and everyone else. It would be cynical to leave things half-way done, even though the achievements of the Tribunal are immense: 161 completed cases. We are truly grateful for their work and efforts. We know that it is the problem of the local contexts and people, but it is cynical to say that we should take over the ownership of the problem that is not ours alone. The crime against humanity is not the crime against Bosniaks, Serbs, and Croats only. It is the crime against all humanity, and you are a part of that humanity.

### **Thomas Osorio, UN Rule of Law and Human Rights Advisor, BiH**

Thank you. I believe this perfectly concludes the work of this panel.

If the panellists have anything to add, I will now invite them to do so.



### **Miroslav Živanović, Deputy Mayor of Sarajevo**

I completely support the remarks made by our last speaker. No one can deprive us of the ownership of the materials kept in the archives. The archives help with dealing with the truth and the past. They enable progress and reconciliation in this country and should be used, and that is what we should think about and work towards. We will see what will happen with the archives in the end. For the time being, it seems to me that it is important to use the materials in a responsible manner for the sake of a better future of these people.

### **Elisabeth Baumgartner, Head of Dealing with the Past Programme, Swiss Peace Foundation**

I can only support this, and I am really glad to hear the remarks from the professionals. I think it is really an issue that has to be further discussed. There are many details about the originals, artefacts, and what will happen with them. I agree that a lot can be used before these questions are resolved.

### **Saša Madacki, Director of Human Rights Centre of University of Sarajevo**

I absolutely agree with colleague Zaimović when it comes to the transfer, but let us draw a distinction here. It is one thing that we have publicly available documents the copies of which need to be made in digital format as soon as possible so that we can start the process of dealing with the past in formal and non-formal education. When I say formal education, I am referring to the establishment of legal clinics at the faculty of law that would use these materials for educational purposes. In the field of non-formal education, there are very good initiatives by non-governmental organisations that organise summer schools and academies for minors, youth, and adults where the materials can be used for educational purposes, research and scientific work, which would ensure that these materials are not forgotten.

The second issue is about the transfer of originals. Given the decision of the UN Security Council, it will be very difficult to resolve that issue. For me, as a person from the sphere of education, the most important is to put these materials to use as soon as possible and make them available to the

judiciary in order to finalise proceedings. The issue of the transfer and the issue of the originals is a parallel process, but it is a separate issue.

### **Gabrielle McIntyre, Chef de Cabinet for ICTY and MICT**

#### **President**

I would like to say that you can at least be confident that the archives will be properly preserved by the United Nations. To preserve the archive is one of the mandated responsibilities of the Mechanism. Our main focus directed on the archive concerns the accessibility. I have to point out that most of our public material is already available to you through the website; so, you do have access. The whole idea of information centres is to try to make better use of material that is available. The statute of the Residual Mechanism puts an obligation on the Mechanism to assist national judiciaries that in accessing confidential material. Requests for variance of protective measures can be made, like they are now made by the courts. There are certain conditions that have to be met, but provided that they are met, the material will be available to local courts.

### **Thomas Osorio, UN Rule of Law and Human Rights Advisor,**

#### **BiH**

I can only thank you all for the remarks you made. You are the final beneficiaries of this. I followed this dialogue related to the archives and I believe that it is in your interest to make suggestions about how to make the best use of the archives and how to enable access to those materials.

## **CLOSING REMARKS**

Moderator:

Nerma Jelačić, Head of Communications, ICTY

### **PANELLISTS:**

- Judge Fausto Pocar, ICTY
- H.E. Jurriaan Kraak, Ambassador of the Kingdom of the Netherlands to BiH
- H.E. Andre Schaller, Ambassador of Switzerland to BiH

### **Nerma Jelačić, Head of Communications, ICTY**

Thank you, Thomas. Thank you, panellists. I would like to thank you all who stayed until the end. I will ask for 30 minutes of your attention to close the conference. Please rest assured that all your opinions, remarks, and questions have been duly noted and will be transcribed and taken into account when future activities are considered.

I will now invite Judge Fausto Pocar, former President of the ICTY, to give his closing remarks.

### **Judge Fausto Pocar, ICTY**

At the conclusion of this significant conference of the Outreach Programme of the Tribunal, I would like first to reiterate the thanks of the ICTY, which were already expressed by my colleague, the Vice-President of the Tribunal Judge Agius, particularly to the sponsors of the conference: the European Union, the Government of the Netherlands and the Government of Switzerland, which have made this event possible. I would also like to express my gratitude to all the persons in the Tribunal and outside the Tribunal who have co-operated in the organisation of the conference, which I do not hesitate to describe as perfect in all respects.

All the four panels were characterised by an extremely interesting and rich debate based on the statements of the panellists whom we want to thank and the interventions of the participants in the conference. I think that all

of them have made an excellent contribution to the success of the conference.

Coming to the substance of our deliberations, it is perhaps difficult to draw now final conclusions from today's debate. It has been, I believe, an excellent and open opportunity to express views and proposals concerning the legacy of the ICTY and important issues such as the archives of the Tribunal.

The material and moral aspects of the legacy have been deeply considered by the participants. The variety of the subjects raised today will have to be considered in depth and will help to shape the best policies to ensure that the legacy of the Tribunal does not get lost and is used the best way possible. I, for one, take back with me a number of ideas. I listened to, with careful attention, all the interventions that were made today; I did not miss one. The material for reflection that has come out today is very significant.

I will not try to dwell on all that has been said today. I only want to take up shortly a couple of questions in this conclusive statement. First, the ICTY legacy is offering a unique opportunity to this country as well as other countries of the region concerned with the events of the '90s. It is now, as it was said today by many speakers, to you, to this country to make use of the legacy of the Tribunal, to develop reconciliation in the country and to develop the rule of law in the country. It is true that the legacy is the legacy of the ICTY, but it is now a tool in your hands. It is a legacy that has been the product of an activity that has been done for the countries in the region; it has been done for you, not for the ICTY as such. It is our legacy, but it belongs to you now. We would like the legacy to become a tool in your hands to be used the best way possible and to guide you in your deliberations. We would like the legacy to become useful for you, to become a basis for your work, letting aside, as much as possible, the confrontation that has also emerged in the debate today.

So, my recommendation would be: take that legacy, make of it the best use possible in your interest because this is what we were aiming at. In this context there is one aspect I would like to reiterate. It is the educational side of it. It is important that this is taken up. You have the advantage of having a partial assessment because it is inevitably limited; the number of cases we took up is limited compared to the total number of pending cases. But it is an assessment that has been done by neutral people. The judges in the ICTY have been and are neutral people. They have not taken any decision based on other things rather than the records of the cases. My wish is that you, instead of debating about what happened, take at least what has been

assessed by an impartial body of the United Nations and make use of that assessment to build on it for the future. What is important, what is the goal of this exercise is that you live in a better world and that your future generations may not be exposed to what happened in the country 20 years ago.

Last consideration: the archives. We have debated here about the ownership, use and location of the archives. As for the ownership of the archive that is now of the United Nations and whether it can be transferred, or it cannot be transferred, I do not know what will happen with that in the years to come. Certainly, for the time being they will remain with the structures of the ICTY as long as they exist and then with the structures of the Residual Mechanism of the Tribunal. I do not know what will be decided later, but one thing is clear to me: whoever will be the material owner of the archives, morally these archives are yours. With that I conclude my intervention.

Thank you for your attention.

### **Nerma Jelačić, Head of Communications, ICTY**

Thank you, Judge Pocar.

I will now give the floor to His Excellency Yurriaan Kraak, Ambassador of the Kingdom of the Netherlands to Bosnia and Herzegovina, to address the gathering.

### **H. E. Jurriaan Kraak, Ambassador of the Kingdom of the Netherlands to BiH**

Judge Pocar, Excellencies, distinguished guests, ladies and gentlemen.

The Netherlands has been there from the beginning, hosting the ICTY in The Hague. After the Nuremberg and Tokyo trials the ICTY was the first major international criminal tribunal. Apart from its impact on the development of international law, the Tribunal was also of decisive importance for The Hague becoming the international law capital of the world. As Judge Agius said this morning, all its 161 indictees have been brought before the Tribunal. That accomplishment not only exceeded the expectations of many, but also sent a very clear and powerful warning to the entire world. This time those guilty of crimes against humanity in Europe will not esca-

pe justice. You can run, you can hide, but one day you will end up in The Hague, where besides having to face challenges of a legal nature, you run the risk of being subjected to the terrible ordeal of Dutch cuisine. However, the legacy of the ICTY is not limited to the number of indictments and verdicts. Its impact is more profound. For example, any serious breach of international humanitarian law is now considered a crime, and rape has been qualified as a war crime. In this context I would like to highlight one of the lines of jurisprudence as being of particular importance to Bosnia and Herzegovina. In 2004 the Appeals Chamber unanimously ruled that the massacre of the male inhabitants of Srebrenica Enclave constituted genocide, a crime under international law. Ever since the denial of that genocide should immediately be disqualified as a *male fide* exploitation of sentiments and a mockery of the feelings of those who survived the atrocities of July 1995.

The legacy of the ICTY needs to live on. In this regard, my authorities are convinced that continued regional support for the fight against impunity is indispensable. Completing the process of rendering justice for crimes committed during the wars in the former Yugoslavia is vital for lasting reconciliation. Also, like Ambassador Sørensen pointed out this morning, full co-operation with the ICTY remains an essential requirement for the stabilisation and association process in the Western Balkans and is a critical condition for membership of the EU. And now, as the ICTY is gradually transferring its competencies to the Residual Mechanism, the burden of responsibility for the prosecution of international crimes and war crimes will now, more than ever, fall upon the national authorities. In Bosnia and Herzegovina the State Court plays a key role in this respect. I would like to recall that, through the State Court, Bosnia and Herzegovina was the first country in the Balkans able to try its own war criminals in its own specialised court in its own territory.

Current attempts to undermine and weaken the State Court are reasons for great concern to my Government, and should cease. Also, looking at the slow pace of implementation of the war crimes strategy is a matter of concern. The amount of cases that are waiting to be dealt with is significant, and the number of perpetrators that have not been brought to justice considerable. Therefore, the Netherlands authorities deem it imperative that the Government of Bosnia and Herzegovina pursues, with much greater vigour, the proper conduct of domestic war crimes trials. Political leaders should avoid comments and measures that call into question the importance of reconciliation and the need to serve justice with the prosecution of war crimes. But we are under no illusion. It is difficult, and results do not come easy. The discussions of today made that clear. But, as I said, continued

commitment to the prosecution of war crimes requires regional co-operation, mutual provision of legal aid, exchange of evidence and extradition. This has proven to be a challenge in the past. Ambassador Sørensen made the same point this morning. My government urges the political leaders of Bosnia and Herzegovina to prove that they take their responsibility in this respect seriously and urges them to overcome these challenges as soon as possible. The Netherlands, jointly with Belgium and Slovenia, has taken the initiative to prepare a multi-lateral treaty on precisely these subjects. The exchange of evidence between countries, the mutual provision of legal aid, and extradition are of paramount importance for the prosecution and proper adjudication of international war crimes.

Ladies and gentlemen, distinguished guests, Your Honour, Excellencies, I said in my opening statement that the Netherlands has been there from the beginning. We will also be there at the end, hosting the Residual Mechanism. The largest burden to the justice, to the legacy of the ICTY in Bosnia and Herzegovina, however, rests now on the shoulders of authorities in this country. I can only repeat what Judge Pocar just said; they are in a unique position to enable justice being done to so many to whom the wars of the '90s caused immeasurable misery. Let there be no doubt about our position. We are not indifferent to the sensitivity and complexity that this region's recent history has caused. We know it is painful. We know it is difficult. And we know that it will take a lot of courage of all parties and institutions concerned. We also know that it is necessary. The Netherlands remains committed to the ICTY and its legacy. We will continue to support its contribution to lasting peace and stability. Thank you very much.

### **Nerma Jelačić, Head of Communications, ICTY**

Thank you, Ambassador.

Now I will invite His Excellency André Schaller, Ambassador of Switzerland to Bosnia and Herzegovina.

### **H. E. André Schaller, Ambassador of Switzerland to BiH**

Good evening, ladies and gentlemen, participants. I know I am in a very tight spot here because I stand here between you and the closure of the conference. So, I will be very brief and make four remarks.

First, thank you very much for your committed comments and contributions as speakers and as participants. I am aware that you come from many

different circles interested in transitional justice in Bosnia and Herzegovina: you come from victims' associations; you are judges; you are prosecutors; you come from the international communities; you are professors, journalists, representatives of civil society; you come from all over Bosnia and Herzegovina. You discussed essential aspects of the legacy of the ICTY. I realised very much through your discussions that such discussions are still painful to you. I think that one of the important legacies of the ICTY is that you continue these discussions and that you discuss with each other showing mutual respect. This is, in my opinion, an essential obligation of the legacy of the ICTY in your country.

Second, we all know that human rights violations do not happen in the abstract. They affect real people in real situations, in their homes, in schools, among families and friends. Accordingly, the work of justice has to be done for people in their daily lives. It is a task that now lies with your courts, the courts of Bosnia and Herzegovina, but also with civil society. Justice, on the one hand, needs to be rendered, but it needs also to be seen as rendered. This is the groundwork for future reconciliation.

Third, let us keep in mind that the ICTY legacy refers to the past and the future. My dear colleague, Deputy Mayor Miroslav Živanović, quoted the basic document on transitional justice. On the one hand, we look back because we know that the victims and their families have to be at the centre without any discrimination. They have the right to know. They have the right to get assistance. And they have the right to justice. We owe them human compassion. On the other hand, we look to the future. We have to ensure and take all the measures that we can, so such atrocious human rights violations never happen again.

Fourth, and last, when we look to the future, let us also think of the young generation. It is important to give the young generation a positive perspective. Many of the speakers have referred to that, including Alma Mašić with her Youth Initiative for Human Rights. When I talk to the young generation, no matter what ethnic group they belong or what part of Bosnia and Herzegovina they come from, they all want a good education in recent history and human rights, good professions, jobs so that they can earn a living for themselves and their families. Ladies and gentlemen, other countries do it successfully. Bosnia and Herzegovina can do it as well.

Thank you. This concludes the conference.





**LEGACY OF THE ICTY  
IN THE FORMER YUGOSLAVIA**

Zagreb, 8 November 2012



## OPENING REMARKS

Moderator:

Nerma Jelačić, Head of Communications, ICTY

### SPEAKERS:

- Judge Carmel Agius, Vice-President, ICTY
- Judge Ana Garačić, Vice-President, Supreme Court of Croatia
- Martin Mayer, Political Adviser, Delegation of the European Union to the Republic of Croatia
- H.E. Ms Stella Ronner-Grubačić, Ambassador of the Kingdom of the Netherlands to the Republic of Croatia
- H.E. Mr Denis Knobel, Ambassador of the Swiss Confederation to the Republic of Croatia

### Nerma Jelačić, ICTY Head of Communications

Good morning and welcome to the conference on the ICTY Legacy in the former Yugoslavia, organized by the Outreach Programme of the Tribunal, with the support of the governments of Switzerland, the Netherlands, as well as the EU. My name is Nerma Jelačić and I am the chief of the Communication Service, as well as of the Outreach Programme. One of my roles today is going to be to take you through the Programme of this meeting. Many of you are aware of the fact that similar conferences took place over the last couple of years in The Hague since many of you attended them. These conferences were organized under the sponsorship of the former President of the court, Mr Patrick Robinson.

One of the key conclusions of those conferences was that the dialogue on the heritage of the Tribunal should also take place in the countries of the former Yugoslavia. We had the first such conference in Sarajevo two days ago, Zagreb is our second destination, and at the end of November we will be having the same discussion, on the same topic, in Belgrade, Serbia. Today, alongside judges from the ICTY and senior officials of the court, you will be able to hear views on the heritage of the Tribunal and the needs of the communities in the former Yugoslavia, from national jurisdictions to civil society organizations, the media, and NGOs.

I would like to invite you to actively participate in the discussions. Each panel is organized in such a way that half of the time is planned for you and your views. That is why we wanted to have as many participants as possible so that we could have an opportunity to have as broadest range of views and options on the heritage of the ICTY and the legacy of the ICTY as possible. Now I would like to give the floor to the honourable Judge Mr Carmel Agius who is the Vice-President of the ICTY – to officially open this conference. The floor is yours.

### **Judge Carmel Agius, Vice-President of the ICTY**

Thank you, Nerma. Excellencies, ladies and gentlemen, good morning and welcome to this conference on the legacy of the ICTY in the former Yugoslavia. I would, first of all, like to acknowledge the presence at this conference of the Assistant Minister of Justice of the Republic of Croatia, the Ambassador Gordan Markotić: Good morning; and of two ambassadors, the Ambassador of the Kingdom of the Netherlands to the Republic of Croatia, her Excellency Stella Ronner-Grubačić, and his Excellency Mr Denis Knobel, Ambassador of the Swiss Confederation to the Republic of Croatia; as well as the presence of the Vice-President of the Supreme Court of Croatia, Judge Ana Garačić, and that of Martin Mayer, the Political Advisor to the Delegation of the EU to the Republic of Croatia. Then of course, I would like to mention Judge Ksenija Turković who is a new Croatian judge on the European Court of Human Rights, and Ms Jasmina Dolmagić, Deputy Chief State Prosecutor of the Republic of Croatia. Last but not least, Gabrielle McIntyre, Chef de Cabinet of the ICTY, and my dear colleague, and former president of the ICTY, Judge Fausto Pocar.

Your presence at this Conference is of great importance and I wish to thank you all for being here, and giving your contribution to the success of this meeting. It is a great privilege for me to address you today, at the start of this conference on the legacy of the ICTY. I started by acknowledging the great efforts made by the Tribunal's Outreach Programme, which made this unique event possible. This Outreach Programme has been criticised many times in the past, and in my opinion very unjustly. They have been doing sterling work, particularly here in the area of the former Yugoslavia. So, not only I congratulate you for your work, but I also thank you for organizing these conferences. My deep gratitude also goes to the European Union and the governments of Switzerland and the Kingdom of the Netherlands. Your long term commitment to the work and mandate of the Tribunal can, once again, be seen in your generous support of these events.

Today, based on the information I have received, I can see an extraordinary gathering of people of all walks of life and from all over the Republic of Croatia, and also—I am told—beyond. You may disagree amongst yourselves on several matters. You may also have diverse opinions on the ICTY and its legacy. But there is one thing that unites you all, and also unites us, the ICTY, with you, and that is the commitment to justice and our whole-hearted hope that the Tribunal's work and legacy will continue to spur Croatia on its path to deal with the legacy of the war. The war that affected and continues to affect every single citizen of this great country.

It is a particular honour for me to open this discussion here in Zagreb and I thank the President of the Tribunal, Theodor Meron, for giving me the opportunity to be here. This country tragically was the first one to see the shape of things to come in other parts of the former Yugoslavia. Few expected in 1991 that the shocking pictures we saw from, in, and around Vukovar and the entire former Yugoslavia, destruction of cities and villages, plunder, murder, unlawful detention, unspeakable suffering of civilians fleeing from their burning homes, would spread so much. Zagreb itself was not spared either. The Tribunal indicted and put on trial almost twenty individuals for crimes committed throughout Croatia, many of them notwithstanding their high positions of political and military hierarchy and regardless of their ethnic origin.

I look at Zagreb today. Its graceful beauty - and you can admire it even from here on the 17<sup>th</sup> floor of this hotel - its dynamism and the affability of its residents, and I am struck by how much the war seems to be a thing of the past. You've come a long way. But is the war really a thing of the past? Despite the remarkable achievements in Croatia's post-conflict recovery, the wounds of war, in my opinion, are still not healed, are still open, in any event many of them are. This conference focuses on the present, but also on the future of this country and its people. Just as a house cannot be constructed on shaky foundations, similarly, the future cannot be built without a proper and honest account of the past.

As the Tribunal approaches its 20<sup>th</sup> birthday and at the same time prepares to retire from the stage, we are faced with the question: What are we leaving behind? And truly, we are leaving behind a world that has undergone a tectonic shift, a world in which people have a completely different view of the necessity and practicability of ensuring accountability for war crimes. Twenty years ago, hardly anyone believed that ICTY would be able to hold a proper investigation, let alone conduct a trial. I remember... I was not a judge at ICTY back then - but I remember that the general opinion, when the ICTY was set up way back in 1993, was that it would practically

close down within a year or two, or maybe, if at all, it could prosecute one single individual, but I can assure you that no one envisaged that twenty years later we would still be here, with three ongoing trials, several appeals pending, and in the situation where the ICTY can boast that it has brought to justice all of the 161 persons it indicted. I can assure you, this was not a dream, this was not envisioned, no one foresaw it, but it happened. The countries in the former Yugoslavia, at the time, were torn apart by war. The judiciaries were not able to cope with the volume of crimes committed almost daily. Many local leaders turned their back on the Tribunal's work. Not only local leaders but those in other countries as well.

Today, the Tribunal is a leader in the global fight for justice, having indicted – and accounted for – 161 people. Arguably, these people would have never been brought to account if it was not for the ICTY. All were given a fair trial, conducted to the highest standards of criminal procedure and due process laws. The Tribunal has been the source of some of the most groundbreaking jurisprudence and ensured that, in the future, perpetrators will be tried on the basis of a sophisticated body of substantive criminal law and procedural law. Nuremberg and Tokyo did leave a very strong legacy when it comes to substantive international criminal law and international humanitarian law, but the recent development in these laws has certainly been enhanced by the ICTY and the ICTY has filled in a lacuna that was particularly and conspicuously noticeable after the Nuremberg and Tokyo trials – namely, the lack of adequate and proper specific procedural law for the trials for international crimes. We have, over the years, created our own body of procedural law which has, in turn, served as the basis for the proceedings of evidence and the procedure of other tribunals. It has also served as the basis for the enactment of the rules of evidence and procedure of the International Criminal Court—although there are variances, some of which are also quite important. This is also part of our legacy.

However, Excellencies, and ladies and gentlemen: for justice to be meaningful it has to have an impact outside of the courtroom, outside of The Hague. This is why we are also asking ourselves: How can we ensure that the people in Croatia and, for that matter, the people in the entire region of the former Yugoslavia, be assisted in understanding and fostering the legacy of this institution? There is no other group more interested in the ICTY's legacy or more suitable to take ownership of it. And I hope we will all agree that your country and your people need it too. I can assure you that the Tribunal hears and understands this need. That is why we are here this morning. The two legacy conferences held in The Hague, that were referred to by Nerma, way back in 2010 and 2011, laid the groundwork for the ICTY's thinking surrounding its heritage and allowed us to take stock

of the needs of various stakeholders. Today's conference marks the success of what we have started and now the dialogue continues in the region. We commenced two days ago in Sarajevo and after this meeting here today we will continue later with another meeting in Belgrade. During all these meetings in the region, the main stage belongs to the local experts, victims' associations, judges and prosecutors, human rights activists, leaders of academia and politics, as well as the media.

The Tribunal's representatives are here to listen and to learn which tools and information you need, as well as what can we do together to ensure that the ICTY's legacy lives on and acts as a catalyst for change. The legacy of ICTY, the facts it has established, its archives and its contribution to the rule of law in the region, will certainly play a decisive part in the process of facing the past and securing reconciliation – not only among yourselves, but also among the other countries in the region. The Tribunal's legacy will be fulfilled when it inspires this generation to continue transforming Croatia through the rule of law, accountability and equal justice, and when this generation succeeds in passing this lesson to their children and grandchildren. We can then say that the efforts we have all made have been successful. If we all succeed, it will not only be the Tribunal's legacy. We all are contributing, but the main role is yours. After what happened in this country in the 1990s, you owe this to yourselves, to your children and to your noble country, especially as it prepares to join the family of nations known as the European Union. I wish you all a very successful conference, and I thank you all for being here. Thank you.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you, Judge Agius. Now I would like to give the floor to Judge Ana Garačić, Vice-President of the Supreme Court of Croatia.

### **Judge Ana Garačić, Vice-President of the Supreme Court of Croatia**

Ladies and gentlemen, dear colleagues, I sincerely greet you on my own behalf and on behalf of the President of the Supreme Court of the Republic of Croatia, Mr Hrvatin. He regrets not being able to be here with us today. However, I wish success to this conference because we will exchange views today, not only about the importance of the Tribunal which soon will complete its mandate, but also about the legacy that this Tribunal leaves to all of



us. We believe that it is extremely important that the Outreach Programme of the ICTY has organized these three conferences. As we know, on 6<sup>th</sup> of November a conference took place in Sarajevo, we have this one here in Zagreb, and on 22<sup>nd</sup> – if I am not mistaken - a third conference will take place in Belgrade as well. Using the legacy of the ICTY in criminal proceedings in Croatia is something that we have discussed a lot so far. I would just like to briefly remind you that the Republic of Croatia, at the end of last year, on a legislative level, made changes and amendments to the Law on the Application of the Statute of the ICTY, by which we regulated a very significant area and that is the usage of the evidence collected by the ICTY, so this is a topic that we hold in high esteem. We are starting to think about where to place this evidence, where to storage it. We will probably get copies of the evidence, as I have discussed with the colleagues prior to the beginning of this conference, but at the legislative level we are already prepared. We are prepared to use the evidence collected by the ICTY during criminal proceedings, and we will accept it as admissible evidence, although we will be applying the procedural and substantive law of the Republic of Croatia. This is something very important and I think it is something that maybe we will discuss at greater length during the first panel. Hence, I will just use this introductory part to welcome you once again. I am very glad to have you in Zagreb and thank you for your attention. Thank you very much.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you very much. You are right, this is certainly going to be one of the topics. I would like to ask Ms Stella Ronner-Grubačić, her Excellency, Ambassador of the Kingdom of the Netherlands to the Republic of Croatia to take the floor.

### **H.E. Ms Stella Ronner-Grubačić, Ambassador of the Kingdom of the Netherlands to the Republic of Croatia**

Judge Agius, Judge Garačić, Assistant Minister Markotić, colleagues and distinguished guests: *Dobar dan svima*. What a true pleasure to be in front of you – speakers and panellists, academics, judges both international and national, prosecutors, authorities, human rights activists, and representatives of victims’ organizations, associations! Seeing all of you here seems to be clear proof of the wide variety of people the ICTY has touched and will continue to influence in the future. Today’s conference is all about shaping that future, shaping the future of international justice by preserving the le-

gacy of ICTY and by collecting building blocks to make sure international criminal law will get stronger, more efficient and swifter. Clearly, we have come a long way, and the Netherlands has been there from the beginning, hosting the ICTY in The Hague. After the Nuremberg and Tokyo trials, the ICTY was the first major international criminal tribunal. Apart from being a milestone in the development of international criminal law, the ICTY has also played an important role in The Hague becoming the international legal capital of the world, which I am proud to say it now is.

In the last two decades the world has changed from a place where it was virtually impossible to bring perpetrators of war crimes to justice, into a place where such criminals are running an ever growing risk of being faced with criminal proceedings. The ICTY's success has been crucial in this development. The efficiency and efficacy of the ICTY has also paved the way for other international criminal courts. The ICTY's impact has exceeded the expectations of many. Today, all of the ICTY's 161 indictees have been accounted for. That accomplishment sent out a very clear and powerful warning to the entire world: that perpetrators of these crimes will not escape justice. But the ICTY's successes also relate to the criminalization and qualification of rape as a war crime in international humanitarian law – to name just one example. It has reformed international humanitarian law from a largely academic matter to one of practice and realpolitik. The existence of the international criminal tribunals has changed the international political stage, or to quote the ICTY's President, Theodor Meron: "The ICTY took international humanitarian law out of the classroom and into courtroom." However, peace is not achieved by legal proceedings, as was stated before, and it is also much more than simply the absence of conflict. Lasting peace requires reconciliation. Only time will tell to what extent the ICTY has been successful in achieving its second objective – bringing about the reconciliation. In this regard, the Tribunal's Outreach Programme continues to play a pivotal part. The conference today, and the other held in The Hague, Sarajevo and Belgrade, fall under that heading. The Netherlands is pleased to co-finance these conferences together with Switzerland and the EU.

Ladies and gentlemen, let me turn briefly to the future, as well as to the role of national states. Now that the ICTY is gradually transferring its competences to the Residual Mechanism, the burden of responsibility for the prosecution of international crimes and war crimes will more than before fall upon the national authorities. In Croatia, the role of the State Prosecutor's Office and the judiciary is crucial in this respect. We have seen positive steps, such as shifting wartime cases to four courts with exclusive competence. Furthermore, a number of priority cases identified at national

and regional level have been addressed with further arrests, indictments, and verdicts. However, as mentioned in the EU monitoring report of last month, there are still many cases of *in absentia* verdicts to be revised. Furthermore, additional attention should be paid to witness protection, as well as to enabling the attendance of witnesses in wartime trials. Further efforts have to be made to tackle impunity, especially since the majority of cases have yet to reach the final verdict or are still to be investigated. A continued dedication to the prosecution of war crimes also requires regional cooperation, mutual provision of legal aid, as well as cooperation on the exchange of evidence and extradition with neighbouring countries. This has proven to be a challenge in the past. I invite political leaders in Croatia and the neighbouring countries to take responsibility and overcome these challenges in the near future. In this respect I applaud the technical meetings that Croatia and Serbia organized recently as first steps towards an agreement on legal aid and exchange of evidence.

Ladies and gentlemen, in my opening I said that the Netherlands had been there from the beginning; we will also be there at the end, hosting the Residual Mechanism – which we are honoured to do. The largest burden to do justice to the legacy of ICTY, however, rests on the authorities of this and other countries in the area. You are in a unique position to enable justice to be done on behalf of so many to whom war caused great injustice. Thank you for your attention.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you, Excellency. And thank you for your support for the Outreach Programme, as well as to this conference. The next speaker will be his Excellency, Mr Denis Knobel, Ambassador of the Swiss Confederation to the Republic of Croatia.

### **H.E. Mr Denis Knobel, Ambassador of the Swiss Confederation to the Republic of Croatia**

Excellencies, ladies and gentlemen, I will be very brief. Since this is an experts' meeting, and your time to exchange information is quite limited, I will say just a few words to express how pleased and proud Switzerland is to participate in this important conference and to cooperate with the ICTY and its legacy in the region of former Yugoslavia. My ministry, in fact, is not just giving financial contributions but it is also engaged in concrete

projects, such as our last workshop here in Zagreb, held on the 21 June 2011. This regional seminar on the legacy of the ICTY and information centres in the capitals was co-organized with our partner, *Swiss Peace*.

Today, I am pleased to welcome again contributions from experts coming from Switzerland. My ministry also participated in both of the conferences held in The Hague in 2010 and in 2011. Furthermore, we support other outreach projects such as the Sense News Agency and BIRN justice report on the war crime trials. Switzerland will remain committed to such projects in the future. Why do we do this? Of course, we have the tribunals in The Hague, but we also have some conventions which were signed in Geneva. Because we know that there cannot be peace without justice – it is one of the fundamental principles of post-conflict peace-building. The ICTY was established in order to promote peace and justice, and to promote reconciliation in the region. It was set up in recognition of the primacy of justice. It wants to ensure the accountability of perpetrators and to provide redress to victims. Today, almost twenty years later, we are in a better position to assess the achievements of the ICTY. Indeed, these are important, not only here in Croatia, in Serbia, or in Bosnia and Herzegovina, but also in terms of the global development of the international humanitarian law. These results have been only possible because local governments, including Croatia, have been committed to transitional justice in former Yugoslavia. Yet, we must admit that, still, great challenges lie ahead when we consider the legacy of the Tribunal within the larger framework of peace and reconciliation in the region. Usually, this process of dealing with the past may begin with the ministry of justice, sooner or later it will end at the ministry of education, or at the ministry of culture. Since the establishment of ICTY in 1993, an entire generation has grown up whose understanding of their own history has been shaped by the trial proceedings and verdicts reached in The Hague and in their own countries. It remains for these generations to build up this legacy and to broaden it with their own experiences in the search of truth and justice.

Excellencies, ladies and gentlemen: we cannot redo history, and as everybody knows, there is no second chance in politics, but what we can do, and what we have to do, is write history in a more scientific way. We have to guarantee that lawyers and historians have access to the bases and facts they need in the future. ICTY has to open its archives and documentation in an effective and sustainable way in order to allow future generations to deal with the past and to help us not to forget, and never allow war in this region again. Thank you.

## **Nerma Jelačić, ICTY Head of Communications**

Thank you your Excellency, thank you for your long-lasting support of the Outreach Programme. Now, I would like to give the floor to Mr Mayer from the EU Delegation to the Republic of Croatia.

## **Martin Mayer, Political Adviser with the Delegation of the European Union to the Republic of Croatia**

Judge Agius, Judge Garačić, excellencies, dear friends and colleagues from the ICTY and Croatian institutions, judiciary and civil society organizations, media, and diplomats, I am really glad that the EU has again been invited to give a few welcoming words. Not only because we are co-organizers and sponsors of this event, but also because we feel that the part played by the EU in dealing with war crimes has been acknowledged.

However, war crimes are, unfortunately, only one of several issues with which we are dealing as a legacy of the war - refugees, missing persons, pensions, treatment of minorities and so on, and so forth. Last 10<sup>th</sup> of October the European Commission, in its paper on enlargement, put particular stress on reconciliation, and we have already heard here today about its importance. War crimes have been looked at through the lens of reconciliation. We said in the report: “Completing the programme and the process of rendering justice for crimes committed during the wars in the former Yugoslavia is essential for lasting reconciliation.” We praised the countries’ continuous cooperation with ICTY, and at the same time, we openly wrote that “With the work of ICTY winding down, the governments concerned still face major challenges, tackling impunity for war crimes within their own jurisdictions”. With political will and increased focus on resources, further regional cooperation, and resolution of the problems with the extradition of their own nationals, the countries of the region can ensure justice is done for the thousands of victims of war. There is not too much to add to these words which highlight the biggest needs in tackling impunity: more cooperation, more resources, more focusing on solving the problems of extradition. Continuous political will is indispensable. Here in Croatia we had the first case of a country which had to deal with war crimes during and within accession negotiations – which continues even now, through the European Commission monitoring of its commitments which Croatia undertook during the accession negotiation. This is also a first for the EU.

This is not the right place to talk about the problems we met and the ways

in which we succeeded in overcoming them, together with the Croatian institutions. Progress is evident; however. Since it was the first time, we are now reflecting on ways to further improve accession negotiations and to obtain even better results, always keeping in mind first and foremost the interests of the war crime victims, of reconciliation in the region, and of consolidating the rule of law in each country as the first step for all countries in the region to get closer and closer to the EU, my final thoughts go to civil society organizations. Their role is fundamental - it concerns monitoring war crime trials, assisting victims, proposing ways to improve the system. They have been of huge help to the European Commission and to our delegation during the accession negotiations and the subsequent monitoring phase. A big thank you to them. Here in Croatia, in the near future, there is going to be no EU delegation, no ICTY, the OSCE has already left, therefore NGOs deserve full support in their endeavour to help Croatian society and institutions to address issues related to the war. I wish you all the best for today and tomorrow's work. Thank you very much.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you very much, Mr Mayer. I think we have set the tone for this conference and for the opening of the working session. Without further ado, I would like to give the floor to our moderator today – Maja Munivrana. I would like to thank all the panellists and then invite Zlata Đurđević, Vesna Teršelić, and Jasmina Dolmagić to join as here in the front, and I would like to thank their Excellencies.



## **PANEL 1:**

### **WHAT IS THE TRIBUNAL'S LEGACY AND ITS ROLE IN TRANSITIONAL JUSTICE PROCESS?**

Moderator:

Maja Munivrana, Assistant Professor, Law Faculty, Zagreb University

## **PANELLISTS:**

- Judge Carmel Agius, Vice-President, ICTY
- Judge Ana Garačić, Vice-President, Supreme Court of Croatia
- Jasmina Dolmagić, Deputy Chief State Prosecutor of the Republic of Croatia
- Zlata Đurđević, Professor, Law Faculty, Zagreb University
- Vesna Teršelič, Director, NGO Documenta

### **Maja Munivrana, Assistant Professor at the Faculty of Law, Zagreb University**

I am really happy to be able to welcome you here as the moderator of the first panel. This first panel will talk generally about the legacy of the Tribunal, and it is going to talk about its role in transitional justice, the role that the Tribunal should and does have. As we have heard from the introductory remarks, this is a topic that has been discussed by the public, at least recently, not only in Croatia but across the region as well. However, I don't think that we have exhausted everything that could be said on this topic, especially taking into consideration the completion of the mandate of the Tribunal. I think that the need to have this discussion and to render evaluation of the Tribunal is even greater today. In order to assess the positive practices and the positive work of the Tribunal which should continue to be applied in local communities following its closure, this panel will discuss these topics from a broad view.



I am really glad that I can introduce once again Mr Carmel Agius who is the Vice-President of the ICTY - he will give us the view of the ICTY during this panel. From a local community and local justice perspective we have Ms Ana Garačić, who is the Deputy President of the Supreme Court of the Republic of Croatia, and Jasmina Dolmagić, who is the Deputy State Prosecutor of the Republic of Croatia. The view from academia will be given by Ms Zlata Đurđević, a professor from the Law Faculty of the University of Zagreb. And last but not least, we have Ms Vesna Teršelić and she is the director of an NGO called *Documenta*. It is an organization which in its work deals with monitoring trials and over the last couple of years they have paid a lot of attention to the rights of the victims of war crimes. After their introductions, I guess we will have a very good discussion, but before that I would like to give floor to all of our panellists. Mr Agius, the floor is yours.

### **Judge Carmel Agius, Vice-President of the ICTY**

Thank you. I will take as little time as possible to deal with the topic from the point of view of the ICTY, having already spoken also on general terms, about which are the salient features of what I would consider to be the Tribunal's legacy. Number one, and most important in my opinion, is the loud and clear message that we sent out to the entire world, but particularly to this region: that the days of impunity are over. If there had not previously been a warning written on the wall for war leaders, for military leaders, for politicians and for anyone else for that matter – that the day will come when they will be held accountable and when they will face justice – then we wrote those words when the Tribunal was started and started handing down judgements! The days of impunity are over.

What has been the result of the creation of the ICTY? There were perhaps international political reasons why the ICTY was set up when it was by the United Nations, by the Security Council -the situation in the world had recently changed dramatically: the cold war was over, and the time was ripe for the setting up of an international tribunal. A year later, as you know, our sister tribunal, the International Criminal Tribunal for Rwanda, was set up. Within two years a miracle happened: negotiations started inside the United Nations for the setting up of an international criminal court. What had been a dream for decades became a reality in a matter of a few years, the ICC was created. In the meantime we had also other tribunals, I will mention the one for Cambodia, the one for Lebanon, the one for Sierra Leone, and I don't even have to mention others. I say that perhaps this is our most important part of the legacy. It is of absolute importance!

But in *realpolitik*, we all know what has been happening. I mean, you all remember that within two years of the setting up the Tribunal the most hideous crimes were committed on the territory of the former Yugoslavia – you know that. And this is when the Tribunal was already in existence. What does it mean? It means that, at the time, the message had not yet hit home. I think it should have hit home, but many world leaders, or generals, or politicians do not hear it. And, as I speak, you all know that crimes are being committed with the international community being almost impotent, unable to intervene and do anything about it. However, that is neither the beginning nor the end of this story. Justice will triumph at the end of the day, and those who are committing crimes will be held accountable. Why are they going to be held accountable? Because there are such institutions as the ICTY, the ICC; there is now the mechanism by which they can be held accountable and brought to justice. So I still say, within certain parameters, this is our greatest legacy. We were the first ones to send out the message that the period of impunity was over. Secondly – I mentioned this briefly in my introductory speech – one of the shortcomings of the Nuremberg and Tokyo trials was the lack of development of any useful body of law on evidence and procedure. Why is this important? It is important because we knew, even then, almost twenty years ago, that the Tribunal was not being set up to run in perpetuity. We knew that it was being set up because, domestically, it was almost impossible, if not absolutely impossible to conduct trials which would ensure equity and respect for due process and fair trials. The political situation was not conducive to having trials conducted on the territory of former Yugoslavia. And so the Tribunal was set up. But we knew that with the passage of time it would be you, Croatia, Bosnia and Herzegovina, Serbia that would have to embark on a massive exercise of ensuring accountability for those who have committed crimes and ensuring a measure of justice for the victims of these crimes. We knew it would be you, so we were aware that one of our main responsibilities was to create not only a body of substantive international criminal law, but also a good corpus of rules of evidence and procedure, because it would be on the basis of those rules that we could show you the way to do it. I think that over these twenty years we have been very successful in achieving this and I was pleasantly surprised, my dear colleagues, when this morning you informed me about the latest development here in Croatia in respect of the immense body of evidence that exists at the Tribunal, which is readily available for you to make use of as admissible evidence. It is a remarkable achievement, and I congratulate you on this.

Victims are very important. The Tribunal has provided a platform for those victims who had the opportunity to come over and testify. It also provided a platform for those victims who unfortunately are no longer with us. What

do I mean? The victims that *did* have the opportunity to come over to The Hague and testify were given an opportunity to tell us their stories, express their pain, express their sorrow. Of course it was not possible to have all victims of the war testify before the court. I was reading last week that the Rwandan government is still looking for 15,000 war criminals. Just imagine: if there are 15,000 war criminals still around somewhere, how many related victims are there?... people who have never been given an opportunity to tell their story... There are still some indictees of Rwanda Tribunal on the run, fugitives.

We also had a limited mandate; we were not created to deal with all the criminals that committed crimes in the former Yugoslavia. We only processed 161 cases and I know, from the records of the various republics here, that there are thousands that are suspected of having committed crimes and are still on the run. Our mandate stops with the last one to be tried. Your mandate, your responsibility continues, and we are here to try to discuss how you could carry out this mandate in the best way possible.

What is our legacy? How can you make use of it? What is important is that first, you have a legacy that you can take advantage of and you can benefit from. Second, however, you need to understand that that is only the beginning. It is you who have your government, your institutions, the office of the prosecutor, the judiciary. There must be political will. You need to work together in order to bring to justice as many people as you can, but also to bring justice for the victims. Unfortunately, the Statute of the ICTY, although it focused on peace, justice, and reconciliation – as we were reminded by his Excellency the Swiss ambassador – was very laconic when it came to victims' rights. Much more laconic, for example, than the Statute of the ICC. We were not oblivious to this, we all knew it. Two or three years ago, the then president of the ICTY, President Robinson, alerted the United Nations that one of our responsibilities was to establish a framework, a platform, for extending more support to the victims, some measure of comfort, some measure of responsibility, of compensation. The reason for that was not only that the ICTY Statute did not provide for any proper compensation or reparation, but also because we know, and we knew then, that the local structures in the former Yugoslavia, including here, were not sufficient to secure a decent measure of reparation for victims. There are still many complaints and there will continue to be complaints until the situation is remedied.

One other major contribution of the Tribunal is the assistance we have provided for the judiciary here in Croatia, but also in the rest of the region, in the extending or making our expertise available in view of the anticipated

increase of cases being dealt with domestically. I think we have made a good contribution there. We have also assisted lawyers, organized trainings, we have had joint meetings in Hague, but here as well, of judges of the ICTY and Croatian judges. All this is also another part of our legacy which I hope has borne some fruit. I think I will stop here, and allow my colleagues more time.

**Maja Munivrana, Assistant Professor at the Faculty of Law,  
Zagreb University**

Thank you, Judge Agius, for pointing out the positive aspects of the ICTY, as well as some of the problems that the ICTY has had in its work, especially with regards to reparation mechanisms, and the lack of reparation mechanisms with regards to victims. There will probably be some questions about that later. Now I would like to give the floor to Ms Garačić.

**Judge Ana Garačić, Vice-President of the Supreme Court of  
Croatia**

Thank you. Listening to Judge Agius, I almost envy him as a judge. I envy him because their work is to be completed, and our work, as judges of not only the Supreme Court of the Republic of Croatia, but also as judges of all our other courts, as public prosecutors, is not even near the end. We are still far away from completing our criminal proceedings for war crimes. So that is the reason why I, to some extent, envy my dear colleague; because we have a lot of work ahead. And in that work, certainly, we are going to use the materials and evidence which were collected by the ICTY in many proceedings. It is definitely going to be of a lot of help.

Let me just briefly tell you some information about the Republic of Croatia and the criminal proceedings in general against war crimes. We have created a special application for exclusive monitoring of war crimes proceedings. According to the statistics I got yesterday from that application, we currently have, at first instance level, 99 trials with 519 accused persons, or indictees – which is a lot of work for the four specialized war crimes courts we have in Croatia, the county courts in Zagreb, Split, Rijeka and Osijek. We changed the jurisdiction provisions in our laws, so in this way all war crime trials will be taking place before these four courts exclusively. There are some criminal proceedings against war crimes in other courts in

Croatia – and we have 15 county courts – but these are only investigative proceedings, or we have some of them still pending final judgement. All others have been transferred to these four specialized courts. And it is going to be quite a burden for the judges who work on these four courts since it is quite a lot of work. Certainly, this is not the final number; the prosecutors know best how many cases they still have, and where they are at the stage of collecting evidence; to what extent the ICTY's evidence is going to be used... – I am sure it is going to be used more and more in the future. And we will have mechanisms in the future to make such evidence available, so we will need more help on that. We have to make this evidence accessible because we now have the legislative framework which enables us to use such evidence in our criminal proceedings.

The number of cases and the number of investigations is also huge; there are still a lot of uncovered crimes, and there are a lot of cases that are going to be prosecuted in the future. That is why I said that, unfortunately, in the Republic of Croatia in the field of war crimes, we will have years and years of work to come. I can only say years and years, there is nothing more specific I can say. It will certainly require a lot of time. As of the beginning of this year, in the four specialized courts, we have resolved twelve cases of war crimes, which is a significant number. And in these 12 cases we had 16 indictees. A lot of war crime trials among the 99, and the 519 indictees, are not being taken forward because people are not available, indictees are not here. Trials *in absentia* are limited in Croatia, and trials *in absentia* are a limited option, so we have to wait with these proceedings until we have access to either the indictees or to have them prosecuted in the countries where they are currently, and after that we are going to be able to resolve and finish these cases. The good thing is that there is no statute of limitations on war crimes. However, I believe that justice when it is too slow, is not good. Of course it is good to have justice, better late than never, but it would be much better if we could, for example, finish these cases within a reasonable period of time. Especially from the standpoint of the victims. Judge Agius has very nicely explained that we have to take in the account the fact that victims deserve justice. But with the course of time what we have noticed in our proceedings is that many victims cannot wait for justice to be delivered, because many witnesses have died and we have only their depositions or statements that have been written down. People get older, they forget things, after twenty years – just imagine how much time has passed and just imagine that witnesses forget things. On the other hand, we as judges, while listening to witnesses or stories from our colleagues, we realize that some witnesses refuse to talk even about the things they know. Maybe it is a psychological defence mechanism because people do not want to evoke the horrible traumas that they lived through twenty years ago. People just want

to forget about that. These are some of the difficulties that we have, and these are the challenges that we face when we work on war crimes trials. There are many of them still ahead of us; we will have to spend a lot of time working on these cases.

At the beginning, we thought that it would be good for alleged perpetrators to face justice in those places where crimes were committed, and not elsewhere, so that the local community could see that somebody had been brought to justice. But when we weighed the *pros* and *cons*, we decided to have four specialized courts where we would group war crimes. There are a lot of *pros* for having such a system because by grouping war crimes together and by bringing all war crimes cases to the four courts it is easier to monitor them, it is easier to monitor the trials, and it is easier to see what is happening. With the help of the EU and with funding from the EU, we have now come up with our special war crimes monitoring application. We now have very good overview not only of wartime crimes but also of what is happening in each and every case. We know the names of those on trial, we know everything about the trials, how many sessions were held, so we have quite a good insight into the statistics. But I don't want to dwell any further on that.

I would just like to point out that it is probably going to be like this not only in the Republic of Croatia but in other countries as well, such as Bosnia and Herzegovina, where the situation is even more difficult, in terms of the number of cases. Still, in Croatia, even with fewer cases, we have a lot of work to do. I hope that we will get the opportunity to use the evidence collected by the ICTY. With the amendment to the Law on Cooperation with ICTY, or to be more specific the amendment to the Law on Application of the ICTY's Statute, which happened in November last year, we have introduced the option for the prosecutor to raise an indictment on the basis of evidence obtained by the ICTY. So far, as far as I know, we haven't had any cases like that – although it is a fact that only a short period of time has passed since. However, it is a realistic option in the law. That is why the availability of evidence from the ICTY is extremely important to us. We have built that legislative option into our law; now we just need to have access. On the other hand, if there is no direct indictment by the prosecutor on the basis of evidence collected by the ICTY, there is another option: evidence can be verified in Croatia's courts. We have lots of judges and prosecutors here; we know that this evidence is admissible if it is admissible according to the procedural rules of the Tribunal. The procedural rules are not the same - the Croatian criminal procedure code is different – but we can accept it as admissible. Now, facts that corroborate evidence, and evidence that corroborates facts... – once we collect evidence from the ICTY, we use



Croatian procedural law to identify facts. In any case, now we do have the legislative framework to use the evidence obtained by the ICTY. It remains to be seen to what extent it is going to be used, but we hope that prosecutors and judges are going to use it to issue indictments. It is a huge body of evidence that can be used and it can improve the efficiency and expediency of cases. Thank you for your attention.

**Maja Munivrana, Assistant Professor at the Faculty of Law,  
Zagreb University**

Thank you for that detailed overview of the situation in Croatia with respect to war crimes. Later on we will talk about whether slow justice is justice at all. And now, Ms Jasmina Dolmagić.

**Jasmina Dolmagić, Deputy Chief State Prosecutor of the  
Republic of Croatia**

Thank you ladies and gentlemen, dear colleagues. I would like to extend greetings on my own behalf and the Chief Prosecutor General who was not able to attend this conference because he took over some business related obligations earlier on. Regarding the ICTY, I think that what we all can agree on is something that we have already heard about from Judge Agius, and it is that the establishment of that court was a huge step forward in the international fight against impunity. The main mandate of that court was to try those who were the most responsible for the severest crimes, the most atrocious crimes committed in the territory of former Yugoslavia. Now that the court is almost done with its mandate, there is a lot we will have to do, as Ms Garačić pointed out. We have to consider the legacy that is left behind by this court and we have to think what is the best way for us to use that legacy and benefit from it. The body of evidence that the ICTY has created is immense, all the judgements, jurisprudence, all the elements which are relevant not only to the work of that court but also in a much wider context, the kind of cases, the sensitivity of the cases they tried – they tried the highest ranking officials. All this knowledge, all this expertise should not go to waste, and should be used to the best of our ability to try war criminals.

The legacy of the ICTY can be viewed from a wider perspective, the most important perspective, however, being its jurisprudence – from the point

of view of the State Attorney's Office. It consists of all the judgements and decisions that define the legal attributes of crimes, the facts through which responsibility was proven; these are both material and personal evidence. What we can use specifically, from my work perspective, is the documents. The range of documents that the ICTY has collected over the course of its work, during its investigations and also during trials before courts: audio records, transcripts – all the evidence which was part of the trials. Jurisprudence is something that national courts should take into account. State attorneys' offices will face a lot of challenges regarding finding and trying the remaining perpetrators of war crimes. We have heard a bit about the current state of affairs in Croatia. Since I am the deputy of the State Attorney General, I can tell you that there is a lot of work to do, and I hope that we will be as successful as possible, as soon as possible. This is the reason why I believe that prosecutors' offices and courts should have access to relevant documents from the ICTY. Because one of the elements of the legacy that the ICTY's leaves is the fact that public prosecutors and national courts should be able and will be able to try war crimes that have not been tried yet. In order to do that properly, the documents from the ICTY, alongside the evidence collected in the national jurisdictions, will be extremely beneficial. Access to the archive and the usage of ICTY documents are an important aspect of the court's legacy. Mr Agius has already mentioned some programmes of cooperation, and programmes through which these documents are used. As I have said, there are such programmes, there are study visits, and liaison prosecutors that cooperate with each other. There are also trainees who cooperate on a regional level. The State Attorney's Office has so far sent 22 such young trainees to the ICTY to join their teams, and share experience, work on complex cases, go through the methodology of working on the type cases that the ICTY has tried, contacting prosecutors, cooperating with crime experts, expert witnesses, military experts, and so on. In that way, they gain expertise and acquire specialized knowledge that they are able to apply when they go back home and work on their own cases with their colleagues.

We also have liaison officers who cooperate on the basis of the agreement signed between the ICTY and the Republic of Croatia's State Prosecutor's Office. We communicate on a daily basis by phone, but we also send requests for international legal assistance; we exchange data with ICTY and we use that data in indictments.

Our colleague, Ms Garačić, talked about evidence, about the legal framework, and the amendments made to it. As to material evidence, we have had no trouble so far in using it, and we have also amended the law on the application of statutes. In the past it was not possible to use personal evi-



dence, testimonies given by physical persons, natural persons. However, in the future, this will be possible. From the perspective of the State Attorney's Office, I can only say that we will continue doing our work, we will do our best to process all war crimes cases. We have competent local prosecution offices and we collect information and data elements and everything else that serves the purpose of making an assessment of whether something constitutes a war crime or not, in order to bring the perpetrators to justice. I think that the most valuable form of legacy that the ICTY leaves us with is its archives; it being a well of extremely important information that we will all benefit from.

As regards legacy, as regards to processing crimes, the Republic of Croatia has always emphasised regional cooperation, Ms Garačić has mentioned that there are many perpetrators who are still not available to us, and this is a dimension that we come across quite frequently after armed conflicts. We have a situation where perpetrators are in one country and the evidence is in another. However, the countries of the region have signed a memorandum of understanding and it is possible to exchange evidence and to cooperate in that respect at regional level. Even if evidence is here and the perpetrator is there, it is there that we can criminally pursue the person. As regards to Serbia, it is up to them to decide on prosecution in the case of their citizens, but what is definitely possible is to collect evidence, to collect facts and information. That form of cooperation exists, it's welcomed, it's beneficial, and it makes it possible for us to collect as much evidence as possible regarding war crimes.

All of us who work in this field of expertise know that it is not easy and that the amount of time that has gone by is not a beneficial circumstance. So we keep thinking about ways to improve our cooperation. Apart from signing the memorandum of understanding, we have regularly organised the Brjuni conferences since 2007. We organise these conferences every year and we have public prosecutors from regional countries attend them. There are also ICTY judges there, prosecutors, people from the USA, and the ICTY Prosecutor. At these conferences we discuss not only legal matters but our cooperation and ways to enhance it. One of the ways in which we can do that is to have exchange visits between liaison officers and the young trainees that I have already mentioned. The liaison public prosecutors play an important role and I can also tell you that the State Attorney's Office here in Croatia has a lot of experience and young people who have been educated to work with the ICTY archive. Last but not least, there are a lot of positive things that the ICTY leaves behind; a lot of positive things that we can take from its legacy. One of the most important things is that impunity will no longer be tolerated. The most responsible and high-ranking commanders

and officials have been brought to justice. Judge Agius has talked about the reasons why this court had to be established at the time it was established. There was an open issue on whether national courts and prosecutors were ready to do that. I think that, at least in that respect, the situation in the Republic of Croatia is better, and acceptable, and that has been proven, I think, through certain trials that we have had regarding war crimes committed by Croatian citizens. I hope we will continue doing that, the State Attorney's Office will definitely do its best. Thank you very much.

**Maja Munivrana, Assistant Professor at the Faculty of Law,  
Zagreb University**

Thank you, Ms Dolmagić, for that presentation on the cooperation that the State Prosecutor's Office has with the ICTY, as well as with other countries in the region. There was some criticism about this cooperation in the region being too informal and that there should be bilateral agreements or some sort of regional agreements. Maybe these are some of the issues that Ms Zlata Đurđević is going to talk about. I would like to give the floor to her now.

**Zlata Đurđević, Professor at the Faculty of Law, Zagreb  
University**

Thank you once again for inviting me to attend this meeting, and thank you for organizing this meeting. I will focus on a piece of legislation which was adopted last year in Croatia. It is a piece of legislation which is very much related to the legacy of the ICTY, as you heard from the previous speakers including the Vice-President of the ICTY. He said that we have to show that the days of impunity are days of the past. And that is why we need to organize a massive exercise in prosecuting perpetrators of war crimes. The basic precondition for this massive exercise is not only to get access to the archives and the evidence of the ICTY but to have cooperation in the field of criminal law in the countries of the region. As Ms Dolmagić said, regional cooperation in criminal matters is necessary particularly because of the fact that the evidence is sometimes not there where the perpetrator is. Such cooperation would enable prosecutions to continue at the regional level. In that way, we will be able to continue the work of the ICTY. There is a barrier that the Croatian public has learned a lot about, especially about ten months ago – nobody talks about it today, although nothing has changed – but

there is this law proclaiming null and void the legislation of Serbia. This is one of the shortest laws and on the slide I've tried to show you how short it is; you have three articles with two paragraphs. And this is one of the most controversial and one of the poorest laws to be adopted in Croatia.

I will give you a short overview of the law to tell you what its consequences are in legal terms. Also, I'll try to tell you about its political consequences, which prevent political cooperation. This is a controversial law and we knew that it was controversial at the time when it was adopted since the political scene both at local and international level was very much disturbed. It was also adopted through an emergency procedure because it was proposed in September and only a month later the President of the Republic promulgated the law. Two month afterwards, he submitted a request for evaluation of its constitutionality. Although the Constitutional Court of the Republic of Croatia is obligated to act urgently upon a request made by the President, so far it hasn't said anything. So, let's try and see why the Constitutional Court has not said anything about whether this law is constitutional or not. The official reason why this act was adopted was to establish jurisdiction of the Republic of Serbia for violations regardless of where they happen. The Republic of Serbia favoured the principle of universality over the principle of individuality. And the Croatian government claimed that the certain principles were violated by Serbia, and that the universality principle should not be applied. Considering the fact that Serbia adopted these regulations in 2009, as well as the fact that cooperation between the two countries when it comes to prosecuting war crimes has intensified greatly, due, among other things, to the application of the principle of universality which had a positive effect on accession negotiations, the real reason for adopting this law in Croatia was a different one. Nobody hid from the public the fact that the reason for the adoption of this piece of legislation was because 44 indictments from 1992 were sent by the Republic of Serbia to the Ministry of Justice of the Republic of Croatia. From the very substance of this law, you can see that this law has two basic objectives. The first is to make null and void all legal acts of the former Yugoslav National Army and Republic of Serbia which are related to war crimes perpetrated by Croatian nationals during the Homeland War. And the second objective, which can be read in Article 3, is to prohibit national judicial bodies from providing legal assistance in criminal matters to judicial bodies of the Republic of Serbia for these criminal matters. My thesis is that this law has no legal effect and that both of these objectives are inapplicable. Why? Because substantive paragraphs, substantive articles cannot be implemented, that is, Article 1, because Article 1 stipulates that the legal acts of the judicial bodies of the Republic of Serbia have no legal effect, as well as the legal acts of the former Yugoslav National Army and Yugoslavia.

Having such a provision, where you make all acts of different country null and void, is legal nonsense. The basis of international law is that a country can adopt legislation for its own territory, and judicial bodies can only carry out any actions on its own territory. You are always limited to your own territory. That is why the Republic of Croatia cannot adopt a piece of legislation to deny legal effects of the acts of other countries, because other countries cannot have legal effect through their acts on the territory of the Republic of Croatia. Croatia could, of course, deny any acts of the Republic of Serbia, only if we were a part of the same country – and we are not – hence, this law has no legal effect.

Regarding the procedural norms from Article 3 of this law, you can see that analysis of that provision, as well as analysis of the preparatory documentation from the parliament, shows that the key to understanding why this law had to be adopted by the legislator. Article 3 was supposed to say this: “Judicial bodies of the Republic of Croatia will not act upon rogatory letters of the Republic of Serbia in criminal matters related to crimes from Article 1 because doing that is not in line with the legal order of the Republic of Croatia and it violates its sovereignty, safety, and security.” Later on in the procedure, this “because” was changed into “if”. The MPs were obviously aware that this sort of provision would change the existing legal order of the Republic of Croatia. But the legal and political consequences would be a disaster not only for the victims but also for the country’s legal credibility in prosecuting war crimes; consequently it would endanger the credibility of Croatia in accessing the EU. It is a well-known fact that legal cooperation on the regional level in prosecuting war crimes was a precondition for the European integration of the countries from the region; while in the Croatian pre-accession negotiations, the will for impartial and objective prosecution of war crimes and Croatia’s cooperation with the ICTY was also a precondition and a key priority. MPs knew that. Unfortunately, it was not until the parliamentary discussion took place that the government amended Article 3 by replacing the word “because” with the word “if”. This amendment was adopted with 68 votes in favour, with one abstention, but with this change the entire law lost its purpose. Why? Because identical provision exists in the law for cooperation between Croatia and the ICTY, and in the bilateral agreement on cooperation in criminal cases between Croatia and Serbia. In these cases, the Republic of Croatia can refuse to cooperate if other important interests of the Republic of Croatia are violated, or if it is contrary to the legal order of Croatia, or to some other state interests. So, it is a clause which is commonly used in the field of cooperation, in the field of international law; you can always deny or refuse something if it is contrary to the legal or national interest. This Article 3 is something that we already have in the Croatian legislation and it doesn’t present any-

hing new. However, when it is repeated in a different law it jeopardises the coherence of Croatian legislation. The same thing goes for paragraph 2 of Article 3 where it says that the minister of justice issues the decision on the letters rogatory of the Republic of Serbia according to the normal legislation. The final word in international legal cooperation is the one of the minister of justice. Regardless of the fact that courts make decisions for extradition, the minister of justice can reject them although all conditions were met. The reason for that is that the decision-making for international legal assistance is related to international relations and not internal legal order, and this is the usual provision. Therefore, the provision in paragraph 2 of Article 3 has also not changed anything in the legal order of Croatia.

Let me say something about Article 2. Article 2 is the most absurd article in the entire law. And it is legally void of meaning, especially in the second sentence. This is something that even first year law students would not write. It says only judicial bodies of the Republic of Croatia can prosecute Croatian nationals before Croatian courts. The sovereignty of the country understands that only judicial bodies of this country can take action on its territory. Of course other countries cannot do anything on your territory. That is also something which is valid for the EU: there are no borders, but there are borders for criminal justice bodies. Cases can cross borders when there is a search for someone, and if it is in accordance with the international agreements. However, bodies of no other country can prosecute someone in Croatia. With this provision, the legislator has shown lack of knowledge in the fundamentals of law making. The same thing goes for the cooperation with the ICTY: when we get cases from ICTY, the State Prosecutor's Office acts only and exclusively before Croatian courts. It is a purely a political act.

Let me also say something about the unconstitutionality of this law. The first issue is whether the law is organic. It is not an organic law, because the basic law of cooperation between Croatia and ICTY and this law should not be organic as well. The second issue is that cooperation in criminal law matters is something that regulates the relations between two countries and not between individuals and the countries, and it is not an organic law because it does not go into human rights. The separation of powers is not violated because the minister of justice has the authority to say the final word when it comes to letters rogatory. The third complaint was that this law violates the principle of fair trial. This is also not true, because the fair trial principle is not applied to extradition; it is applied during criminal and civil proceedings that take place before national courts and national criminal justice bodies. And it does not apply in cooperation on criminal cases between two countries. What this law does violate is the principle of

legality and coherence of legal order. The principle of legality is violated here. And if you violate this principle, you can lose legal certainty and you can potentially violate human rights. That is why the laws that any country adopts should be not only available but clear and predictable.

As I have said several times so far, this law has no legal effect; it contains provisions that already exist elsewhere in other bodies or its provisions are totally incompetent or impotent from a legal standpoint. So this was law that was used only to campaign for the elections - it was adopted one month before the elections. Considering the fact that this law is contrary to the principles of precision and clarity, the constitutional court should reject this law. Matters like this, like this law, as well as other causes such as the *Tihomir Purda* case are matters that give a warning to us all, on how unsustainable this cooperation mechanism that we have in the region is. We do have bilateral agreements on cooperation in criminal matters with countries of the region, and we have the law on cooperation with ICTY in criminal matters, but these instruments have been shown to be slow, unsatisfactory, and ineffective in the prosecution of war crimes in Croatia. That is why, before intensifying criminal justice cooperation, there should be legal agreement or a legal contract which should speed up cooperation. And since we have an unsatisfactory legal framework, a range of agreements between the State Prosecutor's office and other prosecution offices in the region was signed. These agreements are available on the Prosecutor's Office website but the substance of these agreements not only talks about cooperation; it talks about types of legal assistance. It also contains issues such as delivering evidence, giving evidence, accepting indictments, transferring items, transferring cases and so on. This is a matter which goes into basic human rights and it can be only regulated by parliamentary pieces of legislation - meaning, with an international agreement or law, and not through secondary legislation.

In conclusion I will say that this law, that proclaims acts of Republic of Serbia null and void, has no legal effect, because it does not create legal framework for cooperation between Croatia and Serbia. It is a political proclamation without legal consequences, but with a bad political message. The principle of legality is violated and the sovereignty principle is violated. But the question remains whether this is enough for the Constitutional Court to reject the Law. Maybe a better solution would be for the political powers which have adopted this law, to adopt an international agreement, which would be ratified by the Croatian Parliament. And make this act null and void. This international agreement would have to deal with issues regarding positive and negative conflict of jurisdictions between countries of the region. In this way, a judicial review mechanism would be made possible in prosecuting war crimes.



**Maja Munivrana, Assistant Professor at the Faculty of Law,  
Zagreb University**

Thank you, Ms Đurđević. I would like to give the floor to Ms Vesna Teršelić.

**Vesna Teršelić, Director of the NGO *Documenta***

Thank you. Good day everyone. Let me start by saying that the ICTY started its work back in the days when fair trial standards and coping with history standards were different from what we have today. The ICTY started working when we started searching for missing people. Nowadays we do have more efficient working methodologies. In that respect, back in the days, it would have been extremely important for us if we were able to meet once a year and discuss what the ICTY had done and should do. I think that the most important legacy of the ICTY is embedded in the criminal proceedings and prosecution of war criminals. I also think that the most important thing that took place was the research, investigations, and trials regarding war crimes in Croatia and other countries of the region. I would also like to talk now about what I think the ICTY has done and what it omitted to do. Everybody who worked at the Tribunal at the investigation stage made some very important steps. Just to remind you that they investigated the Ovčara crime, and then trials took place both before the ICTY and before a chamber in Belgrade. So what I can say is that an investigation was conducted and it was the kind of investigation that Croatia could never have done. This is important and needs to be said.

However, looking at the way in which it was all done, there are some negative things to be said as well. For example, the fact that the ICTY investigated Ovčara but failed to indict Adžić and Kadijević for the destruction of Vukovar. In the end of 2010, the Appeal Chamber revised the Šljivančanin judgement and said that he should be acquitted of civilian killings for which he was tried. That was based on only one testimony given by one witness whom I deem was not convincing. What were not taken into account were the circumstances under which that crime took place, so in my opinion the standard lost objectivity. And the judgement lost credibility. As a human rights organization, we sent an open letter to the ICTY and Belgrade Prosecutors' Offices. And what we asked in that letter was for the ICTY Prosecutor to reinstate the procedure before the Appeals Chamber. However, in the reply that we received it was declared that our comment regarding the additional circumstance and our comment regarding testimonies given

at Belgrade were not sufficient for the procedure to be reinstated. I think that Šljivančanin knew very well what he was doing, that it was all a part of a retaliation endeavour, and that there is a lot that the Belgrade prosecutors and courts should do not only regarding that case but others as well. What we can see is the burden of expectations focused on the role of the ICTY. 161 people were indicted. Highly significant verdicts were also passed, with limited resources, regarding Martić, Babić, Strugar, regarding the shelling and the murdering of civilians in Dubrovnik. Highly significant judgements were also passed regarding the Ovčara crimes. We also expect a judgement regarding the Gotovina and Markač case – and regardless of what the decision of the Appeals Chamber is next Friday, I would like to point out that it will be the first final judgement regarding crimes committed during and after *Operation Storm*. There are some pending trials here in Croatia, but none of them have reached a first instance judgement, let alone final judgements. We can see the significance of the ICTY here..

A lesson that seems extremely important to me is that, for a tribunal of this kind – and I believe there will be more of them throughout the world – not enough energy was exerted to communicate with civil society organizations, local community, and the countries in conflict. I think that more resources should have been given to outreach activities and that the Tribunal should have communicated with the public at large. I think that ten to twenty per cent of the overall budget should have been used for the Outreach Programme and communicating with the public. That was not even remotely the case. In the former Yugoslavian countries we did not know what was going on at the the ICTY. However, through the Outreach Programme and within its framework, groups of media representatives, and a group of legal experts went to the ICTY, watched the trials, and I regret the fact that more people could not attend those trials as observers. Whenever a decision is being made on where the headquarters of a certain institution that will try a country's war criminals will be, it is detrimental to establish it too far away from the place of conflict because then the victims and legal experts do not have easy access to the courtrooms where the trials are taking place.

I am very glad to see here today members of the *Vukovar Mothers Association*, representatives of the *Association of Missing and Imprisoned Croatian Defenders*, as well as representatives of *Against Oblivion*, because we need to hear from them to what extent they are satisfied and how happy they are when today, twenty years after the crimes had taken place, there are still no judgements on some of the cases. I think that it is also important, very important to be able to hear that the Croatian courts and the Public Prosecutor's Office are doing a lot and that there are 99 pending cases. In



June last year, the law on the application of the ICTY Statute was amended. With the amendments coming into force, it was made possible for national courts to use evidence collected by ICTY in all cases that were tried after the amendments had come into force. We already had some problems – for example, regarding the crime that took place in *Marino Selo* case – where personal testimonies and such evidence were not taken into account. Why not? Because the law was passed in June last year, the amendments, to be precise. And we are afraid that the same will happen in two other cases: the *Merčep* case regarding the torturing and murdering of civilians in Pakrac, and the *Franje Drlje et al* case. So, there is a mismatch here. The law has been amended but we will see what will happen next.

When we talk about the legacy of the ICTY it needs to be pointed out that regardless of how we value and assess that legacy – positively or negatively – my personal assessment is a positive one. I think that the work of this Tribunal which is still ongoing is a very important basis which will guarantee the right to a fair trial, which will ensure reparations for the victims, promote their right to truth, justice and guarantee of non-repetition of crimes. Last year, upon the initiative of the governments of Switzerland and Argentina, for the first time, the position of Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence of crimes was established. And this year that rapporteur submitted his report for the very first time.

We know that the position of the civilian victims in Croatia is poor. We know that there are many people who lost their closest family in the war and now they are struggling to pay legal fees because they pressed charges against the Republic of Croatia and lost. We make it possible for the poorest of Croatian citizens not to pay legal fees. However, that is not enough; that is something that has to do with acknowledgment of the sufferings of all victims due to war crimes. I think that a part of the court's legacy is also a message, a message that is extended regarding the right to reparation and compensation, the recognition of suffering of all victims. The Republic of Croatia does not envisage such a right yet, although there is a platform for fundamental rights, where we see a mention of victims and their right to compensation. This is something that might be helpful in the future when we will advocate for the rights of all civilian victims to receive reparation. I would also like to thank the monitors of the war crimes trials – who currently work without compensation since we do not have adequate financial support – for their dedicated work. Thank you very much for your attention.

**Maja Munivrana, Assistant Professor at the Faculty of Law,  
Zagreb University**

I would like to thank all the panellists, and now I would like to give floor to all of you, for your questions.

**Sadika Biluš, MD from Vukovar**

If the Constitutional Court is positive about the new law on proclaiming legal acts of Serbia null and void, I do not know to what extent this would be internationally supported. I am directly involved and interested in this law – because I am a doctor from Vukovar. I was there during the war, and I was indicted for war crimes. I have the indictment in my hand; it is number 1796. I am a doctor, an internist, and I am also a scientist. I write scientific articles and I usually attend congresses. I am not forced to travel, I really love to travel; and whenever I am crossing a border, it is a huge stress for me. It is true, I always consult the Ministry of Justice, whenever I go abroad, to see whether I can cross the border. And I usually have their special certificate, but it could happen at some point, that when I am seen by the customs officer, a warrant of arrest is issued by Interpol and I can end up being arrested. So my question is what happens if the Constitutional Court says that this law on proclaiming legal acts of Serbia is null and void, does it have than legal legitimacy? My name is Sadika Biluš.

**Maja Munivrana, Assistant Professor at the Faculty of Law,  
Zagreb University**

I would just like to remind everyone that all of you should introduce yourselves before you ask questions. I suggest we take two more questions, and then we give opportunity to the panellists to answer them. Are there any more questions? Please feel free to ask questions, or to give comments.

**Marija Slišković, Women in the Homeland War**

My name is Marija Slišković. I am the president of the association *Women in the Homeland War*. I am the editor of the book *Sunčica* – raped women from Vukovar. I am also someone who participated in the first peace initiative which was launched in 1991. We sent our letter to the General Staff

of the Yugoslav Army, and to general Kadjević. Because we know that was the biggest threat.

When I look at the work of the ICTY, I have to say that the incubator has not been prosecuted – it was only the small chickens, the small people that were prosecuted. For me the directors of camps are of secondary importance. For me, those who started the war, those who had the weapons, who allowed the tanks to go to Slovenia and then Croatia should be prosecuted. I also have to warn you about the fact that today we have to talk about the issue of raped women. We are collecting testimonies, which were collected in 1992, 1993, 1995, as well as in 2005, 2009, and 2012. And we are still collecting testimonies. The law is always selective and I am not convinced that I will bequeath my children with trust for justice.

**Maja Munivrana, Assistant Professor at the Faculty of Law,  
Zagreb University**

Thank you for your question, thank you for your view. The last question now please.

**Ljiljana Alvir, Federation of associations of families of  
imprisoned and missing Croatian soldiers**

Somebody has mentioned the victims. Since I am here representing the victims, I think I should say something. First I will comment on the discussions so far, and I will ask the question later. I am Ljiljana Alvir from the Association of NGOs of missing war soldiers and those held in captivity. What I can say as a representative of this association and many NGOs is that nobody has ever asked us anything. We had one meeting with Mr Fry and he was very surprised when he learned – Manda Patko also attended the meeting and was sitting next to me – that we are the ones that support the prosecution of all crimes. He was surprised. What does it say about us? It says that the perspective on civil society organizations and Homeland War organizations is that we are a right wing group, which only respects one set of victims – which is not true; moreover, it is entirely incorrect. Even recently I heard criticisms like that. *Documenta*, which is represented here, organized an event for Remembrance Day – about those who do not have their own graves. I want to say publicly that we, who represent authentic victims were not asked for an opinion: what to do and where to do it? Recently the Youth Initiative also organized an event which was called “Memory of victims between 1991

and 1994". We did receive an e-mail invitation to participate, but nobody asked us to be a part of a panel or even to say something. We do have a lot of things to say. The support to victims is mentioned here as the legacy of the the ICTY, which is good, but it is also a problem. It is so because due to the barriers set by the Statute, not much has been done, and I think that a lot more could have been done. The people I represent here had only one opportunity to see the ICTY and to come close to the building. That was at the point when Šljivančanin was acquitted and we were there to protest. Civil society organizations do have the opportunity to send journalists or monitors to The Hague, and one of the legacies of the war is missing persons. And I said that a long time ago: I think that both the ICTY and other courts have some information that can help families of those who are still missing. A priority at this moment is to use the legacy to find missing persons first, and then to satisfy justice. Thank you.

**Maja Munivrana, Assistant Professor at the Faculty of Law,  
Zagreb University**

Thank you for your comments. I suggest we give the panellists now the opportunity to say something, and afterwards we will continue talking informally over coffee.

**Zlata Đurđević, Professor at the Faculty of Law, Zagreb  
University**

First I would like to answer the lady regarding the law: this law will not protect you or anybody else from international ABP or anything else. The law primarily has effect on the territory of the Republic of Croatia, but it only repeats provisions that are stated elsewhere in our system. It does not protect you in any way whatsoever. I hoped that was clear from my presentation. You have probably been listening to what politicians were saying when they were passing the law, but that has nothing to do with the contents of the law. This law does not only not protect you but it even worsens the position you are in, as well as of other people who are suspected of having committed crimes. Since evidence is usually in one country and the perpetrator in some other country, there is a need for cooperation between public prosecutors' offices. Otherwise it is not possible to prove whether somebody committed or did not commit a certain crime. So not only does this law not help you, and it does not in many ways, it even makes things worse. And I think this will be corroborated by my colleagues who use it in practice. Its consequences are extremely negative. The abolition of this

law will not worsen the situation you are in at all. And even now that it is in force, it does not protect you. Countries should cooperate, should agree, should sign a memorandum of understanding, and should try and see what the evidence is regarding somebody's guilt. And what about extradition? Well, our Constitution, regardless of this law would prevent that, while you are in Croatia. When you exit the country then it's left to other countries legal frameworks. Anybody else?

**Maja Munivrana, Assistant Professor at the Faculty of Law,  
Zagreb University**

Would anybody else like to speak? All right. In that case, I would like to thank all of the panellists, and I would like to thank all of you.

## **PANEL 2:**

### **DEALING WITH THE PAST BEYOND THE TRIBUNAL – THE ROLE OF THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS (MICT), NATIONAL JUDICIARIES AND NON-JUDICIAL ACCOUNTABILITY MECHANISMS.**

Moderator:

Eugen Jakovčić, NGO Documenta

## **PANELLISTS:**

- Martin Petrov, Chief, Immediate Office of the Registrar, ICTY
- Refik Hodžić, Director of Communication, International Center for Transitional Justice (ICTJ)
- Judge Ksenija Turković, European Court of Human Rights, Professor, Law Faculty, Zagreb University
- Mladen Stojanović, Centre for Peace, Non-Violence and Human Rights, Osijek Drago Hedl, journalist

### **Eugen Jakovčić, NGO Documenta**

As an activist of *Documenta*, the Centre for Coping with the Past, I would like to tell you that this is an NGO that collects facts and information in order to assist judiciaries and to assist victims in their quest for reparation. I am extremely happy that we are here in Zagreb today. We were in Sarajevo several days ago and we will go to Belgrade in a few days' time. After the conference in The Hague, we all knew that the legacy of the ICTY is undisputable and unquestionable outside of the region, but under dispute within the region. The lack of trust is the result of a long-lasting and protracted campaign aimed at tarnishing the reputation of the ICTY and its officials. Even hate speech of some sort, and it is also a consequence of how passive the ICTY was with the regard to reacting to such allegations.

I would like to extend a warm welcome to everybody here. And before I give the floor to the panellists, I would like to tell you, I might freely add –

on behalf of the civil society and as its member – that we have been fighting against denial for years, and that we stand in favour of accountability, historic overview and coping with the past. I think that we have not used the products, so to say, of the ICTY as much as we should have, like evidence, findings, facts, and so on. But we are trying hard, we are doing our best to make use of these valuable and beneficial sources of information so that we can state facts – this is something which *Documenta* holds dear about the work of the ICTY.

I am always uncomfortable when listening to representatives of various authorities who come to these conferences unprepared. Among the audience we have victims, their family members, and I always wonder why it is so, why are they so unprepared? I would always think twice before sharing evidence with such representatives of the judiciary. I truly expected Ms Dolmagić to tell us what we should do in specific cases. What does it mean to us that we have an indictment against Vasiljević and yet the institutions of the Republic of Croatia cannot reach him? What has in fact been done – specifically, concretely, has anything been done? I also expected Ms Dolmagić to answer to the question regarding the horrible fact that we still do not have any valid, final judgements regarding the war crimes committed during and immediately after *Operation Storm* in Croatia.

I also expected some answers regarding the following question: we are currently witnessing an inappropriate campaign by the State Attorney's Office, which is directed at civilian victims of war and their families. They have pressed charges against the Republic of Croatia, but they lost before the Croatian courts and they have to pay legal fees. It is a situation which is unbearable and should be sorted out as soon as possible.

I had some expectations regarding Ms Slišković as well. She should have talked about the terrible situation in which civilian victims of war find themselves in Croatia. For example, at this point in time, there is no single legal act that regulates the status of raped women in the Croatian war and this is something which fails the ICTY's legacy regarding women who were victims of war, raped women. Because rape is a war crime, a crime against humanity, a form of torture and a means of persecution and displacement. I think that it is crucial to do something about these victims. Nothing has been done so far. And these people have no legal status in Croatia. I could go on and on like this, but I will not.

Let me now stop and address the members of the panel. We have Mr Petrov, the Chief of the Immediate Office of the Registrar of the ICTY. I would like him to tell the victims, their families, and the representatives of media so-

mething more about the Mechanism for International Criminal Tribunals. But before that, Mr Petrov, I will give just two pieces of information: the Security Council has, on the 22<sup>nd</sup> of December 2010 decided to establish this Mechanism for the former Yugoslavian countries and Rwanda, and it will be installed after the courts finish their work. It has its chief justice, it has a prosecutor. Tell us more about what it is, what its mandate is, and what it will contribute to. Will it contribute to what we all expect in this region and this is to finally emphasise local judiciaries and local prosecutors?

### **Martin Petrov, Chief of the Immediate Office of the Registrar, ICTY**

I have the pleasure of addressing you today on the topic of the Residual Mechanism and dealing with the past beyond the ICTY. Of course, dealing with the past is a very complex philosophical concept to which judicial institutions like the ICTY can certainly contribute, but there are many more mechanisms which need to be employed to actually achieve that dealing with the past.

The ICTY, as we all know, has contributed to the process of dealing with the past by holding fair trials, by giving voice to the victims, rendering judgements, establishing facts about some of the crimes committed, and importantly individualising guilt. But the ICTY has always been meant to be a temporary institution – we have all known that from the day when it was established that one day it will close its doors. And that is why it had a limited mandate – as we heard this morning, it had to – it had a mandate to prosecute only the highest ranking military and political leaders. Most of the work in prosecuting those war crimes remains to be done on the national level. In its preparation for its closing, the Tribunal has been working over the years with the national judiciaries of the countries of the former Yugoslavia; not only in assisting them to build their capacity but also in making the evidence collected by the ICTY available for national prosecutors. And it has also organized, as Judge Agius has mentioned this morning, a lot of peer to peer meetings between judges, ICTY judges and local judges, prosecutors and other officials, to transfer the knowledge acquired by the ICTY over the years to the national judiciaries. This process is now coming to an end; the ICTY will soon close its doors. This does not mean, however, that the national judiciaries and national prosecutors will be left on their own. The Security Council has established a mechanism that will be there to continue part of the work of the ICTY, and to assist national jurisdictions in prosecuting war crimes.



What is the Residual Mechanism? As you have mentioned, the Security Council established this Mechanism in December 2010. It will be the legal successor of the ICTY and the ICTR. It will be one institution, but it will have two branches. One based in The Hague, for the ICTY work, and one based in Arusha, for the work remaining from trials held by the ICTR. In terms of its structure, it will look very much like the ICTY, it will have one prosecutor, one president, and one registrar, which will be common to the two branches. And the president of the Mechanism is Judge Meron, President of the ICTY, the Prosecutor of the Mechanism is Prosecutor Jallow who is also Prosecutor of the ICTR, and the registrar of the Mechanism is Registrar Hocking who is also Registrar of the ICTY. While the Mechanism will carry out some of the basic essential functions of the ICTY, it will not have the full extent of the mandate of the ICTY. That is very important to realize.

The reason why we have the Mechanism in place is because there are number of residual functions that need to be carried out after the Tribunal closes its doors. But the Mechanism will not have the authority to issue indictments, for example. We cannot expect the Mechanism to be carrying out new investigations and to continue that part of the work of the Tribunal. Like the Tribunal, or the tribunals, the Mechanism is also going to be a temporary institution. Its mandate will be reviewed next in 2016, and every two years after that. So it will remain in existence, for as long as the Security Council decides that there is a need for that Mechanism. Another very important point to realize is that the Mechanism will start, or rather has started, operations while the two tribunals are still in existence. And here are the two dates that I will mention because they are really crucial. For the ICTR work the crucial date was the 1st of July 2012, this is when the Mechanism opened in Arusha, and for the ICTY that date is 1st of July 2013. As of 1st of July 2013, the Mechanism – and not the ICTY anymore – will have jurisdiction for a number of functions. This change is very important to be understood, because the two institutions will coexist for a period of time. The ICTY will be able to complete all of the proceedings that will be ongoing before it as of 1st of July 2013. In other words, all the trials and appeals which are pending before the Tribunal at that moment will be finished by the ICTY, but any new proceedings, following that date the 1st of July 2013 will be carried out by the Mechanism – that's in terms of purely judicial work, I am talking about trials, trials of fugitives. Of course, in the ICTY we no longer have any fugitives, so that function is not that relevant to the ICTY branch of the Mechanism. Appeals against ICTY judgements for which the notice of appeal was filed after the 1st of July 2013 will also go to the Mechanism. The same goes for contempt of court proceedings, review of final judgements, and referral of cases. Any of these actions that

take place after the 1st of July 2013 will be done by the Mechanism. The Mechanism will have the sole jurisdiction to deal with these matters. Having said that these are, if I can put it that way, the purely judicial functions of the Mechanism, there are also a number of other functions which will probably be most relevant to the countries of the former Yugoslavia, which the Mechanism will perform for as long as it exists. They include supervision of the enforcement of sentences, as you know the tribunals, and in particular the ICTY, has agreements for the enforcement of sentences in the number of countries in Europe. The president of the Tribunal – and in the future the president of the Mechanism – has the authority to supervise those sentences. As of the 1st of July 2013, any request for early release, for example, will be submitted to the president of the Mechanism and not to the ICTY anymore. The same thing goes for the designation of new enforcement states, any future sentences that are rendered by the ICTY, or by the Mechanism – after the 1st of July 2013 the president of the Mechanism will be the one designating the enforcement state.

Protection of witnesses is another very important function that passes to the Mechanism, on 1st of July 2013. In all completed cases, cases which are no longer pending before the ICTY, it will be the Mechanism which will have the authority and the responsibility to protect witnesses, and victims to the extent that they have a status of a witness in ICTY proceedings. The same goes for requests for protective measures. Any such requests that are submitted after 1st of July 2013 will be dealt with by the Mechanism. This is very relevant to what was discussed this morning; the admission of ICTY evidence in legal proceedings here. Assistance to national jurisdictions is another function specifically identified by the Security Council, that includes the provision of ICTY materials, documents, evidence to national jurisdictions as was discussed this morning, such requests are currently being submitted to the ICTY. In the future it will be the Mechanism that will be dealing with such requests. And finally, very importantly: the management of the archives of the two tribunals. It has actually already passed onto the Mechanism on the 1st of July 2012 when the Arusha branch opened. However, as far as the ICTY documents are concerned, responsibility for handling those documents will pass onto the Mechanism on the 1st of July 2013. That means that the Mechanism will be responsible for preserving, organizing, and maintaining these archives, but also to manage them, to provide access to them and to coordinate the work with the information centres that Tribunal is now working on establishing, in cooperation with governments of former Yugoslavia. What does it mean in practice? In practice this means, as of that date that I have mentioned a few times, 1st of July 2013, that most of the functions currently performed by the ICTY will pass onto the Mechanism. And the Mechanism will be your main point of contact

for any and all of those requests. The ICTY will remain in place, and it will retain jurisdiction over ongoing proceedings, but most of its functions will actually transfer to the Mechanism. Just to sum up, the Mechanism that has been established will provide an institutional platform for the continuation of the work that has started by the ICTY, specifically in the field of assisting national jurisdictions to prosecute war crimes. The platform will be there – it is up to national jurisdictions, and national prosecutors to make use of it, and to access that jurisprudence and evidence gathered by the ICTY. Of course, this only concerns the judicial side of dealing with the past. And as I mentioned in the beginning, it is much more complex concept. And I am sure that we will hear about it from other panellists today. Thank you.

### **Eugen Jakovčić, NGO Documenta**

Let's move on. This conference today is organized by a programme of the ICTY which was launched by Gabrielle McDonald, because she saw that after the first judgement was pronounced against Duško Tadić – one of the most notorious guards in the Omarska camp, where there were more than 5000 Bosniaks kept and about 1300 of them were killed – she was appalled that after this first judgement nobody from that area of Bosnia and Herzegovina knew that this judgement had been pronounced. And that is why this Outreach Programme was started back then. And I am saying this to introduce Mr Refik Hodžić who was a part of this programme and he was also part of the information sharing centre in Bosnia and Herzegovina, and now he is the director of the Centre for Transitional Justice. Since Mr Petrov has told us something about the Mechanism that will start taking over some responsibilities as of the 1<sup>st</sup> of July, we are now faced with the fact that what is still ahead of us is something completely new. We expect national justice to do much more, so if you could say something about the context of the Mechanism and if you could, please give us the background of the ICTY, its legacy and the responsibilities of local justice systems, and all of us who are a part of that...

### **Refik Hodžić, Director of Communication, International Centre for Transitional Justice (ICTJ)**

Thank you, Eugen. You used one word which is a key word, when discussing not only today and this topic, but it is key in the broader terms: I think that the word “context” is key to talking about any purpose of our discussions. When I listen to sessions such as the first one, which was very

technical, it seems to me that all of this is happening someplace else, far away from the reality we live in and far away from where these processes take place. It seems to me that the first session was focused on the Tribunal and the narrow context. That is why I would like to talk about the broader context.

Somebody said, during the first session, that the ICTY will not be the last court of that type, there will probably be other tribunals that will deal with crimes in a similar way and that is why we should start from that. The ICTY is the first war crime tribunal after World War II, it is the first *ad hoc* tribunal, something we will probably won't see again. The context in which we live today, the international plan is that we have International Criminal Court and between that court and the national courts there will be some tensions on where some cases are going to be prosecuted.

But let's talk about the context. This session is dedicated to what we can do with the legacy of the ICTY, to see what can be done with what has been collected, and what has been done in order to face the past. I think that one of the huge problems that we are facing is the use of phrases which have become void of meaning, and that phrase "coping with the past" is one such phrase. What are we talking about here today? We are talking about the worst possible crimes known to mankind: genocide, crime against humanity, these are the most serious crimes, we can commit. If we limit ourselves to what was said this morning in terms of how many cases were tried, how many years it took, what were the sentences like, why were people acquitted, why this article of law is used and not... – if this is the talk that we will be having about the ICTY, then we definitely need to ask ourselves whether all of it had its purpose. Neither those who were setting up the Tribunal nor we who had great expectations knew that it would have only to do with the 161 persons that were to be accused. There was an expectation that this Tribunal, with its work, would support the changes that we want to see in society. Just to be clear, when I talk about changes in the society, I am talking about changing values from a point where it is all right to kill a neighbour, to rape their daughter, to burn everything and expel them, to a point where this is inconceivable and unthinkable. We need to know that there are institutions that will be there as protectors of our rights, institutions which will not allow for something like that to happen, regardless of what our name is, what our ethnicity is, religion or political affiliation. We know very well that at some point we lived in a world with a set of values where it was completely acceptable to go to your neighbour's house and do something; not only were you not punished, but you were celebrated as a hero because you committed such crimes. Just to make things understood, as we were able to hear today from Judge Agius who put it nicely: "We have reached the end

of our road, but now it is up to you to take this view forward". Judge Garačić also talked about that, she agreed with that. And that is a fact.

To be honest – let's all agree that even if all the courts in Croatia and Bosnia and Herzegovina and in the broader region dealt only with crimes from the 1990s, they would still not be able to prosecute all the crimes – they would not be able to do it in 80 years. So let's agree that not everybody will be punished, never. You will never have a point when everybody will be punished. We need to ask ourselves how can there be expectations, and why there are expectations that the Tribunal as one court is able to punish everyone. How can that be? How can it be that people are misled about the work of the ICTY, that the ICTY is setup to write history? Why at some point were we willing to believe that the Tribunal is the conspiracy mechanism of Western countries to put in question the fight for freedom of other nations? How can it be that we did not see the Tribunal as an institution which can assist us in facing the facts, facing the deterioration of values in this long and painstaking process to change this set of values? We have to take into account that the Tribunal has indicted or convicted some people that we would have never been able to prosecute ourselves. If we take all of these things and put them into the context of the values with which we live today, we will see our reality as it is.

I will try to finish now, because I know that I have overstepped my time a bit. We live in a reality where the impact of these proceedings, which are of extreme importance, of invaluable importance, was limited by the discourse which was used in our countries that Eugen talked about, by quoting Mirko Klarin. So instead of us talking about the substance, and the evidence which was presented in court, and instead of us talking about the causes of crimes, instead of us talking about those who gave orders, instead of us talking about consequences, and instead of dealing with the consequences; we talked about what the accused person had for lunch in the detention unit, we discussed about whether somebody painted a painting in the detention unit or not, whether the interpreters did this or that, so the discourse about the Tribunal – I am of course now going to extremes and giving you simple examples – that discourse was present in the media. And it was always in line with the political vision to view the ICTY in this way while the substance was blurred. The media, brave people from civil society, journalists, reporters who tried to inform us about the substance so that we could have a look at it and talk about it, not only were they the target of political attacks, but they were also physically attacked. A very nice friend of mine, Drago Hedl, is a living example of something like that, and he could talk a lot about this topic. So, if we talk about the reality in which the Tribunal worked, and what the benefit of the ICTY to us should be; then we

just have to briefly think about the ways in which such trials can contribute to a society. There is, of course, a huge range of topics that we could mention and what the benefits of these trials could be. But there are three basic things in my view that we should consider, now that the ICTY is coming to its end. Everybody mentions how precious the archives are, the documents are. I would probably not know 1/10th of what happened to me if it has not been for the Tribunal's work. So this is really precious and invaluable. In my view, there are three things that should be beneficial. First, punishing the perpetrators – the message sent out to the society is that perpetrating crime is punishable. And values which gave birth to crimes, which justified crimes, and tried to cover up crimes are no longer acceptable in our society; that is the message of punishing perpetrators. This message does not come down only to the number of years of conviction, although of course it is important. How many years somebody got as a conviction does matter precisely because of the message I mentioned. Because if you give two years for crimes against humanity, what sort of a message is that? The message could be: "All right. If you are willing to spend two years imprisoned for that sort of crime then maybe it can be worth your while." Of course the punishment is important, but not more important than the message.

The second one is justice for victims. We must not look at victims as people who should beg for justice for what has happened to them. Victims have rights according to Croatian laws; according to international conventions, which are part of the legislation of all our countries of the former Yugoslavia. Victims have rights; they are entitled to justice and truth. And they are entitled to compensation. And now that I hear that victims are losing cases in courts, civil cases, I come to believe that it is a very interesting thing which should be explored further. Why? Because war crimes trials give victims an additional contribution towards their final reconciliation with other parts of the society. Because the whole point of trials is to end the situation where the victims are victims. Victims should become citizens equal to all of us, and they cannot be equal to us if their child was murdered and they do not know who did it, or where the child was buried, or where the perpetrator is. So if we talk about the purpose of the trials, in the context of justice for victims, the judgement is something that gives the victims the right, in civil proceedings, or other level of the country, to be compensated. That their suffering can end finally. And their suffering is addressed in the best way. They can be provided with psychological treatments because they are still suffering continuously as is the case with large majority of them. It can be financial compensation, it can be symbolic compensation, it can be any of this.

And the third thing – I think is the greatest benefit of the ICTY's trials in order to finish with the process of transforming, or at least start it – the



identification of facts within the processes. These are trials which took into account the highest standards – you know what beyond reasonable doubt means, you know what the standard of such trials is, because beyond reasonable doubt means that you cannot try someone, or convict someone without good solid facts. What we can do is to take those judgements and to initiate a public debate on what has happened. Public debate, the dialogue is a precondition for a change in society, the public debate did not happen here, it did not happen in Bosnia and Herzegovina, it did not happen in Serbia. If you look at the society separately, which is a mistake in my opinion, because if we only see what people say for example, Veljko Kadijević is a person who still lives in Serbia. The Croatian justice system ... in Russia sorry, my mistake. Sorry, I do not want to be non-diplomatic, but what I am trying to say is that, the huge majority of the Serb population which lived in Croatia no longer lives here after the war, including victims and perpetrators of some offences. We have to talk about the role of Croatia, and the role of Bosnia and Herzegovina – we cannot take isolated looks at society. It will not get us very far. That is why an initiative such as Rekom is extremely important. What they are trying to do is to apply historical perspective, regional perspective. What I am trying to say is that the trials have this potential to help us finally start talking on the basis of facts not on the basis of our political views.

In the end, judgements of the ICTY in an ideal scenario should in some way be referred to in the school curriculum. In that way our children could be taught something about the basic facts and events that happened. That is something that will help them to avoid renewal of the conflict. It will help them not to repeat the crimes – and I am not being melodramatic here. I would finish by saying that there is a Worldwide Development Report made by the World Bank and it is the most distinguished, the most valued, document about conflicts on a global level. Last year this report very precisely said that in the societies where fundamental causes of violence and crimes are not addressed, in these societies there is no way to achieve development in the long run, to achieve security in the long run, and that there is 97% chance that the conflicts will arise again – sooner or later. That is something we should think about, when we are discussing what we should take from the ICTY's legacy. Thank you.

### **Eugen Jakovčić, NGO Documenta**

I think it is very important now to emphasize one thing: we are considering this new fact of the Residual Mechanism that will continue the work of the ICTY as of July next year. So there is that novelty; to consider the existence

of Mechanism but also the work of the national courts and prosecutors. Under the pressure from the international community what our countries did so far was provide evidence or arrest fugitives and that was more or less the only form of cooperating with the ICTY. I think that this was done widely in the region exactly in order to avoid something Refik mentioned, and that the use of other mechanisms to support the rule of law. I hope that in the continuation of this discussion we will be able to address some more positive aspects of the Croatian judiciary because there are aspects we are proud of. We are joined by a lady who is the elector for the ECHR, professor at the Faculty of Law, Professor Turković. Could you please help us with this discussion? Could you please, perhaps, address this idea of ownership of justice, which will be returning to the hands of national courts and judiciaries, and they all have to take the full responsibility for everything? This morning we were left with some unresolved expectations, and we are not sure how that will continue. So would you share your expertise?

**Judge Ksenija Turković, European Court of Human Rights,  
Professor at the Faculty of Law, Zagreb University**

Thank you very much. Unfortunately, I was not able to join you this morning, so I do not know what was said. I would, however, like to share some of my observations and I will make them brief. In one part of our society the war is still going on. This is the exact reason why we have to talk about this. I will not talk about the legacy of the ICTY, because this is what was discussed in the first session, but still, if we consider its legacy, we have to take into consideration two aspects. The first aspect is the expectations set towards the ICTY, which were initially huge, in all of the countries of former Yugoslavia. After a while we had to face facts, and we had to deal with disappointment because the ICTY has shown to be something that wasn't entirely desired from a political point of view. And then this clash ensued – between those great expectations and the disappointment with the reality. I remember that I myself had huge expectations. One of our great expectations was that once the ICTY was established the war would stop, and it did not. Another of our expectations was that it would state the facts about the history of this conflict which is not actually the function of this court. It was an important mechanism, however; at the time it was established, our national courts were not able to deal with these cases in the way it should have been done. And the ICTY has paved the way and shown the course to take. This was the first court that was established in that way, after the Second World War. When you take a look at its history, the way in which it was established, the way it started working, particularly in certain things



having to do with procedural, or process law, as well as substantive law. It did, however, improve all of it, and it did play a huge role. It played a huge role in processing crimes but not only that, it played a huge role because it had a huge impact on international crime law, international crime, and international trials of war crimes.

The subject of our discussion today is how to deal with the past. For some people this phrase is void of meaning, but it is nevertheless important for others. What is extremely important is that the ICTY and local courts are just one of the minor mechanisms to do that. What they can do is to process crimes. That is extremely important, but what else can they give to the victims? They can give a sense of satisfaction. But what research shows is that what victims get at an emotional level from courts and trials is unsatisfactory. So, to limit ourselves expecting courts to make us face facts is too much. How do we make courts do more for victims? How do we give victims a new and greater role in trials? I think that the ICTY was the one who increased that role. The ICTY made progress, the ICC did even more because victims were given a special role in criminal proceedings. I think this will be a difficulty in national courts in Croatia. Why? Because it will mean that we have to change our national legal framework with regard to criminal trials. We will have our legal code amended, and an adjustment of its framework to the special needs of the victims. However, it will still not be sufficient. We have included victims, we have made mechanisms available. But the moment where we have to get the victim involved into trials is still not satisfactory. If we saw victims given all the rights and entitlements they have at the the ICTY, it would be sufficient. You mean the reparations? No, I mean participation. What kinds of rights to participation victims have in trials, how much are they allowed to say, and what they are allowed to say? I know that it cannot be just free speech for all victims – to say whatever they like. I know that criminal trials limit that to a certain extent. Because we are there to state facts and to see whether somebody is guilty or not of certain crimes, and we have to accept the fact that we will not be able to prosecute everybody.

However, we need our society to show that it is ready and willing to reject some of its past, that it is ready to prosecute war crimes and war criminals, and it does not have to mean that we have to convict everybody in order to yield the deterrent effect of such convictions. You can never convict them all, but what is important is for the victims to be given an opportunity to participate and then will they achieve everything they want. So we have to have formal proceedings and we have to try and restore justice, it is only partially possible, as it always is. But there is something that this society lacks even more. I even think that we are more willing to prosecute crimes

than we are willing to face the past with respect to some other elements, like some other societies that were facing similar situations: what happened, what the truth was... not many people talk about that. And a small number of people know what happened.

Victims have this need to talk about what they went through. They want their suffering to be recognized. What they also want is for the perpetrator of the crime to perceive what kind of impact they had on the victim's life. This is something that brings more satisfaction to victims, than convictions, than judgements. As regards compensation, reparation – of course we can do that through trials, but we have significant problems regarding that in the Croatian judiciary. If Croatia wanted to do what's right by itself, it would have to do much more. And maybe it is too early for that. The economic situation is dire and you have seen how much time it took Germany to get there, or, let's say Canada with regards to the aboriginal issues. In any case, Croatian society should work on establishing a foundation that would serve the purpose of compensating the victims. So that the victims would not have to go through trials again. Such a foundation would enable the state to take the matters into its own hands and make the victims equal citizens, citizens that no longer feel hurt. I know that there are some other mechanisms of course. You mentioned education as important. What we should do in fact, is to try and review our history books. We should take a look at what it is our children learn at school. I have a child who is in the sixth grade at elementary school, he is 11, and I read a book with my son, called "Little Wartime Diary". I was appalled by this book that was given to my son to read. It seemed to me that it was horrific because it is impossible to take the right stand if you are a child – the question being what is right or wrong – and to extract something positive from that book. And if the teacher is not skilful while elaborating on this book, and bearing in mind that he is too young to read such a book, that book could really have, at such young age, severe psychological effects, as well as a counter-effect to achieving reconciliation. Luckily, he had an assignment to make a cardboard poster and we made it in an effort to explain what the book was about. But it was difficult, and I don't know how many other parents did that. So it is difficult to learn about these things, and to teach about these things.

As for education, there is a joint project for example between Bosnia and Herzegovina, Serbia and Croatia. This joint project has to do with the vertical level of education and training, and the entire education system. It has to do with humanitarian law, it needs to be introduced at all levels, to educate children and students about what happened on the territory of the former Yugoslavia and how we assess that, and also something about human rights and so on. So, I hope that something along these lines will be done in the fu-

ture. I have said several things about what I think is important regarding the issue of how ready our judiciary for all of this. We have to believe we are ready and I do not think that we will give our trust in vain. There is something interesting that I would like to share with you, there is something interesting about this entire region: it can almost serve as an experimental field for determining what kind of judiciary is more effective and efficient. For example, in Croatia we have got regular courts, regular full-time judges, with some additional education. Bosnia and Herzegovina has a different system, mixed system of domestic and foreign judges. Kosovo has the same situation, Serbia has a special court – different story all over again. It is almost an experiment unfolding before our eyes, where we can see different approaches to the same issue, in communities which are actually similar in their heritage, historical heritage, and legal heritage. So we will be able to see and assess what kind of a system is proven to be better in tackling these issues.

Regarding the international community, I think they have done so much for us through the ICTY. Through the ICTY they have developed procedures, and these procedures should at least be attempted to be introduced into our system. When our courts try these cases, it is difficult to do it properly without reading ICTY documents. So there is an issue for you. How do we force our judges to read ICTY documents, judgements, rationales, and jurisprudence? There are some specific issues regarding international criminal law, and this is also something that we have to learn about through reading these judgements. Hence, this aspect is also very important – to read and then interpret and transpose these judgements and proceedings into our system. Criminal procedures are not sufficient, as I have said. We have to talk about all other aspects as well if we want to achieve, as soon as possible, every single aspect of what facing the past really means, and this is first and foremost reconciliation. As for a single uniform truth, it is difficult to accept that there is one. We all come from different perspectives and we all have our little truths about what in fact happened. When I used to live in the USA, my son went to the United Nations school. One day, as I was driving him back from school, he said: “Look Mom, we talked today about the Civil War in America, and you see, Mom, we can never have a single story about the Civil War or of any war for that matter.” He was so young, so I asked him: “How do you know that?” He said: “Well we watched a film today, two films in fact, one made by a Southerner and one made by a Northerner, and these are two completely different stories about the same war.” So what I am saying is that it is not perhaps a horrible thing to have two different stories. However, it is horrible not to be able to live with these two differing stories. Of course we need not to have two stories diverging totally, we need to bring them closer together, but we cannot always expect them to be completely the same. Thank you.

### **Eugen Jakovčić, NGO Documenta**

Thank you. We have Mladen Stojanović with us here today as well. And he will talk about the *Documenta* Osijek NGO, and the Civil Centre for Peace and Non-Violence and Human Rights, from Osijek. Mr Stojanović, we said that facing or dealing with the past for some people is a phrase void of all meaning. What does this mean regarding the legacy of the ICTY? How much has been done? Perhaps not enough? Could you pick up on what we heard today? And could you talk about the notion of command responsibility because the ICTY was the first to distinguish between command responsibility and other types of responsibility such as individual..So Mladen, could you take us through your perspective on these issues, because you published several annual reports about what takes place in the Hague courtrooms?

### **Mladen Stojanović, Centre for Peace, Non-Violence and Human Rights, Osijek**

First of all, many things have been said during the first panel, and during this panel as well. I would like to offer my apologies in advance if something gets repeated. Considering the fact that I was invited here on behalf of the monitoring team, which monitors trials of war crimes, I would like to talk to you about some situations that Eugen mentioned during the introduction. A lot has already been said about which cases were transferred to the national level and national courts by the Prosecutor's Office of the ICTY. First we have to distinguish between two different types of cases. We have cases where the prosecutors of the ICTY have issued indictments and then transferred them to the local judiciary – in those cases either investigation was carried out and no indictments were issued or some investigations were underway but were not finished. With regards to the cases which were transferred to national courts where there already was an indictment by the ICTY, I would like to point out that there are about eight cases which include 13 indictees. Most of these cases were transferred to Bosnia and Herzegovina. Croatia and Serbia received only one case each. The *Ademi-Norac* case was transferred to Croatia, as you probably know. Why is this case important? This case is important because the facts of the transfer of the case and the adjustment of the indictment to the Croatian legal system have encouraged this practice of indicting commanders who did not prevent crimes among their subordinates. During the time where these crimes were perpetrated there was no special provision which would regulate command responsibility and there was a question whether commanders in

Croatia could be indicted and convicted because they did not do anything to prevent their subordinates from committing crimes. They knew that crimes were being committed, through that they accepted crimes and aided and abetted these crimes. There was some discussion whether something like that was possible or not. Even today some lawyers think that it was not possible. But the case was transferred to the Croatian judiciary and there was one acquittal and one conviction. As I have already said, this has encouraged a practice in the Croatian judiciary and in the Croatian legal system which was good. After that, several other indictments were issued, the cases are still underway. For the time being, it is difficult to say to what extent every individual case is successful or not. As to why this is important, I have to point out that in Croatia we still have a number of unprosecuted crimes. Most of these crimes are unprosecuted because you have an unknown perpetrator. However, very often it is possible to identify which part of the army these people belonged to. Because if we know what their military formation was, or what part of the Croatian army it was, you can then find out who the commanders were. The *Ademi-Norac* case is important because in Croatia it opened that opportunity. I do not think that any of that would have happened if the case had not been transferred to Croatia. Therefore, do not nourish that illusion. If we compare the situation of which I talked about – and, of course, I am only talking about Croatia – you have to know that, with regards to Serbia, I talked to some Croatian prosecutors who are in touch with Serbian prosecutors. Serbian prosecutors do not think that commanders can be prosecuted in Serbia, and that is why in Serbia we do not have any indictments against officers, high-ranking officers of the Yugoslav National Army. Within civil society organizations, we believe that debates and discussions should be encouraged, views should be exchanged, so that the practices could become coherent and sustainable, even though we are dealing with the legal systems of different countries, and although our systems were identical before 1990. Hence, these are only interpretations and from the point of view of willingness to prosecute crimes, it is also important. When we talk about transfer of cases apart from the *Ademi-Norac* case, which was one case that was transferred to Croatia after the indictment was issued, it must be said that you can also transfer a case for which there is no indictment, but some investigation, or part of an investigation, was carried out.

A couple of years ago, when we were monitoring one case which Vesna Teršelić has briefly mentioned – this was the case for a crime committed in Marino Selo, close to Pakrac – the question of whether the testimonies and depositions taken by the ICTY could be used in that particular case was posed. The Supreme Court decided that, in that particular case, such statements could not be used. The Supreme Court treated them as police

statements and they were not accepted as admissible evidence. The Supreme Court made that decision on basis of Article 28 of our law on the implementation of the ICTY Statute, which was quite imprecise and it did allow them to interpret that provision in such a way. Those of us who monitor the trials reacted immediately; we said that something like that cannot be changed. Just to compare, I would like to tell you that the same statements were used in the Ademi-Norac case because the indictment was issued in The Hague, and then the case was transferred to Croatia. But in other cases, for example the *Marino Selo* case, evidence which was collected by the same bodies that collected evidence in the Ademi-Norac case was not admissible because there was no indictment from the ICTY. Ms Garačić, Ms Dolmagić and Vesna Teršelić during the first panel talked about the fact that there was an amendment to the law in 2011, and that such personal statements and testimonies can now be used, regardless of the stage when they were transferred to Croatia. However, the situation in reality does not correspond to that. The *Marino Selo* case was retried and even after the amendments came into force, these personal testimonies were not used as evidence. They were not used because the previous decision of the county court rejected them as inadmissible, and the Supreme Court treated such evidence as something that could be used only if the case started after the amendments were adopted. That was their interpretation.

Generally speaking, when we talk about the Mechanism which will be operational after the completion of the ICTY's work, its basic assistance will be its assistance to the national judiciaries because the Mechanism will respond to letters rogatory or requests for assistance on transfer of evidence. However, the responsibility for prosecuting crimes remains with national bodies, and the responsibility lies even with local politicians. Somebody said today that this part of the world that covers all of the countries which were created after Yugoslavia is an area which needs continuous political willingness to prosecute war crimes. But there is no such political willingness. Ms Zlata Đurđević, the professor from the Law Faculty talked about the null and void act. We do not need null and void acts, we need better regional cooperation and we need contracts, agreements between governments which will regulate such cases. However, there is neither willingness nor shared views that there should be some level of consensus between our governments. At the beginning of the year, Presidents Josipović and Tadić had a common initiative, but then the government changed in Serbia. In Bosnia and Herzegovina it is impossible to reach a compromise because Bosnia and Herzegovina believes that everybody should be tried where their crimes were perpetrated. On the other hand, Serbia and Croatia want to try the perpetrators on basis of their domicile or habitual residence. Judge Garačić said something about the current number of cases and the cu-



urrent number of indictees before county courts. She said that there are 99 cases with 519 indictees. She very honestly said that most of these cases are inactive at this point. I would say that, luckily, we no longer practice having a huge number of cases *in absentia*. Most cases are inactive because of that. In order to activate these cases, regional cooperation should be improved, cases should be transferred to those countries where perpetrators actually are, after which judicial bodies will decide whether to prosecute them or not. A huge number of cases have not been transferred. They have not been transferred because these cases are “not ready” for transfer due to the fact that investigations were carried out and indictments were issued during the 90s or at the beginning of the year 2000. And the indictments are very often not corroborated by evidence. In some cases, criminal offences for which indictees are indicted are not war crimes at all. The State Prosecutor’s office on several occasions reviewed all the indictments. However, there are still such cases and that is what we face. That is something we see in practice.

### **Eugen Jakovčić, NGO Documenta**

Thank you, Mladen. We still have some time left, and I hope that we will be able to have a brief discussion. Last but not least, we have Drago Hedl, a journalist.

I would like to first share some perspectives with you. At *Documenta*, we feel a bit provoked, not only by the things that happened on the occasion of rendring of the judgement against the Croatian generals on the 15<sup>th</sup> of April 2011, but also regarding the way in which the public in Croatia is informed about such thins, and facing the dark side of our history. We monitored the information provided by the Croatian media from the 15<sup>th</sup> of April to the 30<sup>th</sup> of April. The voices of the victims were not heard, descriptions of their suffering were not heard, nor were people given a chance to talk about that. Instead of victims’ testimonies, the TV screens were flooded with statements of support and compassion, bestowed by citizens, co-fighters, friends of the generals. Hence, the key information about the true proportions of the crimes and their victims were entirely suppressed. The court proceedings, which lasted for a long time in The Hague, were not followed up through either continuous reporting or through special television broadcasts of any kind. I don’t know whether the Croatian public at large knows that Stanišić and Simatović, the former chiefs of the Serbian secret services, are indicted with ethnic cleansing of civilians. I do not know whether Croatian society knows that Perišić is indicted with not stopping the shelling of Zagreb, and it seems to me that those journalists who are there just do not do their jobs. The international correspondents

are horrified by the way in which the Croatian media neglects to inform the Croatian public about this, or the way they do it when they choose to do it. So I hope that with the new team of people in charge of the Croatian public television, we will see a change in this tendency. Drago, could you please share your views?

### **Drago Hedl, journalist**

Thank you. We do not have much time, so I will try to reduce my speech as much as possible. I think that one of the most important things to mention regarding the legacy of ICTY is the step after it, and that is the legacy of the courts in the territory of former Yugoslavia. What will these courts leave behind them after having acquired knowledge from the ICTY? We know that we now have a vast source of data and information; we have personal testimonies, evidence and everything else that ensues from the ICTY, and we can now benefit from it. There are the archives, of course, which the ICTY leaves as its legacy, in order to prevent things that are taking place as we speak.

Those are several things to consider. First and foremost, we are already witnessing that some people are attempting to revise the facts established by the Tribunal – there is a great deal of revisionism in the region. Of course, we have to be aware that there will always be political forces which will try to negate war crimes, genocide etc. We have to count on that. However, we cannot allow that to happen; we cannot have, at the level of highest state, high-ranking politicians negating openly and frequently the genocide in Srebrenica where, as we know, thousands of people were murdered – young men, old men, boys even. If such a crime, for example the Srebrenica crime, is revised, minimized, or even completely denied, what will happen then with the story about Vukovar, the story about Ovčara or with the story about the civilians that were killed in Osijek? What can we expect if a war crime of such a dimension as the one of the Srebrenica genocide is denied entirely from highest state positions? The legacy of ICTY will leave us with a lot of work, work that needs to be done by our courts. This needs to be done in order for us to learn the truth and to try and give some justice to the victims.

We have heard from numerous panellists here today about the victims... the vice-president of the ICTY also discussed the topic. I am a journalist by profession, and as such I have written about numerous war crimes. I could number many examples about how all this hits victims. Victims sometimes get victimized twice, not only going through what happened to them, but



also through going to trials. Because trials were carried out in a way that re-victimized, marginalized or neglected victims; they were even sometimes insulted and punished for the second time. Let me share one example with you: the example of a war crimes trial in Osijek where the victims all of a sudden became perpetrators, and the perpetrators became heroes. The media contributed greatly to this situation; they kept talking about certain things that mislead the Croatian public and made everything completely incomprehensible so the public could not assess what actually happened. People do not even know what went on; there were not enough attempts to explain to the public at large what happened in the so-called *Selotejp* or *Garaža* incidents. I think that the legacy of our national courts is important because there is one thing that their legacy will serve for, and that is the persistent will of some people to make crimes less relevant, or even minimize the things that happened in the past. Such attempts will exist in 10 or 15 years, and the legacy of our courts should not allow that. We should use the legacy of regional courts in order to prevent all those who would like to revise history by doing that.

Since we have to speed things up, let me share just one more case that corroborates what I have been saying. After the ICTY's legacy we have to create a legacy of national courts from the entire region. We recently had the unveiling of a monument dedicated to victims of war in Osijek. And this was also a monument to Homeland War defenders. The names and surnames of the victims were written on this monument; the names and surnames of all those who lost their lives to war, be that in combat, or as civilians. You do know that in Osijek we have hundreds of people who lost their lives and the exact number is still not known? So we have these names, and surnames, but what it says is: "The victims of the grand Serbian aggression". Although we did not only have victims who were victims to Serbs, but also people who were murdered by Croatian people – and these names are there with such a title! This is not a matter of ignorance, this is a matter of an attempted revision of history where crimes committed by Croats are ascribed to Serbs. And I think this is something that our common sense should prevent. Because it is a tremendous offense for the victims and for all people who respect the rule of law. So once again, I would like to reiterate that in addition to the ICTY's legacy what we need is the establishment of the legacy of national courts who would also collect evidence, and also provide us with documents with facts so that nobody can make such attempts again. Thank you.

**Eugen Jakovčić, NGO Documenta**

Thank you, Drago. Would anyone like to speak?

**Manda Patko, Vukovar Mothers**

My name is Manda Patko. I come from Vukovar, I am the president of the *Vukovar Mothers* NGO. I did not speak so far, but I do agree with somebody who said that the war is not over yet for some people. Well, for those of us in Vukovar who have not found our dear ones, we are still in 1991. Today is the date when my husband went missing, I still do not know where he is. It has been 21 years now, I do not know where he is, and I do not know where his remains are. The gentleman here said that every country has the right, or at least it should try and compensate its victims. Well, I went to Serbia, I paid a visit to Belgrade, I went to an NGO, we talked about humanitarian law and all of us who spent time in camps during the war were there. I went through the hands of Chetniks and I was in a camp, and I wanted to speak some five or six years ago. I also wanted to speak before a court, but I have never learned whether what I said was admitted as evidence in a court. What I am trying to say here is that there are some youth initiatives, and they are important. For example, there is a youth initiative in Belgrade that organized a conference four or five years ago. They condemn the war that took place in Croatia. They condemned the excessive shelling of Vukovar, and they told me that they submitted a claim before the ICTY for the excessive shelling of Vukovar. However, we also have some claims about concentration camps of Serbia, but I do not have information about what happened there. Do you know that there are bilingual schools and nurseries in our territory? I mean in 50 years' time, if we continue in this way, the war will break out all over again. Why are these things happening? I have travelled through a lot of countries, and I know you probably have too – if there is an official language of a certain country then that is the language that people use at school.

**Eugen Jakovčić, NGO Documenta**

Thank you. Refik, are these expectations i.e. what can we expect?

**Refik Hodžić, Director of Communication, International Centre for Transitional Justice (ICTJ)**

Well, I would first like to extend condolences on the occasion of the anniversary of your husband going missing. For a certain percentage of our population the war still goes on, and I think it is the majority of the population. I think that the fact that we hear no guns around us does not mean that the war has ended for us. I can definitely state that with certainty regarding Bosnia and Herzegovina, and the war goes on mostly because of what politicians do. Somebody mentioned the denial of genocide, somebody mentioned hate speech. Well, you should only listen to what the president or the spokesperson of Republika Srpska say to the media. I really do not know what happened to the youth initiative, to those claims made to the ICTY, I do not know what the ICTY did regarding the concentration camps you mentioned, or the one you were in. But I do know that when it comes to reparation and compensation that needs to be made to victims, as it was mentioned by colleagues before me, there is absolutely no doubt in my mind that victims should not be the ones to press charges and go through trials. I do, however, admit that we have to look at the situation we are in; we cannot expect the kind of foundation that Germany had for compensating the victims of the Holocaust. We have seen some examples of reparation in Argentina and some other countries and that reparation was not done through financial compensation. The victims' compensation does not have to be financial, it can be in the form of free education, free healthcare, priority in employment and so on. All of these are ways in which your state can assist you and offer reparation to you as a victim of war. You only need to be aware of the possibilities for reparation. There is one thing I would like to share with you, and this is a thing of which I am deeply convinced— we have one fundamental problem with making progress in how we treat victims, how we are divided in our communities, for example through bilingual schools; that single problem that we have in our judiciaries and our practices is political will or rather the lack of it. The lack of political will is a much greater problem than the all aforementioned technical issues.

**Eugen Jakovčić, NGO Documenta**

Mr Petrov, could you give us your perspective on this situation of communication with the victims? What will the Residual Mechanism do in that respect? Will it make communication with victims a priority?

## **Martin Petrov, Chief of the Immediate Office of the Registrar, ICTY**

Well, to be very honest, I do not think that the Residual Mechanism will have the mandate to specifically communicate with victims simply because, as I mentioned earlier, it is supposed to be a very small and temporary institution whose mandate is really limited. But to the extent that as part of its mandate, the Mechanism will have the authority and the possibility to communicate with the region, particularly with national prosecutions, I think that there is probably some room for that process to also include victims, as an important element of the stage that comes after the closure of ICTY. I would only mention the information centres, which will be subject of the discussion later on today, and I presume that is probably the more appropriate moment to discuss the position of victims, the communication between the victims and the mechanisms that will remain after the ICTY closes its doors.

## **Julijana Roksandić, Association of Croatian Civilian Victims of War**

First of all, I would like to confess, because two weeks ago I attended an event and have some experiences that I would like to share with you. With regards to the previous panel, and with regards to the discussions that were taking place here – from the standpoint of a victim – I would not say that I was uncomfortable, but I cannot understand some things. All of you who have not been affected by the war should understand that twenty years have passed after the war, and then you have the Deputy State Prosecutor saying: “There is a lot of work ahead, we will try to do our best.” Will we be alive by that time, after twenty more years?

For example, I come from Slavonski Brod. It is a town which was shelled on a daily basis between March 3 and October 15. That is a huge number of days; we were shelled on a daily basis with long-reaching artillery from the Bosnian side. The result of that was about 300 victims: 148 were killed, others were injured. There is a very sad fact related to that: at that time, 28 children were killed in the town of Slavonski Brod. The youngest was eight-months-old. For the last 10 years in Slavonski Brod we have been organizing meetings of families who lost their children. Every year we asked for those who did it to be held accountable. Because we want someone to be held accountable and responsible; we want someone to be held responsible for killing the town, for killing the children! It is not enough to say “I

am sorry, we apologise, I apologise that your child has died” – that is not enough. For ten years we have been questioning the issue of responsibility. This year, the town of Slavonski Brod supported us and they supported our initiative, the result of that was that about three weeks ago I was summoned by the court. Just to give you an example of poor cooperation between the court and the victims: so, I got the invitation from the court. They invited me as a witness against Mr Narančić. During the first ten minutes I was shocked: “Who is Narančić, who is that person, who wants me there, why I am a witness there?” How can the State Prosecutor’s Office, how can they expect from us small people to know the terminology they are using? I did not understand that. After that, I went online to see who Narančić was, and I understood. Because earlier I did not know what I was supposed to do. I am trying to say that on the basis of our initiative the investigation was launched. When I came to court, I found out something more, another devastating fact – that the investigation was launched in 2005. For seven years it lay somewhere and it took them seven years to ask me to testify about what happened to me and my family! It took them seven years! I cannot describe the way I feel now. The judge was completely unprepared, and this is the county court. It seemed like he did not know what to ask me. He had police statements in front of him, police documents; everything is there in the document; what happened, why it happened... Then I asked the judge who Narančić was. And he said that there was an investigation carried out against three persons, the other two were commanders from the Yugoslav National Army and they were stationed in Bosnia. Two of them are no longer alive and Narančić is now in Serbia.

Personally, I do not have problems talking about it. I can talk about it a lot, I can scream about it, although nobody wanted to listen to us over the last twenty years.. And I would like to say that there is no institution in Croatia that you can call and ask them how many people were killed in the Homeland War in Croatia. What is even sadder is that parents whose children got killed will be invited to testify. And what about others who also went through horrible things? What I am trying to say is that this is not a proper way to deal with these matters. With regards to reparation, even if all of those who perpetrated evil, even if they disappeared from the face of the Earth, it would mean nothing to me; that is something that will not bring back the lives of the loved ones to any of us. When you say “reparation” you should not think about it only in financial terms.

**Eugen Jakovčić, NGO Documenta**

Thank you, Juliana.

## **PANEL 3:**

### **THE FUTURE OF THE PAST: THE SCOPE OF THE ICTY LEGACY**

Moderator:

Nerma Jelačić, Head of Communications, ICTY

#### **PANELLISTS:**

- Judge Fausto Pocar, ICTY
- Hrvoje Klasić, Department of History, Faculty of Humanities and Social Sciences, University of Zagreb
- Zoran Pusić, President, Civic Committee for Human Rights, Croatia
- Sven Milekić, Youth Initiative for Human Rights, Croatia
- Boris Pavelić, journalist

#### **Judge Fausto Pocar, ICTY**

The Security Council decided to close the Tribunal, so that was a political decision to stop the ICTY dealing with cases. But the resolutions also gave the impression that the Tribunal should achieve reconciliation; that it needs to establish the rule of law, to establish societies, should do everything. Of course a court cannot achieve everything. However, there is one thing we can all agree upon: justice is a solid, important contribution to reconciliation, in achieving reconciliation, rebuilding society, after the events you went through in the 90s. Now, achieving justice has been the primary responsibility of the Tribunal; thereby contributing to reconciliation in the society. But we also have to bear in mind that the same responsibility lies on the domestic judiciaries because the Tribunal was never considered, or established, as an institution that should last forever. We heard this morning, and it was recognized by everybody, that it was impossible or difficult at least, during wartime, for the domestic judiciaries to effectively prosecute people. That was the reason why the Security Council gave that responsibility to an international body like the ICTY. But I do not think that the Security Council ever wanted to derogate from the principle, which is the

basic principle of the ICC and that is: the primary responsibility of doing justice is a responsibility of domestic courts. Only when domestic courts are not able to do this will the international community intervene. That is the principle of the ICC that you all know very well. Croatia has ratified the Rome Statute, has implemented the Statute and you know it very well; you know how it functions. But the system in the ICTY is not contrary to that, although the Statute speaks of a primacy of the international judiciary. Why the primacy? Because the Statute was meant to establish a temporary court to work for a certain period of time during which the domestic courts would not be able to work. And afterwards the accent goes back to the domestic jurisdictions. I do not have to repeat the cases which were referred back, at a certain moment, when it was realized that the domestic judiciary was able to deal with cases. Some were retained, perhaps some more could have been referred, but that is past, history. We do not have to look at that very much. The principle is that the primary responsibility in these matters belongs to domestic courts. As it is in general for human rights matters, the primary responsibility to protect rights belongs to domestic courts, not international courts. We heard the colleague from Strasbourg this morning. One can say that if there is a right to be protected, that is the responsibility of Strasbourg. Isn't that the case? The responsibility is a matter of jurisdiction, Strasbourg will come in only if the domestic jurisdiction does not function properly. But in an ideal world, the international jurisdiction would not have any work to do because the domestic jurisdiction fully complies with the obligations they have.

I say that because the same problem arises when it comes to reconciliation. The same criticism that could be put on the Tribunal not to have done enough for reconciliation now goes back to domestic courts. If the domestic courts do not provide justice, then they fail also ensure their contribution to the establishment of the rule of law, and to reconcile the population in a country. I was a bit, I must say, a bit affected this morning when I heard that there were investigations going on for seven years, and she was not even asked to tell the story to the investigator. There was no time for answers at the end, but there is something that does not function in the investigation, and one should look at that because I also heard that all courts that deal with crimes are functioning well. But are they dealing just with the trials? And investigations, as I heard this morning, were carried out by other courts. But are the other courts working, or prosecutors, working well at doing investigations? So there is something to be looked at. I would have liked to have the answer of the Prosecutor that was present this morning – just to hear, as a judge, the other party explaining the problem. I do not know whether the Prosecutor is here now, but if he is coming, he should be given an opportunity to state his position. There might be reasons. I am



not saying that there's something wrong, but it is something that needs to be looked into because the responsibility to render justice now rests with domestic courts. How much the domestic courts can take from the legacy of the Tribunal is a different issue. I was very pleased to hear that evidence heard by the Tribunal can be used in the domestic courts. But here, too, we must be very clear. What is evidence? That means evidence tested in the Tribunal, heard before the Tribunal in a case. But what about the material that the Prosecutor is sending to the prosecutors here? That is not *per se*, evidence, yet. Or maybe evidence, if it is written evidence, according to the domestic procedure. Because the Tribunal follows mainly common law and if the evidence is not tested, it is not really evidence. But in the civil law jurisdiction like in Croatia, there may be evidence that does not need to be tested to be used as evidence. However, this would be under Croatian statute of courts, not the Tribunal's. And in this case, the Tribunal does not have to dictate what the evidence is. Otherwise, if it is not evidence, it is just information given to the Prosecutor to carry out his investigation, but it is not something that can be used under the law as evidence. I would like to make an additional clarification, there are quite a number of judges and prosecutors here, so perhaps they may clarify the issue. What I wanted to say essentially is that we should not give the Tribunal more responsibility than it has, but to use the legacy of the Tribunal in order to contribute to the activity in a harmonious way. You know, all of you know, that I put a lot of accent on establishing partnership between international and domestic jurisdiction because I consider that to be essential for the future, also in this country. There is another issue I wanted to raise and comment on, but perhaps my time has elapsed, so I will take it on later. Thank you.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you. The ways through which the cooperation could be built between the ICTY and the national courts: I hope that during the debates we will be able to hear something about that from colleagues from domestic legal institutions. But, before that, let's hear something from Mr Hrvoje Klasić. I want to ask you, Mr Klasić, to tell us something from the perspective of academia, from the perspective of the education system, since you come from the Department of History. So, tell us in what way can the material and the legacy of the ICTY be used positively? And what are the needs of academia in that respect?



**Hrvoje Klasić, Department of History, Faculty of Humanities and Social Sciences, University of Zagreb**

Thank you. I will try to be very brief and to keep it simple. Over the last twenty years, the ICTY has used historians for their own purpose. Now we have to use the ICTY for our own purpose. It turns out, when I say it out loud like this, that there are different purposes. However, these are purposes which have a common denominator. This common denominator should be the truth. Because there is neither justice nor history without truth. I am just talking in terms of theory. We all know that it is always like that; we have witnesses here among us and we could number cases that happened throughout history. Hence, this is not the first nor will it be the last example of cooperation between historians and the justice system. According to the experiences that we have, this relationship points out the advantages and disadvantages of such cooperation. Those of us who deal with the second half of the 20<sup>th</sup> century are lucky because we deal with people who are still alive. Let me give you a specific example. When I was doing my master's degree, I worked on Communist Party documents, and when I was finished I met a lady who was the recording secretary in charge of those transcripts who said to me: "You can throw all that to the garbage; it happened completely different. But then the secretary came to me and said: "Change this, change that." So we as historians usually love court documents because we believe that since people there pledged to God, to the Constitution, or to whomever – those documents are more reliable. However, it is not always like that.

As I said this morning, there was a key word for us – "context". The political context, the context of space and the context of time. Because not every judgement is a judgement, not every court is a court in the same way. What about the Third Reich, what about judgements announced back then? – they were legal at that time, against those who did not abide by the Racial Purity Act. Somebody mentioned several times the Nuremberg court. The Nuremberg court did contribute to some legal norms and it did contribute to creating a context which is even today present about what was happening in the time of the World War II. But the Nuremberg court is also not without its disadvantages and contrasts which were later pointed out. And what about the double standards? Germany's armed aggression was mentioned in the processes before the Nuremberg court, but nobody mentioned the Russian invasion of Finland. The Nuremberg court dealt with the inhumane treatment of the Germans towards their war prisoners, but what about the French who after the World War II treated their own war prisoners very inhumanely? These are issues which have been raised

and they show us that it is a very complex issue – and, as Judge Pocar mentioned, not all evidence is evidence. It has to be, it can be during the trial, it can be before the court, it can be elsewhere, these are all different types of evidence.

And if you want, we have our own example. We lived, that is, a great number of us here lived, in a system where the courts and court judgements were pronounced in a different way. And there you have an additional complication; for example, I had problems and received threats because I dared to say that if you look at the legal proceeding against Alojzije Štipešić most Croats and the majority of the public will say “Yes, it was a staged process. It should be reinvestigated.” Yes, but when the same country undertook proceedings against Draža Mihajlović, we said they did the right thing because he was a war criminal. So it is the same system, we have the same court prosecuting two people, but we know that each and every one of these processes should be looked at from different standpoints and with different nuances, which all leads us to an issue which will be probably brought up by people from Vukovar. Others who are convicted, the real people who are guilty, are they the only perpetrators? And one more thing, does it mean that those who are not convicted are completely innocent? Just the other day, I watched the documentary on Mr McNamara who was Kennedy’s minister of defence who told about his life after the World War II. At some point, during the documentary, he says “We bombarded Japan, Tokyo, on a daily basis. 150,000 dead in one night. We dropped the atomic bomb and at that time I said to my commander that we mustn’t lose because if we lose we will become war criminals. We did not lose the war, we didn’t become war criminals.” This was said by a high-ranking official .

These materials will be used to create a narrative that for many years will be used to teach the children. And let me give you a technical detail, I would like these materials to be accessible, very close by, because they relate to us. Next week I have to work on the Yugoslavian archives –. it also contains Croatian materials, but as you will be able to hear during the next session these documents and materials are not in Zagreb. And they should be here in Zagreb. Instead of me spending money and traveling to Belgrade – although I am not saying Belgrade is bad, there are interesting things in Belgrade – but I would like to work in Zagreb on Croatian materials and documents. So my message is a very important... that needs to be tackled well. So I would like the materials and documents to be present here in Croatia, in whatever form they would be. But it is certainly a hope that should be tackled with a lot of caution taking into account the context, the time when the judgements were made.. I think I was the briefest speaker so far. Thank you.

## **Nerma Jelačić, ICTY Head of Communications**

Thank you. Hrvoje. The archive issue will be discussed in the last panel session. And we will definitely clarify certain issues then; we will clarify what we will be able to do with the archives of the ICTY. Mr Zoran Pusić, you are the president of an NGO called the Civil Community for Human Rights, and it seems to me that it would be good if you also reflected on the judgements that were passed so far, and yet did not have a more positive impact on dealing with the past. Perhaps their impact should have been bigger throughout the region?

## **Zoran Pusić, President of the Civil Committee for Human Rights, Croatia**

I think that we have evolved a bit in that respect. I remember my first meeting with Hague people in Banja Luka, which was back in 1999, perhaps 2000. It was spring. And we had a lot of problems; it was so difficult to present our perspective which we perceived to be right. And our perspective was that NGOs and the ICTY complement each other, that they are complementary institutions and should be perceived as such. Some people said: “No, you should not think about this, you should not think about any kind of committees for truth and reconciliation. No, this is all about trials, and convictions.” Well, the ICTY is a court which is not perfect, and we cannot say that it has not done anything wrong. However, what you think about the ICTY is something that a new light is shed on when you consider the work of your domestic courts. I would now like to say something about the legacy. The legacy is multiple, its existence and its work represents the new point of reference in the history of human attempts to make law a better approximation of justice. It also achieved specific results. It tried politicians, commanders, people most responsible for war crimes committed during 1991-95 in the territory of Croatia and Bosnia and Herzegovina. This could have never been done, had it not been for the ICTY.

At this conference we will discuss various aspects of that legacy, in various panels. These panels are about the future of history and we should focus on the impact the legacy of the ICTY has on dealing with the past and reconciliation in the region. What will be the future of the past? Well, I think we can say, with a great deal of certainty, judging by the rich historical experience, that history will be manipulated, or at least attempts will be made to do so. It will be manipulated for political purposes. There will be attempts to hide the facts, to not disclose facts, to write about and talk

about non-truths, and to try and falsify official state-level truths. We could share numerous examples from when that happened in World War II; we can recall the forest of Katin and the events related to Bleiburg that for 40 years were treated as a form of state-level secret. And even democratic countries, with a long-lasting democratic tradition, also went through certain events where they did not disclose facts, or adjusted the official version of history a bit. Croatia and Serbia are a good example how not talking about events from the past, hiding crime, not processing crimes that happened, can return as a boomerang and backfire on you. In the end, it served as a motif and justification not only to minimize things, in this case to minimize the crimes committed by Ustashas and Chetniks, but also to relativize the evil behind the ideas that led to crime. All that together has a negative impact on those people who are grandchildren to those who participated in the events that took place 60-70 years ago. Facing the past in principle should be a fair and impartial deposition of facts about past events, where we refuse to model the past or to use the myth of the past to justify various terrible things that we do in the present. However, since the first war in the Iraq and the Yugoslavian war unfolded in the IT era where wars were broadcast live, it seems that all that has to do more with dealing with the present. The existence and the work of ICTY has made an impact on facing the present; it abetted positive changes, not only in the justice systems, but also the overall state of social awareness. We can see to what extent these changes were positive when we take a look at the newspapers 15-16 years ago. For example, in 1995, a Zagreb university professor wrote this: "Neither peace nor war is better or worse than the other. Justice is not better than is injustice, or injustice better than justice. A virtuous person is not better than a criminal or vice versa if they do not lead to the creation of a state, and the realization of national dreams." A parliamentary representative said this in 1995: "These elections were for Croatia, so we could get rid of the Serbs forever, and make an ecologically clean state for ourselves." A highly esteemed journalist in 1997 said: "These fervent fighters for human rights only have individual cases of violations of human rights to work with." And the Bishop of Lika and Senj County said in 1998 that the individualisation of crime is the Devil's work. He talked about NGOs and the ICTY on that occasion. Well, there are numerous such examples. The evolution of arguments against the ICTY started with saying that it was the Serbian court, then demonstrating in front of the Sheraton hotel in 2008 and saying that it is a political court which is dictated by the great powers and is intended against the independent state of Croatia. Those arguments involved statements saying that the ICTY is a court which sees no difference between the victim and the aggressor and even acts apologetically on behalf of the aggressor. And that kept happening; that was a prominent argument. What was interesting is that, in Croatia, the pinnacle of the Catholic Church got

engaged in this populist, aggressive propaganda, lacking on arguments and aimed against the ICTY. Openly.

As for reconciliation, you only need to take a perspective, a cynical one or an idealistic one. Cynics would say that the ICTY brought nationalists of both sides together, because they feel fervent animosity towards this international institution that violates their version of state sovereignty. And that states, when headed by people who think like them, should do to their citizens whatever they want to do with them and to them.

All right, I will speed up. There is, perhaps, something that you might not know, not many people do, and that is that the ICTY introduced ethnic cleansing as a crime. Talking about dealing with the past and facing the past, it could be beneficial to say this: our contribution to the international judicial practice would be the term “Balkanization” and the term “ethnic cleansing”, both ensuing from this war. And now another question: Does any state have the right to displace minorities it deems dangerous to itself? There is only one person who at an international event regarding this topic in 1952 said that this was something to be condemned. Everybody else thought that it was allowed for the state to displace anyone whom they consider to be dangerous to the state. After the ICTY that no longer remains the case. Why have I chosen to quote those statements made in the media in the 1990s? Because they sound so horrific and horrendous today, but they did not back in the days. I remember a law professor who climbed the pillar in front of the US embassy and yelled: “We will try the judges of the ICTY.” Those days are gone, it does seem a little off and weird today, but back in the days that was our reality. A shift in our reality has occurred, and it has occurred thanks to the existence of this kind of an international institution as well. Because through this institution, the meaning and significance of human rights gained weight, gained recognition, and it gained it not only in the judiciary but also what we call the opinion of the public at large. And this is significant form of legacy. What will happen in the future remains to be seen. It is not clear still, it is especially unclear in the long run. But one thing that we can say is that it will depend on what we do now. Thank you.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you very much for painting such a clear picture for all of us. We are looking forward to having a discussion session with our guests and audience. But now, I would like to give the floor to a representative of young people, from the Youth Initiative for Human Rights NGO from Croatia. Mr Sven Milekić. Could you talk about the role of young people and reconciliation?

## **Sven Milekić, Youth Initiative for Human Rights, Croatia**

I can say that many young people in Croatia are not well-informed about the work of ICTY. At the same time, they are not well-informed of the effects and the impacts of ICTY. Because there are facts which are identified by the ICTY, which is something young people should know. And these facts are something that could be quite helpful in further trials and in building the narrative. And there are some things that are not heard in the media, sometimes because the media in Croatia report sometimes in a way that you cannot hear anything relevant for a couple of years. But when there is an indictment, they are all over the place with the news for two weeks. And the young people get only the selected view which is quite distorted. What is also very important and is a huge issue in Croatia is the fact that the ICTY has enabled us to have more effective prosecution of sexual offences which is not the case at this point in Croatia, as Ms Slišković has explained. And it is a huge problem. The Youth Initiative has been working on that; we are working on improving the legislative framework and we are also trying to improve the case law. The case law in Croatia has so far worked in such a way that you need to find three witnesses, medical documentation, and then they go into the sexual past of the person in order to render the judgement. These are things that the young people have nowhere to find out about. We can blame the media, we can also blame the politicians who use the ICTY for their political messages. Nobody treats the ICTY objectively. Apart from the media, and apart from the politicians, we could also say that the education system has failed in that respect. And even academia in that respect failed. Many people who deal with law and even international law, and I am referring now to students and future lawyers – they do not have a lot of knowledge about how the ICTY works, and they do not know how much the ICTY has done for international humanitarian law.

And also in schools – somebody mentioned textbooks – in textbooks you can see the relationship and the way the ICTY is viewed. It is viewed mainly negatively, or neutrally with negative connotations, which I think is the wrong approach. I also think that regardless of the facts that the ICTY identifies, history will not be only that. History should be left to historians, as Mr Klasić pointed out. It should be some sort of foundation which they start from. I think that young people are uninformed. I don't know what kind of situation we can find in other countries. Perhaps the media there are more engaged. In Croatia, it seems as if the media is not interested. Try and see what the media has been writing about over the last few weeks, and you will see that they find the ICTY's work uninteresting. Whenever you do find something, you find it on Facebook, on some news portals which are rather informal, and so on. These are topics which young people do not



find that attractive and also it took place back in the days that they perceive as part of ancient history. As the gentleman beside me said, we need to face the present as well. Wounds are still open and still fresh. This is something that burdens our society, and it will continue to do that in the days to come. Thank you.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you, you are right. The situation is similar elsewhere in the region as well. Let me now pick up on what was said in your presentation. I represent the Outreach Programme, and I can tell you that we have projects in Kosovo, Bosnia and Herzegovina, Serbia and Croatia. We went and visited high schools in these countries with the backing of the relevant Ministries of Education; we talked to the pupils of the third and fourth years of high school, aged 17 and 18. We talked about these issues, the ICTY, the past, and so on. Over 3500 young people went through this project. We are now embarking on the second stage of that project. What I can tell you is that there are certain themes that keep repeating. They keep quoting the media's rendition of the ICTY's work and the widely held opinions of the public at large. I know that there are some NGOs in Serbia that have similar projects; however, these are short-term projects, short-term programmes. They do affect a small number of students and pupils, but what you had in mind, was something of wider, larger impact, that would affect generations to come. You have mentioned the role of the media. We are joined by Mr Boris Pavelić today and he is a journalist who has been writing about this for a number of years now. Could you share the perspective of the media, your own perspective? Could you tell us something about how you and the media perceive the ICTY, its legacy and the role of the media in creating a public image of the ICTY, and whether it could be changed and how?

### **Boris Pavelić, journalist**

Good afternoon. Well, my impression is that the ICTY in Croatia – because I cannot talk about other countries – is not a court which is widely favoured. There are, of course, certain journalists in some media who are highly interested in what the ICTY does. They want to understand its working methodology, they try to do that and when they do, they realize that as a Tribunal it is the most reliable mechanism of identifying facts about the events that took place and the war. Media, as such, are subject to all sorts of different influences. And then what happens at the end of the day is that we

have the media who do not reflect the reality or facts but create narratives or deliberately distort facts.

So, the key question is how we make sure that the facts that the ICTY has established are spread. Because we are not talking about value judgements here, we are talking about facts. How do we teach the public about these facts, the facts that the ICTY learned on the basis of evidence, testimonies and so on? I am not sure how we can do that, and I think we have every reason to be pessimistic when it comes to relying on the media to share these facts. Namely, the media are under commercial influences and these commercial influences are devastating when it comes to establishing war-related facts, facts regarding war crimes, and even moral issues. The public media in Croatia, the media who should work on disclosing these things do it in an unprofessional, incorrect manner. Let me share information about two of the most sensitive trials here in Croatia. It is the *Operation Storm* trial and the Herceg-Bosna-related trial. As for the Herceg-Bosna trial, it is almost a forgotten thing, non-existent. Why it is so I do not know, but it is so. The Croatian media, in my mind, did a disastrous thing there, they failed miserably in informing the public about this. When I say “the public”, I mean the general opinion that we come across in our community. They were supposed to inform us about the process and the procedure, and about facts. They instead created a myth of a single hero, and we know that not only one person was convicted. Let us go back now to that issue of making sure that facts end up in the media. I am not sure we can be that optimistic, about relying on the media. I think it would be important to try and create a set of impartial bodies interested in finding and hearing the truth. These should not be bodies with commercial interests, these should be enthusiastic voluntary organizations which are more prone to finding out the truth. They could serve as a helping hand, not only a helping hand but also as a motivator of the media to report on facts. Thank you very much.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you very much, Boris. Let me just add something as a former journalist. Some of you know that I used to be journalist, and I was also the spokesperson of the Registry and Chambers at the ICTY. The situation is not like that only in Croatia. From my experience, just as you mentioned that media in Croatia write only about one case, I received calls from people from other countries complaining about their media. Because the media of other countries only talk about people who are accused from their countries, and I rarely received questions from journalists who represented the countries of the victims, which is something very interesting, as Boris



said. It is important to see how facts can reach media. All ICTY trials are open to the public. They are open to the extent that they can be open, but still, we can only read about certain cases, certain trials in each of these countries. And I think that the situation is completely the same in each and every country and it is something that I was never able to understand. That is why I established an NGO that we talked about this morning and that was mentioned by the Swiss ambassador. It is a question that should be raised: Why do the media decide to present only one part of the story no matter whether it is a domestic or international court?

I would like to start the debate now and I would like to give the floor to all of you for your questions. We raised a number of key issues, regarding academia and civil society organizations.

### **Gordan Bodog, *Concordia Rediviva***

Good afternoon everyone, I am Gordan Bodog. My organization is called “Rediviva”. I would like to be as brief as possible. The gentleman from the ICTY, the former president, reminded all of us here that one of the intentions of the ICTY being set up was to stop conflicts and war. And within the pacification of this area, not only the ICTY, not only the international community, but also the United Nations through the Security Councils was supposed to tackle the arming aspect. So that the ICTY could operate properly, and in that way conditions could have been met for other things to follow.

However, we have to remind ourselves of the fact that the area of the former Yugoslavia is often referred to as “the region”, although we cannot call this region only a region, we should be more direct and say which region it is. Because the region is categorized as a region by its similarities, and now we have huge differences in the judicial systems, the educational sector, in human rights... There are such big regional disparities and differences in other aspects, that we cannot be called a region any more. All societies arising from the former Yugoslavia, now belonging to sovereign countries – in parallel with the aggressions which are now called mildly conflicts or “yet to be found out what it was”... so, in parallel with the atrocities – these countries found themselves transitioning from autocratic dictatorship to multiparty systems. The EU and other international organizations issued declarations to condemn one-party systems and one-party crimes. These societies were hence not only affected by the war, these societies were affected by the processes of transition. When I say affected, I mean that the situation is still ongoing.

Refik Hodžić talked about context during the previous panel, and said that the context should change our societies to the extent that we could guarantee the non-repetition of the war, not only for a period of one generation but forever. Many people discussed the justice systems in these sovereign countries. These systems have their own legacy emanating from a system which lasted until 1990. This system was starting to break down before the war. It was starting to break down after the democratic elections in Slovenia and Croatia, and we know what it led to. In Croatia, some standards regarding human rights, no matter whether those are regulatory human rights or other rights, were not initiated or implemented to their full extent. And that is also an aspect of history which should be taken into an account when we talk about the judicial bodies such as the ICTY or the transformed judicial system, especially the one in Croatia. We have to take all of that into account and that needs to be part of the equation when we talk about the past. Also, when we talk about our view and dealing with the past, we have to know that *facing history* as a notion is one of the elements of a broader aspect which is called *dealing with the past*. It is inaccurate to use these as synonyms.

One more thing: when you select speakers it affects the process. For example, when these four panels were planned, you could have invited more representatives of the victims. The Outreach Programme started operating in 1998 and in the process of cooperation it's been only in the last two years we started having such conferences. These are somewhat belated and the ICTY has to bear its share of responsibility for having these conferences so late. I'm saying this not in order to criticize the ICTY openly, but to talk about future practices that this legacy leaves in this part of the world.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you. Before we give the floor to the panellists, let us take a few more questions and then we will allow time for comments.

### **Marko Sjekavica, Civic Committee for Human Rights**

Thank you, Nerma. Regarding this panel about the future of the ICTY's legacy and regarding the panellists' views, I would like to share something with you. I think that the problem here today is that we do not have more students here. I studied at the Law Faculty and the Faculty of Humanities and I am sorry that when we had a discussion at the Faculty of Humanities and Social Sciences couple of days ago and we talked about war, victims

and events, not many students attended the discussion. I also regret the fact that I do not see more students here today. We also conducted a study among law students about the ICTY's work. During the studies, within the Association of European Law Students, we conducted a survey, analysed the data, and the results were devastating. These were law students, and yet they knew hardly anything about the work of the ICTY. This is why I think our starting point should be the approach of the educational system of the universities and even the high schools.

The media also play an important role here. We had a presentation about the media, we talked about what happened before and after judgements were passed by the ICTY. Both Boris and you, Nerma, presented it well: media are interested only in cases against accused from their own countries, while they have very little interest in the court proceedings related to the victims. I come from Dubrovnik, which was hit by the war quite hard. There is a lack of awareness that there are people from the other side that were also accused with regards the crimes that happened in Dubrovnik. People tend to think that there are no judgements regarding the crimes in Dubrovnik, although we have two valid judgements. I will not go into these judgements, but I think awareness plays an important part in facing the past. I think that there is a lot of responsibility in the hands of our judicial systems, courts, educational systems and the media. And I think all of them should contribute to speeding up the process of facing the past, while the universities should try and attend these kinds of conferences more. Thank you.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you. Refik?

### **Refik Hodžić, Director of Communication, International Centre for Transitional Justice (ICTJ)**

I have a question for Mr Pusić and Mr Pavelić. When we analyse the media, we should also analyse how academia and educated citizens approach these issues. I think that you shared some illustrations with us which are crucial; you shared that image of a person who climbed the post in front of the embassy and shouted. Well, that painted a very clear image in our minds. There are highly polarized societies, highly polarized communities, polarized in different ways, politically, ethnically and so on. But similar situations did

occur in Peru and other environments where similar trials to these took place. The media and even civil society no longer acted from professional but from national points of view. They all felt as if they were supposed to defend their state. When somebody leaves that nationalistic position and goes back to their professional role, that is the point at which change occurs. In our case, it seems, that does not happen very often. Therefore, it is very obvious that the change should take place in the media discourse, in the political discourse. But we need to have political will for that, we need to have a special process that would take place with the participation of leading politicians, like Mandela did, contributing to a change in the public discourse. We did see some examples like the relations between Tadić and Josipović. These kinds of things need to happen, so that these issues get recognized as key issues at a political level. It is only then that the media will follow suit. But there needs to be a decision to approach things in this way. Since we have the representatives of the media here, I would like to hear what you think about this.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you, let's take one more question and then we will give the floor to each of the panellists.

### **Marija Slišković, NGO *Women in the Homeland War***

Women of Omarska have a judgement – these are women who were raped in Omarska; the ICTY passed a judgement, they overcompensated; and these women are very rich. However, there is no mechanism for them to actually receive the compensation. So they continue living on their scarce income from their pensions. Mr Pusić, you quoted quite some number of individual cases. I gave you the book “Sunčica”, with the testimonies of raped women, and yet I have never ever heard you speak about that horrendous war crime. That book is not as embittered or as difficult as anyone may expect to be portrayed, and yet these are women who underwent most horrendous torture; women whose human rights were violated, and yet they have never been mentioned by the civil society of Croatia, by the Prosecutor's Office or by the Croatian judiciary. Nobody has mentioned them. The last judgement they have seen was five years ago. There was a judgement and yet the Vukovar case was not even indicted. It was difficult for me to listen about these individual cases. I do not care about what these people you quoted said. Why don't you comment on these things – like the rapes

in Vukovar, where a special white sheet was put on the door of a woman who lived there so that everybody would know that she was a sex slave for rape? Please change your rhetoric, the war started in 1991 and horrendous crimes were committed. People did not believe that what happened would happen. Many people wonder why we stayed. We thought: “We did not do anything, why would we leave?” Yet we were then made victims. Let us think about these victims. When we discuss the aggression, when we discuss the war, let us talk about these heinous crimes and bloody victims. I have listened to numerous horrendous stories of women and this book is something that testifies to their stories. I did not exaggerate because that would not be in the interest of the reconciliation of our peoples.

### **Nerma Jelačić, ICTY Head of Communications**

Can we perhaps keep things brief? So that we can continue.

### **Ivan Raos**

We have not talked about cultural heritage. The area that was stricken by war was very rich in European cultural heritage which was pillaged, plundered, destroyed and burnt. But nobody asked any experts from UNESCO to come, or from other European countries, in order to help us categorize that cultural and historical heritage. To assess its value, to see how valuable that heritage in this area is. What has the ICTY done in that respect? Will humanity ever have an insight into the value that was plundered, that was destroyed, none of it being restorable? How do we help the healing of these areas? How do we again affirm the local in the global context? I think that what we need is an international organization which would reassess the consequences of our war and present that to the public, with respect to cultural heritage.

### **Nerma Jelačić, ICTY Head of Communications**

All right. Let me take this opportunity and give the floor to each of our panellists to respond to the issues that have to do with your areas of expertise, and of course, also share some final thoughts and closing remarks. Judge Pocar, could you go first?

## **Judge Fausto Pocar, ICTY**

I believe I can be rather brief because the second issue I wanted to raise and did not raise in the first round has been largely addressed and covered by my colleagues in this panel. And that is the question of education. It is a continuous effort, not something that is achieved in one day, it has to continue indefinitely. Many things have been mentioned, except for the problem of looking into the future. We are here, on this panel, looking at the future of the past. The past must be a lesson for the future. And it is critically important that that lesson be a fair one. I understand this is not easy, to be impartial. It is not easy for everybody. It is easy to say, historians have to be impartial, it is easy to say journalists are being impartial, the media must be impartial, any educational body must be impartial. It is not easy to do it, to be really impartial. But you have an advantage which is the advantage of having resolved its imperfections, an international body having assessed something. It does not cover the entirety of the facts, but it has covered some facts, giving a basis for impartial projection of the facts. The problem is that not too many people project the activity of an international body, hence we come back to the problem of being fair towards what is being done.

The judges of the ICTY might have made mistakes. Everybody makes mistakes, especially when you do something for the first time in history; you make mistakes. The most honourable judge of our Tribunal, Judge Antonio Cassese, is now being recognized by everybody for developing the ICTY. When he was the president during the first years, he said to the media and to me: "Every day, when I get up, I put to myself the following question: What will be the mistake I'll make today?" Obviously, taking up issues for the first time is not easy, and you might go sometimes one way or the other, you have to make the wrong decision, it might happen. So I am not saying that the ICTY is perfect, but what is sure is that what the ICTY has done was impartial. The judgements were never partial. It may have, as I said, made mistakes in different situations, but what we have assessed, especially on facts, are facts! It is clear that not necessarily all the evidence was generated, not necessarily all of the witnesses were brought, all the victims heard; but what has been heard is a fact. And building on that, on education, one can do something for future generations. It is an opportunity that should not be missed. Because it is extremely important for this society, any society, that the generations to come will have knowledge. We all want that. We will have a better world. It is something we all want to leave to the future generations, and it is a duty to all of us. And I was a bit concerned even this morning, I do not know if it was a misinterpretation of mine, when I heard that children should be protected from the past. I got that

through the translation, I hope it was a mistake in the translation. Because children should not be so protected. Children should not be protected by hiding the past; instead, they should learn from the past. Because the future is their future and they must have the connection. Of course they should be protected by explaining the facts in certain way, and not in the most direct and horrendous way. But they should learn what happened. I'll tell you just one more thing and then I'll stop. One of the most rewarding experiences I had was when once, among the thousands of interviews, I had a magazine for children interviewing me – boys and girls between 8 and 12 years old asked me for an interview – I did not have a journalist questioning me, but children questioning me. I was brought into a classroom with children. And I sat at one of the desks, with them, and had to introduce myself. And I introduced them to the issues by looking at the map of Europe that was there in the classroom. I said: "Look, there it is where it all happened". Of course it was far from them because this was another state and not their state with which they were concerned. But they immediately got the problem and raised issues, including judicial issues. I don't have that time to tell you how many issues, even legal issues, were raised by them – of course not in legal terms. It was amazing. So, do not protect the children, help the children know what happened, and this is the basis for a better future in the country.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you so much, Judge.

### **Hrvoje Klasić, Department of History, Faculty of Humanities and Social Sciences, University of Zagreb**

We are having problems with textbooks, but we should not disregard the factor of time. In that process, we should not be passive observers, we should be active participants. What we are doing right now is necessary, but it requires the dimension of time, distance in terms of time. I very often say to the students that Ante Starčević is probably turning in his grave when he hears that we are friends with the Hungarians because they had been fighting the Hungarians for centuries. But on the other hand, and I am not trying to minimize the need for everything that has been said, we need to work on a lot of things.

I got back from Northern Ireland couple of days ago, from UK which is the cradle, one of the cradles of democracy, and I said "Thank god that there



is a part of Europe where the situation is worse than in my country”. The schools are divided by ethnic groups or religious affiliations. The pubs, the schools, the shops, the quarters – you go there on the basis whether you are Catholic or Protestant. Belfast is divided by walls which are longer than the Berlin Wall, 10 meters high, fences are set up in the middle of the street, and they close by night. I don’t know whether the situation in Mostar is like that, let alone the situation here in Croatia. Neither the French nor the Germans, or the Polish, managed to solve all of this what we are talking about, decades after World War II. Wounds are fresh but sources are not available, and we did not mention today, what will happen to the documents? Will we have all of that available? Will we be able to access them all? There is a whole range of issues that the education system cannot handle, so we cannot say we will immediately have an objective approach, that we will have textbooks that are going to be perfect. Unfortunately, experiences from more advanced democracies than ours show us that it is not a simple process, which does not mean that it doesn’t have to be tackled on a daily basis. Thank you.

### **Zoran Pusić, President of the Civic Committee for Human Rights, Croatia**

There are two questions I should respond to. The first one was regarding political will and the existence of politicians who will talk about these issues in the future. Well, I think both develop over time. For example, when Milošević was arrested in Serbia, if I remember correctly, just before that there was a donor conference where people talked about the fact that they would not donate money until there is cooperation with ICTY. So, political will can be generated. In Croatia we had to cooperate with ICTY in order to make any progress on our path to accession to the EU. Political will can be changed.

As for the second issue, opinions do get changed. Let me share an example. Back in 2001, I visited the UN. I was asked to write a shadow report about the human rights situation in Croatia, cases of human rights violations in the Republic of Croatia from 1994 to 1998 – a five year period. They sent me the Croatian government report. This is something that the Croatian government sent to the UN in 1995, and they wrote 127 pages. The report was about international conventions and the impact they had on the legal framework in Croatia and how we harmonized our legal framework with them. In these 127 pages we did not have a single violation of human rights mentioned. However, this was a report from 1999, and it was discussed in



early 2001. In early 2001 we had a new government that came into power through criticizing the former government. And it defended that report although there was no real need for that because there were some judges there and even a judge that was supposed to come here today, from the governmental Committee for Human Rights. Well, they remained silent and my shadow report did not consist of any polemics or debate, just 42 instances of human rights violations in alphabetical order, although there were 400 or more. This has changed; people have changed their opinions, changed their attitudes, and I am of the opinion that in the future we will have more and more people who will take a different perspective on these issues.

I believe that one of the achievements and successes of the ICTY is the *Mladić* case and the *Hadžić* case. Although that achievement has only been partially recognized by the public in general. I see these two cases as something that marks a huge step forward, and something that is important regarding the permanent international court – the ICC. The achievement regarding Mladić and Hadžić is something that the ICTY leaves this region with and it is something that leaves us with the perception that it is a very important, successful institution. It plays a very important role and makes a huge impact, and will make a huge impact on education, and public opinion in our countries.

Regarding raped women, I believe that rape does constitute a war crime and that is an absolute fact. In Bosnia rape was used systematically to humiliate women and it was something that was not treated as a war crime in the past. However, it should be treated as a war crime. Thankfully, through the ICTY's work it was categorized as a war crime. You said that you are not interested in what Šeparović said. I mean, of course you do not have to be interested, but I am. I am interested in what they have to say because such people create public opinion. Tuđman said that he was lucky and happy that his wife was not a Jew or a Serb. Tuđman also said that Croatia now looks like a pretzel that needs to be filled with the territory of Bosnia and Herzegovina. Tuđman said that we have to conduct humane ethnic displacement. You know, anyone that has any knowledge about humane ethnic displacement knows that when this rhetoric is transposed into the field, it results in rape and in bloody ethnic cleansing. Therefore, it is always better to prevent certain things from happening, if it is at all possible than to try to do the healing when it is no longer possible.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you. I think Mr Pavelić has some questions to respond to.

### **Boris Pavelić, journalist**

I have no illusions regarding the Croatian future. I do not think we will see a Mandela emerging in the Croatian political arena over the next ten years. Well, I also have to say that huge change did take place, in Serbia, and in Croatia in the 2000s, with Đinđić and Mesić respectively. This is why I think that nobody prevents the Croatian media from reporting in a just, fair and open manner. We have a completely new leading set of people in the Croatian public television. Whether they do their jobs as they should I am not sure. That is not due to the fact that there is a lack of political will, but due to the fact that there is a lack of quality journalists; there are no good, no excellent journalists. If I am correctly informed, the Croatian television is filming a movie about General Gotovina. I think that is a great test, and we will be able to see and then judge what the current situation is like. So, let us just rely on the old good truth, *ius iuris*, and then we will see.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you, Boris.



## **PANEL 4:**

### **THE IMPORTANCE OF THE TRIBUNAL'S ARCHIVES**

Moderator:

Vesna Teršelič, NGO Documenta

#### **PANELLISTS:**

- Gabrielle McIntyre, Chef de Cabinet for ICTY and MICT President
- Gordan Markotić, Assistant Minister, Ministry of Justice of the Republic of Croatia
- Marin Bonačić, Research Assistant, Law Faculty, University of Zagreb
- Elisabeth Baumgartner, Director, Dealing with the Past Programme, Swiss Peace Foundation
- Jozo Ivanović, Deputy Director, Croatian State Archives

#### **Vesna Teršelič, NGO Documenta**

We will now talk about the significance of the ICTY's archives. I first heard that there was an issue about what will happen to the ICTY's archives many years ago and then I immediately heard that what happens to the archives of various institutions and UN organizations is always the same. They get stored into a hardly accessible place somewhere in New York. But then we heard about the ICTY archives something along the lines: "No, this is so valuable, this is so significant to the victims, this is so important to post-war communities that we have to find a different solution. There was a discussion that has been going on for years now and it certainly did not include, at many stages, civil society organizations or the governments of Croatia and other post-Yugoslav countries of the region. However, it still managed to involve NGOs, victims' organizations, as well as governments. There are still some open issues, there are some dilemmas that need to be discussed, and I am happy for this opportunity to talk about the archives, the Residual Mechanism, and the role of the information centres.

Ms Gabrielle McIntyre, could you please share a few opening remarks?

**Gabrielle McIntyre, Chef de Cabinet for ICTY and MICT****President**

Thank you very much, Vesna. As you heard from Martin today, the archives will actually be situated with the Residual Mechanism. They are not going to be taken away and hidden somewhere. They will be situated with the Residual Mechanism – the Security Council made that decision when it established the Residual Mechanism, it was Resolution 1966. In that resolution, it basically said that the Mechanism will be responsible for the management, the preservation, and the access to the archives. So, while the archives will be situated with the Residual Mechanism in The Hague, the Security Council also considered that there needed to be another way to make the materials more accessible to people that are interested in them. Especially the people from the region of the former Yugoslavia. In the same resolution, the Security Council also mandated the Tribunal to facilitate the establishment of information centres. And information centres would be places which contain the public record of the Tribunal. So that people can access it. Ironically, you can actually access the public records of the Tribunal already, through its website. From what we heard today it seems that that is not sufficient, because people are not getting the information. The sources they are relying on locally are sometimes unreliable sources of information. Information centres will make the information more visible, and easily accessible to you. With respect to national judiciaries and their cases, there is a stipulation related to the Residual Mechanism which puts an obligation on the Residual Mechanism to cooperate with national judiciaries. Now, the ICTY Statute did not have that obligation, so this is a move forward. While the ICTY Statute did not have that obligation, one judge in particular I would say, Judge Pocar, recognized very early on that national judiciaries would have to take over the work and the Tribunal had to take steps to make sure they can do that. So he introduced the amendment into the rules of the ICTY that allowed national judiciaries to directly access the chambers, to get access to information, to ask for variation of protective measures. So there will be the same facility available to national prosecutors and defence, as well to the national judiciaries, to petition for access. So the focus of the Tribunal in going forward is in making sure that as much of the record as possible is accessible to you in a visible way. And information centres are aiming to do that.

**Vesna Teršelić, NGO Documenta**

Thank you very much. I would now like to ask Mr Gordan Markotić, the Assistant Minister of Justice in Croatia, who has been dealing with this issue through the various functions he performs, to state the position of the government of Croatia on this matter.

**Gordan Markotić, Assistant Minister, Ministry of Justice of the Republic of Croatia**

Thank you. From the very beginning, the government of the Republic of Croatia had special interest in finding a sustainable and practical solution for storing the ICTY's archives i.e. the archives of the future Residual Mechanism. The basic assumption of ours is that it needs to be a safe place, and that there needs to be access made available for everyone. And this view of ours is a reflection of the importance we place on the archives. And I think that is one of the most important functions of the future of the Residual Mechanism. The negotiations have taken quite a long time, as was mentioned earlier. Let me say that, in 2010, to be more specific, on the 22nd of December 2010, the UN's resolution was adopted, which among other things talks about the Residual Mechanism, but it also deals with the question of archives. The resolution more or less says that the ICTY archives, as well as the archives of the International Criminal Tribunal for Rwanda, will be owned, after the closure of the courts, by the UN. It will be of full integrity and the Residual Mechanism will be responsible for the management as well as safekeeping and access. It also says that the archives will be located in one of the branches of the Residual Mechanism, either the Netherlands or Tanzania. Of course, our part will be kept in the Netherlands. In managing these archives, the Residual Mechanism shall secure protection of the confidential information, especially when it comes to protected witnesses and especially when it comes to information which we gained on confidential basis. So it is set out by this UN resolution. This UN resolution corresponded to a large extent with Croatia's views on that matter. From the very beginning we kept saying that the archives need to be centralized. And we were in favour of having archives in one of the institutions of the EU where there were already some other archives. Why? Simply in order to make sure that the highest standards are met. There were some initiatives to place the archives in the region and some people said that it is a symbolic gesture, the historic writers of certain countries. But from the very beginning we were against that. Because we still have political relationships which are quite complex in the region, and we were afraid that if we place the archives in

any of the countries which materials were collected from – be that Croatia, Serbia or Bosnia and Herzegovina – in that case access will not be equal. We also thought that it might happen in those cases that the archives get abused from one side against the other. That is why we supported the option to have an international centre based in the UN and controlled by the UN. Alongside the archives of the ICTY, we also wanted to have all the documents and all the evidence to be kept there, which were generated through public sessions. We were also of the opinion that those documents or evidence which were treated in a confidential manner by the ICTY or were presented during closed sessions, without public persons, that these archives should go back, and should be given back to the countries that provided these documents. This is because they are very confidential, highly classified documents, which could be important today for national security reasons, as mentioned in Article 54 of ICTY's Rules of Procedure and Evidence. Or these documents can be obtained in a confidential manner, by the Prosecutor, which is mentioned in Article 70 of the same rules. What is important for the future years of the archives, from Croatia's point of view, is that we would like future archives, the data, which are unlimited, and documentation which is public and which was generated by Croatia, to be made available to the national institutions of all countries. We have the State Archives, we have the assistant director here, and he is going to say something more later on. We also have the Documentation Centre of the Homeland War. And we believe that these two institutions are the right ones to hold these archives, and have access to it. We hold the same standpoint when it comes to the documentation generated for the defence of indictees. At this point, there are huge private archives and Croatia believes that these documents should be given back to the country. Then the country should dispose of these documents and not have them anymore in private hands. Why is that important? It is important not just because of history, because these documents are part of our recent history. It is important to further prosecute war crimes. Regardless of the fact that there has been excellent cooperation between national prosecution offices and the ICTY. For future prosecutions it will be good to have a certain database of documents, especially the most confidential ones and the classified ones which are then kept by the countries which generated these documents.

What about the public? What should we do in order to enable the public gain access to all of these documents? We now come to the issue of information centres. It is true that currently on the ICTY's webpage you can have access to most documents, to quite a large extent. However, I must say that the webpage is quite complicated; you probably need special training to use the webpage of the ICTY. I am saying that from my own experience, because my office has been dealing with the cooperation with ICTY for a

number of years now and several times we experienced lot of problems in trying to find some documents because it is quite complicated. And that is why, from the very beginning, our view was to set up information centres throughout the region. These information centres would be there to contain data from the ICTY but it would be made available in the local language. These documents and data would be different motions, court decisions, different testimonies, and transcripts, audio and visual recordings. Apart from that, there could be also a library which would then contain copies of, for example, all decisions made by the ICTY. It would also contain books about international humanitarian law, books about international criminal law, books about procedural law, and books about human rights. Accordingly, they would serve as some sort of points of reference which could be used not only by scientists, historians, but also by victims and NGOs who deal with those issues. In this discussion on information centres, our conclusion was that not all countries have the same interest for the same type of information centres. That is why there was this idea to have four basic models.

The first model was the basic model: to have access to public documentation held by the ICTY, which I just talked about, and which is the option that Croatia favoured. We have a project which is already ready according to which if the information centre is to be situated in Croatia, it should become part of the law faculty. We thought that would be the best place to situate that sort of documentation. It will not be part of the faculty itself; it would be on a different location, but young legal professionals would work there and they would be able to help users in accessing and interpreting different documents which would then be part of the information centre.

The second model was the so-called “reconciliation model”. This model was supposed to be used to raise public awareness about the work of the ICTY, as well as to raise awareness about the work of national courts, especially in the field of prosecuting war crimes. According to this model, roundtables would be organized, videos would be shown, movies would be shown, and seminars would be organized, as well as public debates. In that way, this model would make sure that we have broad participation of all interested stakeholders, ranging from the victims to scientists. There is a lot of interest for this model by Bosnia and Herzegovina or, to be more specific, the Federation of Bosnia and Herzegovina. Since opinions in Bosnia are always divided, the same thing happened in this case.

There was also another model; that was the model designed to support the legal profession and civil society. This model was designed in such a way as to have the information centres facilitate roundtables and lectures about



the work of the court itself. These information centres would be intended for those professions that deal with war crimes, judges, prosecutors and sometimes historians. Banja Luka was interested to institute this model; I am talking about the Republika Srpska.

And the last model was the so-called “exhibition model”, which means that there would be a permanent exhibition of a public nature which would talk about the work of the ICTY – but not only the ICTY, national judiciaries too, in prosecuting war crimes. That kind of exhibition would contain different video footage, audio material, written documents, but it would primarily be used to inform the public and journalists. In a certain way, this model would be used for the purpose of reconciliation, just like the model which was called the “reconciliation model”.

As far as the information centres are concerned, many steps have been taken. It all started in September 2010. We have had two large conferences since then. The countries from this region decided it should be a regional project, existing in all three countries. It should be founded in the transitional period, by the international community, for at least five years, and the idea was to have staff in the information centres who would be then trained by the ICTY and more or less we talked about local staff, who after this training would be able to work in the information centres. The problem is that not all the countries share the same views on the information centres. Some countries have still not decided whether they want information centres on their territory or not. What is important is that not only one country accepts – all three countries from the region should accept this idea of information centres. Only in that case would it make sense. In that case, there would be regional projects which provide countries with an equal database as a starting point to set up similar information centres. Thank you.

### **Vesna Teršelić, NGO Documenta**

Thank you. I would like to give floor to Mr Moničić from the law faculty, to tell us something about his perspective.

### **Marin Bonačić, Research Assistant at the Faculty of Law, University of Zagreb**

First of all I would like to say hello to everyone. I would like to thank the organizers for giving me the opportunity to say something at this confe-

rence. I have to say that for me as a lawyer it would be much easier to talk about the legal legacy of the ICTY. And we would then be able to discuss organizational legacies since that was the first court which was set up by the Security Council. This model of *ad hoc* tribunals has certain advantages, compared to all other criminal courts which are international because it can put pressure on governments and countries, and those who are directly related to the conflict zone. Hence, it can force people to cooperate. We can also talk about substantive law influences, and the influences on procedural law, on the work of other international courts, as well as the national courts. And there is a large impact on procedural law because it is a mixture of two models, the common law model and the civil law model. So the Tribunal, the ICTY, has changed its Rules of Procedure and Evidence about 50 times. We could talk about it from the context of creating an effective system of criminal proceedings on an international level. And as part of the completion strategy there are some views on what should be done with other courts and their Residual Mechanism. Residual functions have to exist, even when the court stops to work. That is also important for the archives.

The second thing I would like to talk about, and which could perhaps be of more interest to the region of the former Yugoslavia, are issues of the court's impact in the broader context of post-conflict justice. We can discuss to what extent the Tribunal has brought peace. We can see to what extent the Tribunal has brought justice to these countries and to what extent it identified truth, and as the last part of the post-conflict justice we could talk to what extent the Tribunal has brought us reconciliation. When it comes to identification of the truth, somebody has already said that truth for historians is only one source of information and that adding other sources can give us a complete picture, since court trials in themselves are not focused on the full truth because they deal with criminal responsibility of alleged perpetrators in a particular case. Apart from that, the inability of the court to identify the truth also has an impact on the type of proceedings brought before the court. We can say that common law procedure is not so favourable for full truth or complete truth. The completion strategy has an effect, and the Prosecutor has an effect on that as well. All of this means the court is unable to identify the truth fully. When it comes to reconciliation and the importance of archives, maybe the importance of archives is more important in the field of post-conflict justice, to identify the truth and also to bring about reconciliation.

If we talk about the beneficiaries of the archives, we can distinguish between primary and secondary users. Primary users are those who are related to pending trials. The Residual Mechanism should also provide all materials in the future and part of the cases in the future will be held before natio-

nal courts too. So the national bodies of criminal justice are the primary users of the archives. After the completion of the ICTY's mandate, these archives should be made accessible for further prosecutions and other related issues. The second group of users are so-called secondary users which include victims, the population at large, scientists, researchers, historians, and experts in political sciences, people who want to keep a memory of a certain event either through creating training materials or something else. Secondary users would be more important. Of course, the importance is very high of the archives. At the same time, we need to see what the level of access will be because you have a different usage, which would probably have different levels of access. Because you need to make it possible for a person to be entitled to information, but at the same time, you should be able to protect other interests – as my colleague mentioned..

The protection of the archives is also of extreme importance. Mr Markotić talked about the fact that these should be kept in a safe place, there is an example from 2006...there was a breaking and entry into the archives of serious crimes units, things went missing. Such archives which contain confidential information could be in great danger, especially for protected witnesses and some other interests. So that is why it is extremely important to protect these materials properly. Good quality browsing of the database is also of huge importance so that people can have access to what they are really looking for.

There is another issue that should be raised, and that is the issue of proper safekeeping. Today we have digital technology but we do not know how long certain media can last. There are new media being developed so it will have to be transferred at some point to a different media. The archives of the Tribunal are complementary to all other databases which have been collected so far. At the law faculty in Zagreb there is a database of digitized newspaper articles on war crimes. As far as I know there is also another database, at least it is being developed, which will have data on monitoring cases of war crimes in Croatia. So, to get a broader picture all of these sources are pieces of the same puzzle in order to reconstruct the truth. Or at least part of the truth. Thank you for your attention.

**Elisabeth Baumgartner, director, *Dealing with the Past* programme, Swiss Peace**

You have pointed out the importance of issues of security and it is an extremely complex and huge archive. We have an archivist here who knows

what this means in technical terms. And I am glad to hear that you see it as important to have all this together in one place. I would like to go in a little bit less legal and little bit less technical direction and talk about what you can do with archives. As for archives as such, you can just put a computer somewhere, you can just give access to the documents which are already available, as Gabriella said, but what else can you do? What is the benefit of having this incredible collection of materials which comprises audio/video material, written material, and also artefacts which are in The Hague? How can you actually use that in the broader process of dealing with the past? There are a lot of examples, all over the world where archives of truce commissions, of tribunals, of national tribunals have been used, have been somehow processed and made available to the public in a way that goes beyond just producing material for schools, it goes beyond just having exhibitions... It really was also a process of fostering dialogue.

There is a really important point that had been brought up several times – to make all this accessible to young people, who are in many aspects distanced from the events. At a certain point in the past, terrible things happened, which later got forgotten. However, it is really important to keep the memory alive and to use archives to go beyond what was achieved by legal processes. We heard many voices of victims here who, in a way, could not really get from legal processes what they were looking for. Using archives and material that is contained in different archives is important – you mentioned that it could provide the basic, but it could also provide a lot of material that had been collected by NGOs. And to make it accessible in a personal way by telling personal stories, which maybe you cannot see in a judgement, but they are still there, not as part of the judgement, but you have to make something with it and show it to the public in a way that also touches people. Extremely important in educational programmes is that you really personalize the stories, personalize what had happened. I saw this picture, these handcuffs at an exhibit from Srebrenica which had been used in the trials – just using this kind of things evokes emotions, it can provoke dialogue which goes beyond just reading material, just reading a judgement. So I think there are some ideas which could maybe also shape a bit what can be done with the information centres which go beyond just having access to just documents. Thank you.

### **Vesna Teršelić, NGO Documenta**

I would like to give the floor Mr Jozo Ivanović, the Deputy Director of the Croatian State Archives. Let us hear your perspective.

**Jozo Ivanović, Deputy Director of the Croatian State****Archives**

Thank you very much. I will try to be brief. Archives come last, so people working in archives say people end up in graves and documents end up in archives. I know that we have to make things rational, but we should also bear in mind that people respect graveyards, so if they respect graveyards that is an aspect that we should also apply to archives. Let me now try and join this discussion about the archives of ICTY. One important objective is met precisely through the ICTY's archives. What the archive does is something that pertains to what any kind of an archive does. We do not want to end somewhere in a remote location. We also have to think about how we will approach that archive; is it a part of a larger archive or is it something that is an independent archive? There is such a thing as an independent archive; it is a collection of experience, documents and so on, that sends a message. In the future, I hope that the ICTY's archive will be an independent archive, because it would share the messages, kept permanently as a symbol of the values that we believe should be a part of public discourse in the future. There are numerous types of different archives. Various organizations and individuals established various types of archives always trying to say something, always trying to share certain values. It is by no accident that we have had archives from as late as the 19th century but they did not exist in the Middle Ages. This is because we saw the occurrence of different ideologies, historical events, and so on. And this is why archives exist. Archives are a voice that says something happened and it should remain in the future. So there are the actual and virtual archives of the Holocaust and we do not have one single institution that created such an archive after the Second World War or during it. But here the most important thing is this need to preserve the message, to let the message speak and to connect that message to the time and place that it provides evidence to. The time and place that will be remote to future generations and yet we do not want to make that voice unheard. I think that is a huge success, a very important achievement and everything else seems to me to be something of a more technical nature. So in this context, we are talking about the archives of the ICTY.

Let us take a look at the future. Let us try and imagine the perspective of people who will live in this region. We immediately perceive a change in perspective. A change in context and the context will continue to change as time goes on. The context we are talking about here is the context of the court, the trials, the war, and the victims, and the crimes. There are certain boundaries to all of that. And it all took place in a certain time frame. Once

we come to the region because of which ICTY exists, we see that what we are dealing with is a special period of time. The past which is filled with trauma, but is also documented, remains in the people's memory and in the documents kept in the archives. It also exists in the archives on the field, in the archives of the media, in private archives as well. So the question is not what do we do with the ICTY's archives, but how do we use the ICTY's archives in the future? How do we manage the ICTY's archives in the future and how do we use them to share certain messages that have to be said aloud?

In this area our researchers will not look at the ICTY's archives as an isolated issue but as a part of a mosaic. A mosaic or a puzzle that is made up of different elements, but the ICTY's archive is a crucial element, a very important element that is there to stay, and is a source of relevant documents. So to me this seems a very important thing. When we make decisions which will have long lasting effects we should think about the use of archives.

There is something interesting that was mentioned this morning and it is natural. Somebody said that we still think about the legal context of it all. I think that the legal context will lose its importance through time. I think that the social context will gain in importance. In two years' time we will talk about the one hundred year anniversary of World War One, which was terrible. Still, our relationship and our view of World War One differs from the point of view of the people who lived at that time. And then, let's think about the Napoleonic wars and some other wars that we do not have to remind ourselves of. Our perspective of these wars is not equal to the perspective of the people of those times who belonged to certain movements, or partook in certain ideologies. This is something we call historical memory and perspective. There are certain things that we find important at a given point in time. Later on, they are a part of perspective, later on there is a selection, and later on we have to make sure that we have an archive of facts and documents that make it possible for us to define strategies for the future.

I will not go into any technical details now. I think that the conservation of digital documents, and safety of data is not a topic for this conference. However, I would like to pick up on something I said earlier on. One thing keeps being discussed among archive people. We like to say that archives save, keep the truth. If you look for things well, than you can find the truth. Over the last twenty years that formula has been questioned a bit. It has been shown that it is quite difficult to say what objective truth is and what kind of truth would be a link for a quite diverse community. The truth is something that is shifting, something that is considered to be truth at one



point in time, while at some other point in history it is no longer perhaps considered to be truth or is perceived and interpreted differently – 20 or 30 years later. Let us go back to early 1990s: the war broke out, we were embittered by Europe's behaviour. We were embittered by the world's reaction – they seemed disinterested in our problems. However, six months later in a different part of the world these things happened and yet, we were disinterested, and six months before that we were wondering why Europe was disinterested when we were at stake. The question here is this: what is the right strategy, do we have to formulate all accompanying general truths or should we just leave the door open and make it possible that parallel interpretations and different initiatives can exist simultaneously. There is yet another perspective that is shared by contemporary archivists and this is the question of what to select, what to choose, for archiving. We have over 100 years' experience in thinking about this particular issue and we are never satisfied. We are never satisfied, we are always on the lookout for general criteria, and we are always on the lookout for general ground, which will be so safe that it will enable all of us to agree what to keep for posterity and what not to keep. Lately there are opinions that in the assessment of this we should not take this central view, but rather to have more people and more institutions sensitized to the process of archiving and preservation of what some people feel to be their legacy, their heritage. I hope this is the view that will be taken, because then value judgements or assessments are no longer in the hands of one group of people. The responsibility gets dispersed among different people, and also we will have people who will have certain value judgements, and they will then produce their own archives. Thank you.

### **Vesna Teršelić, “*Documenta*” – Centre for Dealing with the**

#### **Past**

Thank you. I would just like to add that during the consultations about the appropriate solution, we also consulted with human rights NGOs. We pointed out that after the decision on information centres is reached – and it almost is, from what we hear – human rights organisations, functioning as information centres should also get a copy of the documentation that will be made available to the public, so that they can combine it with the documentation on war crimes, the indictments, first instance judgements, reports from trials et cetera, which you can find on our website along with Supreme Court judgements, along with personal recordings of wartime memories. The manner in which the documentation will be presented is a very important issue for us. Therefore, I am not talking about the contents



of the archive managed by the Residual Mechanism; I am talking about the part that will be publicly available. I would be glad if governments, when considering this, would not be against human rights organisations having access to these documents. An issue that has to be discussed is the issue of ownership of this documentation; it has to be decided who has ownership of the documentation: the United Nations or the respective governments.

I would like to share one more thing with you, one very interesting and exciting project for the archivists, regarding the archives of the Holocaust. The leading organisation is an institute from the Netherlands. It will be a project scheduled to run until 2014. It is worth several million euros. I believe it will be funded by several different sources in order to make as much information available to the public as possible. I am giving this information as an idea for where to get funding to establish the information centres. Of course, the big question will be from whom do we get the money, from whom do we get financial backing. What we should consider is cooperation between the archives, human rights organisations, universities, in order to make it available to the public in as transparent a manner as possible. I am not talking about mere documents. I am talking about video presentations, video clips, kinds of presentations that are much simpler for ordinary users, which could tell people a lot based on facts established in court beyond reasonable doubt and free from any wartime interpretations. I would like to leave enough time for discussion, and I would like to ask you kindly to join the discussion. Thank you. Gordan Bodog.

### **Gordan Bodog, NGO *Concordia Rediviva***

Victims' organisations do have their archives, and that is certainly true. In a certain way, victims' organisations have shared their archives, and they are cooperating, I hope, in one way or the other, with already institutionalised organisations or processes. However, we should be aware of the fact that victims' organisations have been working under difficult conditions over the last ten, fifteen, twenty years or so. They were not able to do as much as the Residual Mechanism is going to be able to do in the follow-up, regarding collection of documents et cetera. The role of victims' organisations does not end once the judgements are given. For instance, I will mention here the issue of missing persons. Their work is not over until the last person is found. One of the proposals we should consider when we talk about victims and their right to compensation, recognition et cetera, is that we should also introduce an additional element for improvement, through this very process related to the archive, to obtain additional funding for the victims' organisations, because they do have something to say with respect to reconciliation, information, research and so forth.

Let me say something regarding the credibility of – I would say – the whole archive. Over the last decade or so, I have discussed this issue many times. The outcome, these official documents of the proceedings, are one thing, but the criteria for verification of collected data is a different issue. The transparency of that whole process regarding the Outreach Programme has never been quite clear. It has not been transparent at all. For instance, we know that there are some security and safety issues, data protection and witness protection and so forth, but the question still remains: What happened with the information that went through the government authorities, investigators, etc.? Did it also come from other alternative sources, like NGOs and victims' organisations? Who verified all of that? How was this marked and assessed? Has the validity and credibility been assessed? This is something that remains unclear to the public as whole. I think that we need to address this issue if we want to continue with the follow-up of its credibility.

The sensibility towards these activities, including this process even, has to do with a question that is being asked not just in Croatia. The ICTY announced that it will render the final judgements for Gotovina and Čermak on the 16<sup>th</sup> of this month, and it is a well-known fact that between the 18<sup>th</sup> and the 21<sup>st</sup> of this month there will be Memorial Days manifestations in Vukovar and throughout all of Croatia. What were the reasons to choose the 16<sup>th</sup> of November as the date of final judgement? Has there been any sensibility, has there been any intention behind it? Even this whole follow-up can be jeopardised, so this potential and objective problem needs to be discussed. Thank you.

### **Vesna Teršelić, Documenta – Centre for Dealing with the**

#### **Past**

Since I do not see any hands in the air, I would like to ask our panellists to share their closing remarks. Gabrielle McIntyre.

### **Gabrielle McIntyre, Chef de Cabinet for ICTY and MICT**

#### **President**

Thank you. For me, one of the main issues at this conference is the visibility of the information that is available, because there is a lot, a wealth of information that is available. It is your website. The website might be

cumbersome – I find it easy – but it is about how we make the information more visible, and I think that this is really a role for civil society, in many respects. The Tribunal has its Outreach Programme. The Tribunal, like civil society, has always had to raise funds for its Outreach Programme. It has never been part of its budget from the United Nations.

In relation to your question about the credibility of the material in the archive, I think that the judicial archive is where the evidence has been tendered into the record and that it has been tested and evaluated by the judges. However, there is a whole other archive, which is the Prosecutor's evidence collection, and that is a huge archive. A lot of that evidence has never been introduced into court, and it is still not clear. I know that my colleague was saying that the confidential material – Rule 70 material – which is material that the Prosecutor is not allowed to tender into evidence into court without the provider saying that he can do so; basically, he has generally used it to generate new evidence that he can tender. It is unclear, and I asked the Prosecutor before I came what was going to happen with his huge evidence collection; was there an idea to give the material back, or what was he going to do? He said that they were developing their policies. I think that at this stage they are still talking to the providers of the information, to work out what is the best solution. However, they are also guided by the fundamental principle of archives: you do not split it up and destroy the archive. Nevertheless, there may be a process; I know Elisabeth is very concerned about the Prosecutor having original documents and that they should be returned. Thank you.

### **Vesna Teršelić, *Documenta* – Centre for Dealing with the**

#### **Past**

Thank you very much. Mr Markotić?

### **Gordan Markotić, Assistant Minister of Justice of the** **Republic of Croatia**

I would just like to say once again that the archives are important for the work of the Residual Mechanism going forward, and for future prosecutions of war crimes in domestic courts, on the one hand. On the other hand, the archives are extremely important for the countries of the region and the history of these countries. As far as Croatia is concerned, we provided

the prosecutors of the ICTY with everything they wanted. And with most sensitive documents, which were classified as secret or confidential, which dealt with issues of national security and other important national or individual interests, we always pointed out Rule 54 *bis*, so that the archives can be then returned to the provider, which is the Republic of Croatia.

The information centres are one of the ways on the level of which different stakeholders or actors in the societies of the region could use the documentation – starting from victims, scientists, and all the way to historians. This single corpus of information is extremely big. A lot of energy and money should be put into that to have it all translated into regional languages. Whether we are going to be able to reach an agreement on that or not it remains to be seen. I am afraid that the discussion at the end of the day will boil down to funding, as everything does nowadays, because everything is viewed from the financial perspective. However, I still think that it would be good if these information centres do get set up in the entire region. Information centres would solve to some extent the issues we talked about today; that the public is not well-informed, that the expert public, including students of law faculties do not know much about the work of the ICTY. Everything that has happened in the past where mistakes were made... and I think that the Croatian national television has made a big mistake by not streaming the war crime trials, at least the big cases that are relevant to Croatia. I think that was a big mistake. In that respect, in solving and in not repeating the mistakes of the past, it would be good to have this video footage as part of the database, which would be then made available through information centres. Thank you.

**Vesna Teršelić, Documenta – Centre for Dealing with the Past**

Thank you.

**Marin Bonačić, Research Assistant, Faculty of Law, University of Zagreb**

Maybe it would be good just to repeat once again that the archives of the ICTY are a fact, that they are part of our history. It would be important to make them accessible to people from all of our countries. In that way, those who are interested in history, or who have personal reasons, do not have to

go abroad to find something about the events that took place in our country or countries.

There is one more thing that I would like to add. These materials should be prepared for users. They should be as much as user-friendly as possible, because the archives are going to be huge. Apart from the archives, some materials should also be prepared, which would make it possible for people to find out what they want to know.

### **Vesna Teršelić, *Documenta* – Centre for Dealing with the Past**

Ms Baumgartner?

### **Elisabeth Baumgartner, Director, *Dealing with the Past* programme, Swiss Peace Foundation**

I fully agree that an important point that has been raised is how to make the archives visible. Another important question is, as it was already mentioned, what happens with all the information that is contained in the archives of civil society, I would not say only NGOs. There is a lot of information in the hands of civil society, which complements the archives of the ICTY. I do not agree with Gabrielle that it is the sole responsibility of civil society: to do something with it, to actually use it and make it accessible to a broader public, to use it in a way that fosters dialogue and maybe reconciliation, that needs resources, and I think it is partially also a responsibility of the state towards the victims, towards society – to keep this material somehow available and alive. I would not say that it is the responsibility of civil society to do that. There are many examples where archives of official bodies have been combined with archives of civil society, of the church. For example, in Chile you have a museum that combines the Truce Commission Archives with church archives on what had happened during the military regime. There are examples where it was made available through museums, Documentation centres etc. This needs funding, needs serious planning, and so it is an important factor of what do you do with all this material.

### **Vesna Teršelić, *Documenta* – Centre for Dealing with the Past**

Thank you. Gabrielle McIntyre?

**Gabrielle McIntyre, Chef de Cabinet for ICTY and MICT**

**President**

I just wanted to clarify, because Elisabeth disagrees with me. What I mean is that civil society has a role in making it more visible; that is what I meant, not that you have a responsibility to do everything. I meant you could raise the visibility maybe more than governments are prepared to do. Thank you.

**Jozo Ivanović, Deputy Director, Croatian State Archives**

I think the crucial thing for this archive, as well as any other archive, is the extent to which it is part of a community. The archive has to try to define the ownership that it holds. Nowadays, this greatly depends on the level and quality of access, and the micro-community that supports the archive in a certain society. There is a nice definition of an archive; it is a community of people interested in the same topic, or the same values.

**Vesna Teršelić, Documenta – Centre for Dealing with the**

**Past**

Thank you, I think this is a very good closing point for this panel. This group will try and further monitor what goes on with the archive. I hope that we will support each other, so that the collected information is presented in the best way possible, because it is an important part of reconciliation and building trust. Thank you very much for participating in this panel.

I would like to take this opportunity to thank Judge Pocar for having attended this conference. I would like Judge Pocar to say a few things and to join us here at this table.

## **CLOSING REMARKS:**

### **SPEAKERS:**

- Judge Fausto Pocar, ICTY
- Gordan Markotić, Assistant Minister, Ministry of Justice of the Republic of Croatia

### **Judge Fausto Pocar, ICTY**

Thank you for giving me the floor to say a few words in the closing remarks of this conference. However, let me first express my gratitude and the ICTY's gratitude for all those who sponsored this conference, and those who organised the conference. My gratitude goes particularly to the people in the Tribunal and outside the Tribunal that cooperated for the organisation of the conference; an organisation that has been excellent in any respect.

Let me say that the four panels that we had today were characterised by an extremely interesting and rich debate, based on very good statements by the panellists. I wish to express my appreciation and thanks to all those who took the floor during the conference, from the panels, and from the audience. As for the substance of our deliberations, I believe it is difficult now at this late hour to draw our conclusions on what we have discussed today. It would probably take too long to make such conclusions in detail. I believe the opportunity we had today to exchange views on such important issues of the legacy of the Tribunal, especially for the future of this country and other countries in the region, was extremely useful and important, including the question of the archives, which was taken up in the last panel. The variety of the themes that were taken up today will give us material for reflection, and will help, I think, to shape policies on how to ensure that legacy of the ICTY is not lost after the closing of our facilities in The Hague.

However, while I will not even try to deal with, or summarise all that has been discussed, I would like nevertheless to pick up, without any idea of being complete, some issues that were taken up. We will start with a note of optimism. It is true that there has been criticism on many issues; there were debates, responses that are maybe not satisfactory here and there, but I think that one thing is clear, and this is accepted by everybody here, I think, that there is awareness that the closing of the ICTY is not the end of the story. The closing of the ICTY still leaves a number of things to be done, still puts



responsibility on many people to continue the work. The ICTY has done something; maybe it has done it well, or not so well in some cases – this is more than natural – but there is still a lot of work to be done. Why do I say that this awareness is important? Because when any institution closes, it has certain responsibilities. The trend might be to say, “Well, it closes, it’s finished.” It closes, but it starts at the same time. It closes, but there is a lot to do. I think everybody acknowledges this, that there are responsibilities to continue the work. It has to continue on the judicial side, to a large extent.

We started also a few years ago... I admit we might have been late. We started a bit late, perhaps, this process of going back to the countries in the region here. However, the problem was that we were not perhaps prepared ourselves to tackle that issue. When we started, we tried to establish through visits, through meetings of prosecutors, meetings of judges, we tried to establish a partnership, judicial partnership with the local judiciaries, in order for the work to continue better, in a more harmonic way, not with the local judiciaries having to start from the scratch to deal with the question of the Tribunal. I think that it was extremely important to start that process, because now I feel that when we close, the local judiciaries will go on in a more easy way than they would have done otherwise. I would not repeat the question of judicial assistance, but when the Tribunal was set up, everything was drafted in a way that the local institutions had to cooperate with the Tribunal; they had to make the Tribunal work, they had to provide their cooperation for an efficient Tribunal in The Hague. At a certain moment, the idea came that it should be otherwise, that the Tribunal should cooperate with the local jurisdiction. Some measures that were taken in this respect were important, but at the same time, when we started this process of bilateral cooperation with the domestic jurisdictions, we realised that this was not enough. Probably the main issue was to put in place or to promote cooperation between the jurisdictions of the countries concerned here. This is extremely important. I was happy to hear that there are projects, agreements on cooperation. Some agreements are already in place, but it is extremely important that all of the judicial community works and participates in this exercise. Therefore, from a judicial point of view, there is a lot to do, but I am confident that the way is paved for this to be effective, both in the relations between the Tribunal and the domestic judiciaries, and the essential cooperation amongst the judiciaries in the region.

The second aspect that I think is important – although there was much discussion about this – is the question of reconciliation through recognition of the past, and through information about the past, and education about the past. I already said something during the panel, and I do not want to repeat what I said, but it is extremely important that this be carried out. The arc-

hive is a part of it, information through the information centres is a part of the process, and other action has to be taken by educational institutions, by schools, by universities. We know that education is continuous process and it never ends, but it is extremely important not to lose the effects of the past.

I will close with a warning, as I have been optimistic, a warning that when something is achieved, it is never fully achieved. In human rights matters, like in international crimes, one must always be alert. It is easy to manipulate the past. It is easy to recognise or to change what has been recognised and make these steps backwards. I will just take one example, because it has been raised. It has been repeated several times here. Rape, through ICTY case law, has been recognised as a war crime. That is quite clear to everybody. However, this is not a conclusive word. Action must be taken in this regard. It is not enough to say we have recognised rape as a crime. Actions have to be taken so that the rapes are punished. Sometimes the achievement is an alibi for stopping. This should never be. So that, I think, is extremely important, and it is just a warning I wanted to put as my last note on this extremely good and exciting day we had here in Zagreb. Thank you.

### **Gordan Markotić, Assistant Minister of Justice of the Republic of Croatia**

In my closing remarks, I would like to thank Judge Pocar for his excellent closing remarks, which made my life difficult because now I have to say something and I am left with almost nothing to say.

I will focus on what has been said today. I will share some personal remarks and I hope it will lead to some conclusions.

What is it that we heard today about the legacy of ICTY? We first heard that impunity is a thing of the past. The ICTY was established and impunity no longer existed. It also contributed to the establishment of a new jurisprudence, a new set of legal mechanisms, or institutes. I think this is one of the ICTY's major contributions, if not the greatest – its impact on justice and judicial systems in the region. Regarding the impacts of ICTY in Croatia, we now use video conferences in proceedings; we did not do that before ICTY existed. We have also seen a different situation for the defendants. There is a list of lawyers in the bar association who have expertise in dealing with that, and that is also important and has to do with ICTY's existence. Unfortunately, one important thing was not established, and this is the mechanism of compensating victims.

Unfortunately, the ICTY's practice has not established this as a mechanism that should continuously exist to strengthen the position of victims; and yet the victims are the ones who suffered the most. They need to feel satisfied with judgements, but I feel that there was some other form of satisfaction that they should have been offered.

As for the aspect of history, we heard statements about why you believed that the ICTY was established to write the history, we also heard that writing history is not the job of the ICTY; we heard that it was high time that historians should use the court and so forth. All this is true; the court does not write history. The courts and the Tribunal establish facts in their proceedings. Whatever takes place in proceedings is a solid base for further court proceedings and for the historians of the future.

This brings us to the issue of the archive as one of the most important mechanisms. This is related to the public information dissemination. We have witnessed many failures in this regard. Not many people know a lot about the ICTY's work, even law students, young people, but also some experts or those who purport to be experts. Have we started too late with our regional conferences? Well, perhaps we did. Has the Outreach Programme come in too late, when it started with these conferences last year, instead of starting several years ago? Perhaps it was a little too late, but still what remains important is the existence of the Residual Mechanism. It will carry on with the functions of the ICTY. We are extremely happy not to have any fugitives at large. This is also a very important function of the Residual Mechanism, which has been completed fully; everybody is apprehended. I am talking here about those who were taken to The Hague in the last year or so.

What is also encouraging is the fact that the Residual Mechanism will open the door to a huge amount of work that needs to be done in cooperating with domestic judiciaries, helping them process war crimes. There is no statute of limitation regarding war crimes, so this is a long-lasting objective, and it is the responsibility and task of the judiciaries in the countries of the region. Thank you.

### **Nerma Jelačić, ICTY Head of Communications**

Thank you.

On behalf of the organisers, I would like to thank everybody who stayed until the end of this conference. I know that you had a long day, but we do have some specific conclusions now. I would like to thank the Outreach Programme, and I would like to thank everybody who participated; we will see each other soon. Thank you.