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# STATEMENT

*(Exclusively for the use of the media. Not an official document)*

PROSECUTOR

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## ICTY COMMEMORATION: REFLECTIONS ON 24 YEARS OF FIGHTING IMPUNITY THROUGH INTERNATIONAL COURTS AND TRIBUNALS

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I would like to take this opportunity to thank the United Nations Legal Counsel, Mr. Miguel de Serpa Soares, the Assistant Secretary-General for Legal Affairs, Mr. Stephen Mathias, and your predecessors for the continuous support that the Office of Legal Affairs provided to the Tribunal over the course of our mandate.

Today, I would like to just share a few thoughts about the Tribunal, our work and what remains to be done.

As the last two weeks have shown, the Tribunal remains relevant even today.

Ratko Mladić was convicted at trial and sentenced to life imprisonment.

Yet when I assumed this position, arresting Mladić, as well as Radovan Karadžić, seemed impossible to imagine. In all our meetings, the victims and survivors told me how they could not move forward unless these final fugitives were brought to justice. Now, both have been convicted. This must be considered the ultimate validation for the Tribunal's creation.

Yet at the same time, President Dodik of the Republika Srpska reacted by confirmed that Mladić is a hero to the Serb people, and condemned the Tribunal. And last year, when Karadžić was convicted, it was a similar situation. Just the day before the judgment Dodik dedicated a university dormitory in Karadžić's honor.

And just a few days ago, the Appeals Chamber confirmed the convictions of six senior Bosnian Croat leaders for implementing an ethnic cleansing campaign against non-Croats. While this case may not have been as well-known as Mladić's, it was an important decision shining light on horrific crimes that devastated communities. Unfortunately, we saw again strong negative reactions rejecting the Tribunal's judgment, this time from Croatian and Bosnian Croat officials.

Although my Office has insisted time and again that only individuals are responsible for the crimes, not countries, it seems that this has had little impact.

So we cannot conclude that the past is truly past. Even today, acceptance of the immense wrongdoings during the wars in the former Yugoslavia is an enormous challenge. Convicted war criminals continue - in all countries - to be considered heroes, while the crimes are regularly ignored and denied.

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The Srebrenica genocide is an obvious example, where the governments of Serbia and the Republika Srpska still take a position of genocide denial.

One of the Tribunal's most important legacies then has to be its archives. There are our judgments, the evidence introduced in court and the testimony of more than 4,000 witnesses. In addition, my Office's evidence collection totals more than nine million pages of documents, most of which was never introduced in court.

The archive will continue to be available to those who want to learn the truth of what happened. Moving forward, there should be renewed focus on promoting and defending the truth, particularly through education. The facts of the crimes are taught in classrooms around the world, but not in the countries where they were committed.

But the Tribunal's legacy of course is not limited to the former Yugoslavia. As the President noted, our jurisprudence is essential for efforts today to hold accountable those responsible for the most serious international crimes.

In particular, the Tribunal has developed important doctrines that define the criminal responsibility of political leaders and military commanders.

Joint criminal enterprise, which is similar to legal doctrines in many national legal systems, has been one important tool. My Office used JCE to establish the individual criminal responsibility of leaders from most parties to the conflict for the crimes that were committed.

We proved that ethnic cleansing campaigns in Croatia, in Bosnia and in Kosovo were committed pursuant to criminal plans developed and implemented by senior officials, who then used military, police and paramilitary forces as tools to carry out the crimes. In a number of cases, the judges found that senior government officials from Belgrade and Zagreb were participants in these joint criminal enterprises.

Another important doctrine that we developed is command responsibility, which holds that commanders can be held responsible for the crimes of their subordinates that they failed to prevent or punish. This applies to both military and political superiors, provided that they had effective control over their subordinate. The importance of this doctrine cannot be over-emphasized. The ICRC has conclusively shown that the most effective way to prevent war crimes is by influencing the behaviour of those in charge.

The Tribunal has also greatly developed the law on international crimes, particularly conflict-related sexual violence. While rape has historically been considered an opportunistic war crime, we have successfully proved that it is a foreseeable consequence of criminal plans to forcibly expel civilian populations. We have also prosecuted sexual violence as the crime of torture, as well as sexual enslavement.

Similarly, the ICTY has greatly developed the law of genocide. When the ICTY was created, we had to tackle many unanswered questions about how the law of genocide applied in practice. Contrary to popular understanding, genocide is not a question of how many people were killed. Rather, what distinguishes genocide from other crimes is the intent behind the crimes. What is required is that crimes were committed with the intent to destroy a particular group in whole or in part.

My Office also considers that one of our most important legacies has to be our lessons learned from two decades of working to obtain state cooperation.

When we talk about cases involving international crimes, more often than not we are talking about massive violations, involving hundreds if not thousands of victims, committed by many perpetrators at all levels of the political and military hierarchies, over the course of many years. So our investigations are massive, involving an immense amount of evidence and a large number of witnesses. We also have to locate and arrest suspects who may be protected or have gone into hiding.

Yet international prosecutors need permission to access crime sites and witnesses, as well as to conduct arrest operations. There is no international police force. Governments may be reluctant to cooperate or even hostile to international prosecutors. These basic facts mean that international prosecutors need to work to secure cooperation, often from the very people that we are investigating.

Even with the legal authority of the Security Council through Chapter VII of the United Nations Charter, the ICTY had to negotiate for access, in many instances with many of the same people who were in power during the conflict, including perpetrators of crimes or their superiors.

When the Srebrenica genocide was committed in July 1995, there was no infrastructure in place to secure the crime scenes. It was twelve months before investigators were able to access the sites to carry out exhumations and collect other evidence. The scattered remains of Srebrenica victims are still being recovered from graves today. As we now know, delayed access enabled the Bosnian Serbs to remove the bodies from primary graves and relocate them to secondary graves in a bid to cover up the crimes. Even though we finally found and exhumed the mass graves, the reburial operation had disrupted the crime scenes. This has complicated the evidence and created opportunities for the defence to attack expert findings.

The greatest challenge though has been securing the arrests of fugitives. The ICTY has been cited as a success because we are the only international tribunal with no fugitives from justice. However, it took the ICTY 18 years to achieve that goal.

At the ICTY, there were a number of factors that ultimately led to the arrests of all our indictees and to obtaining the access to evidence that we need. But one measure was of decisive impact, which can apply to any situation: the conditionality policy established by the EU and the United States.

The arrest of the former President of Serbia, Slobodan Milošević, is a clear example. The Serbian government refused to hand him over to the ICTY for trial. In 2001, the US Congress placed conditions on its foreign aid to Serbia, which was desperately needed to rebuild the country after almost a decade of conflict. In advance of a crucial donors conference, then-Secretary of State Colin Powell warned that US support for international aid would depend on the arrest of Milošević. In the end, Milošević was delivered to the ICTY one day before the United States' deadline.

This same mechanism of international support and pressure continued and was expanded through the EU's conditionality policy. The EU's mix of incentives and sanctions for states in the former Yugoslavia tied to cooperation with the ICTY was crucial to our success. In 2002, the European Union made membership conditional on full cooperation with the ICTY, which created powerful pressure. The States of the former Yugoslavia had to demonstrate at least that they were taking all necessary measures to arrest the fugitives. EU conditionality led to the arrest of several of our most wanted fugitives, including Radovan Karadžić and Ratko Mladić.

The lesson learned is that international prosecutions are taking place in a realpolitik world. Prosecutors must remain independent, but accept that politics impacts our work. In the end, without support from influential countries, the mission is truly impossible.

The key point I want to make is this: if there is a clear political agenda in favor of accountability, then justice has a greater chance of being successful. This is applicable with respect to not only international investigations, but also domestic ones. The US and EU conditionality agenda ultimately resulted in the development of domestic justice in the countries of the former Yugoslavia.

This raises what I consider the Tribunal's under-appreciated legacy, the relationship between international and national post-conflict justice initiatives, which today is often labeled "positive complementarity".

As Prosecutor of the ICTY, I have been intimately involved in the sustained cooperation and coordination between my Office and prosecutors throughout the former Yugoslavia in support of national investigations and prosecutions. This cooperation included numerous capacity-building activities and close cooperation on concrete cases. Looking at the ICTY's experiences, we can see clearly how international justice can help reestablish the rule of law in countries devastated by conflict.

Initially, national governments in the former Yugoslavia vigorously opposed justice and accountability.

The international community, led by the US and EU, made it clear however that war crimes prosecutions were non-negotiable. Local courts were eventually established to prosecute conflict-related crimes, including the War Crimes Chamber of the State Court here in Bosnia and Herzegovina, the War Crimes Chamber in the District Court of Belgrade and specialized chambers in the District Courts of Croatia.

In turn, for my Office, supporting national justice became an integral part of our Completion Strategy. The Completion Strategy was designed to allow the ICTY to focus on the most senior leaders responsible for crimes and thereby complete its mandate, while at the same time linking the completion of the ICTY's work to continued war crimes prosecutions in national courts. This combined approach aimed to ensure that the accountability process will continue even after the ICTY completes its cases.

This has been an important lesson. To have real impact, there must be an integrated, global solution. If international tribunals focus on those most responsible for the crimes, there must still be national courts addressing other perpetrators in order to avoid significant impunity gaps. As the ICTY has shown, only if international and national justice mechanisms work together can meaningful justice be achieved. In the future, collaboration and intense cooperation between the international and national should be the rule, not the exception.

I won't go into detail, but my Office undertook a wide array of measures to make this positive complementarity a reality. First, we transferred cases from the ICTY to national prosecutors: these are the so-called 11bis and Category II cases. Second, we have provided extensive support to investigations and prosecutions initiated by national prosecutors, particularly by enabling them to directly access to our evidence and analysis. Third, we have engaged in extensive capacity-building and knowledge transfer with national investigators and prosecutors. Finally, the OTP has engaged in efforts to improve regional cooperation between national prosecutors themselves, as well as to develop and implement national prosecution strategies.

In this regard, the program we established of having liaison prosecutors from each of the countries of the former Yugoslavia working in our office is a model that should be seriously considered for future accountability initiatives.

By way of conclusion, I would like to just sum up by looking to the future.

The Tribunal issued more indictments than all other international criminal tribunals combined, and we brought to justice many senior leaders from all sides of the conflicts.

Yet the Tribunal is not closing because its work is done. Rather, the Completion Strategy reflected the Security Council's decision to transition responsibilities from the ICTY to national judiciaries in the former Yugoslavia.

It is clear that for this strategy to succeed, our national colleagues will need as much - if not more - support as the ICTY and my Office received.

So the completion of the Tribunal's mandate is not the end of war crimes justice, but the beginning of the next chapter. Further accountability for the crimes now depends fully on national judiciaries in the former Yugoslavia. Thousands of cases remain to be processed, particularly many complex cases against senior- and mid-level suspects in every country.

As my Office has reported over the last few years, accountability for war crimes, crimes against humanity and genocide in the national courts of the former Yugoslavia faces many challenges, with negative trends at times overshadowing the positive.

So ultimately, I believe that the ICTY's legacy is not simply measured by our own work, but by whether the countries of the former Yugoslavia build the rule of law and demonstrate they can secure meaningful justice for the victims of serious crimes during the conflicts.

The Mechanism Office of the Prosecutor is committed to continuing and strengthening our assistance to our national colleagues. At the same time, supporters of international justice should also strengthen their engagement, and ensure that national war crimes justice is at the top of the diplomatic agenda.

If you speak with one voice, and provide your full support, more victims from all communities will receive a greater measure of justice, and hopefully the countries of the former Yugoslavia will begin to embark on a path of real reconciliation.

Thank you for your attention.

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