

**Celebration of the 20<sup>th</sup> Anniversary of the International  
Criminal Tribunal for the former Yugoslavia**

**Keynote Speech by Ms. Patricia O'Brien  
Under-Secretary-General for Legal Affairs  
The Legal Counsel**

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Your Majesty,  
Mr. President,  
Excellencies,  
Ladies and Gentlemen,

**[Introduction]**

It is a great pleasure to be here to speak to you on the twentieth anniversary of the establishment of the International Tribunal for the former Yugoslavia (ICTY). The ICTY has been at the heart of what the Secretary-General, Ban Ki-moon has called the "age of accountability".

It is fitting that we are celebrating this anniversary in the City of The Hague – which is often described as the international law capital of the world. I would like to pay tribute to the Netherlands and to the City of The Hague for their significant contribution to international justice. By hosting so many international courts and tribunals and by facilitating their activities, the Netherlands has positioned itself at the vanguard of States supporting the advancement of international justice.

I will take the opportunity today to reflect upon the impact of the ICTY's work over the past two decades, as well as to consider its legacy as we look to the future of international criminal justice.

## **[The historical importance of the establishment of the ICTY]**

International criminal justice is one area of today's international legal landscape which would be unrecognisable to a jurist of the early twentieth century. In the immediate aftermath of the horrors of the Second World War, through the Nuremberg and Tokyo trials, the Allies brought to justice those who had committed atrocities. The international community sought, in the 1948 Genocide Convention, to ensure that the horrific events of the Holocaust were not repeated. It created, in the Geneva Conventions of 1949, a legal framework to regulate the conduct of war.

In the wake of the elation of the ending of the Cold War and the fall of the Berlin Wall, the events in the former Yugoslavia in the early 1990s came as a terrible shock and a grim reminder that the worst horrors of war had not been consigned to history. In the years between the Second World War and these events, the Geneva Conventions and the Genocide Convention had essentially lacked any practical enforcement. Those who acted in violation of their provisions were not brought to justice, at the domestic level or elsewhere – except in one or two rare war crimes cases. These were exceptions that were so unusual as to seem to “prove the rule” of impunity.

The establishment of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) in the early 1990s therefore demonstrated a new-found and serious commitment on the part of the international community that those responsible for perpetrating the most serious crimes of international concern should be held accountable for their actions.

Shortly afterwards, we also witnessed the creation of the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon. And of course, the ICTY also acted as the catalyst for the negotiation and conclusion of the Rome Statute, which established the world's first permanent international criminal court. Efforts to develop a code of international crimes and a permanent international criminal court had been ongoing for some decades: it was the ICTY's demonstration that an

international criminal tribunal could work in practice that enabled the ICC to come into being.

The achievements of the ICTY are truly remarkable. I will begin by identifying some of the tribunal's major contributions to international law. I will then turn, as we prepare for the opening of The Hague branch of the Residual Mechanism in a month's time, to consider the impact of the work of this tribunal on the future of international criminal justice.

### **[The ICTY's contribution to substantive international law]**

The ICTY has contributed to a substantial body of international law, including international humanitarian and criminal law.

Today, this tribunal's position in the architecture of international criminal justice is firmly established and secure. However, you will recall that in the early 1990s, doubts persisted as to whether the Security Council had the authority to establish a judicial body. At the earliest opportunity, the ICTY itself confirmed that the Council does indeed have such authority under the UN Charter. This demonstrated a clear link between the pursuit of justice and accountability and the restoration of international peace and security. (*Tadić*)

It is a tragic fact that in today's world, so many countries are blighted by civil war. Indeed, the nature of armed conflict has changed in the second half of the twentieth century, with the majority of wars now taking place within the borders of States. Some 45 years after the adoption of the Geneva Conventions, the ICTY has set out the legal criteria for distinguishing between international and non-international armed conflicts, and it has confirmed that many rules of international humanitarian law apply in internal armed conflict. (*Tadić*)

The ICTY has enriched international criminal law, including by clarifying offences such as enslavement, rape and torture. The tribunal's development of the theory of joint criminal enterprise has been essential to its ability to address the complex and systematic

crimes that occurred in the former Yugoslavia. This jurisprudence has been relied upon not only by the ICTY but also by the other international criminal tribunals. (*Kunarac, Kvočka*)

It is well-known that women and girls are all too frequently among the most vulnerable in armed conflict and that they have been victims of shocking assaults and violations. As gender crimes were largely undeveloped by the Nuremberg and Tokyo tribunals, the ICTY's jurisprudence in this area is a substantial and valuable contribution to international criminal law. It has laid the foundation on which other tribunals have subsequently built. (*Čelebići, Furundžija*)

Moreover, the ICTY has afforded a voice to victims who were previously not heard. Victim evidence had not played a significant role at Nuremberg and Tokyo. Through the ICTY, vulnerable victims, including women and girls, have been given the opportunity to tell their story in court, to place their experiences on the record, and to see the perpetrators of crimes against them held accountable. In addition to creating a powerful historical record, this opportunity to be heard can help victims of horrendous crimes to reclaim their dignity.

Although the Genocide Convention had been adopted in 1948, the ICTY was the first international criminal tribunal with jurisdiction over genocide. The tribunal's finding that the killing of more than 8,000 men and boys at Srebrenica in 1995 was genocide has been of enormous significance. It is important legally, but also, it is a critical fact that must be recognised by all Bosnians. It is a common historical basis from which their painful efforts toward reconciliation can proceed. This decision imparts the stigma of involvement in genocide to those responsible. It serves as a warning to those who may, in the future, contemplate perpetrating such heinous acts. (*Krstić*)

When defending the commission of serious international crimes, it can never be enough for the Accused to say "I was following orders". The ICTY has been unequivocal in clarifying the doctrine of command responsibility, confirming that there need not be a formal superior-to-subordinate relationship for criminal liability to arise. (*Čelebići*)

These brief examples demonstrate the depth, breadth and importance of the ICTY's contribution to international criminal justice. In many ways, the case law of this tribunal has provided the foundation for accountability for the perpetrators of serious international crimes across the world. The ICTY's legacy to substantive international law is truly a global one.

### **[The ICTY's contribution to procedural international criminal law]**

The stakes are high in international criminal justice. States invest a great deal of time, money and political capital in international criminal tribunals. With senior leaders indicted and with testimony covering some of the most horrendous episodes in recent human history, proceedings have a high public profile and are followed closely. It is therefore imperative that the procedural law governing the proceedings operate to secure fair trials. The accused, the victims and the international community need to have confidence in the fairness of the proceedings.

One of the areas of lasting criticism of the Nuremberg and Tokyo trials is a perceived shortfall in procedural guarantees. In contrast, the ICTY has played a crucial role in the development of international criminal procedural law, blending elements from civil and common law.

At times this has posed challenges to the tribunal, and it has faced criticism, for example: that of the length of time which proceedings take.

While any legal system must strive to conduct proceedings in an expeditious and efficient manner, we must recall that the cases faced by the ICTY have presented the most complex legal and factual situations. The proper resolution of such cases, even in an established domestic legal system, must be expected to take time. Those who have contributed to the work of the tribunal can take pride in the ways in which the tribunal has always sought to ensure that the defendants' right to a fair trial is not compromised.

Respect for the rights of defendants goes to the heart of ensuring that the legal process maintains international support and is conducted in accordance with the rule of law. The ICTY's legal aid system has afforded defendants the opportunity to be represented by experienced lawyers from a range of jurisdictions. This is of particular importance given the complexity of the legal issues involved in the cases. This system has resulted in a growing body of lawyers with the necessary expertise to represent defendants before international criminal tribunals.

The tribunal's rules of disclosure and admissibility of evidence play a vital role in conducting proceedings in accordance with appropriate standards of fairness and due process. Particular challenges have been faced when dealing with documentation which is confidential or raises issues of national security for States. The ICTY's handling of these and other novel and challenging procedural issues on a regular basis has, as with so many matters, informed the conduct of proceedings before other international criminal tribunals.

The testimony of victim witnesses has been at the core of the ICTY's proceedings. Many of them have suffered threats and intimidation, and have shown enormous courage in coming forward to give evidence. Ensuring their safety and security is paramount. The tribunal has developed a range of measures to support victims and protect witnesses before, during and after giving evidence. The development of these measures, both judicially and through their practical implementation by the ICTY's Registry, has set the standard for the tribunals that have followed.

The ICTY has developed law and practice in other procedural areas too numerous to mention today, including sentencing, plea agreements and assistance to national courts, which other international criminal tribunals have relied upon and developed. This body of procedural law and practice forms part of the ICTY's global legacy alongside its substantive case-law.

## **[Future of the ICTY - Residual Mechanism - future of international criminal justice]**

We are on the cusp of the next stage in the life of the ICTY. The tribunal is getting closer to completing its work. The Arusha branch of the Residual Mechanism began operating last year. The Hague branch is on schedule to commence operations on 1 July this year. Therefore, as well as reflecting upon the achievements of the tribunal to date, we also have the opportunity today to look to the future of international criminal justice.

In doing so, there are many instructive lessons to be drawn from the UN's work to end impunity for international crimes. Allow me to summarize them as follows:

- The old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new Age of Accountability;
- In this new age of accountability nobody is above the law, including in particular Heads of State. Leaders will eventually be held accountable for their actions;
- Sovereignty as a barricade against international justice is gone; and
- There is no peace without justice. Peace and justice must go hand in hand and elements of justice must be factored into every post-conflict strategy in order for peace to be sustainable.

I consider that the legacy of the ICTY persists not only at the international level, but also at the national level.

The ICTY has contributed to building national capacity in the former Yugoslavia, particularly through the Bosnian War Crimes Chamber, the importance of which was recognised by the Security

Council. The transfer of investigation files to national authorities, the referral of cases to the national courts, and the ongoing provision of evidence and assistance to enable them to prosecute the many thousands of crimes that took place in the conflicts of the 1990s is a significant part of the ICTY's lasting regional legacy.

Building national capacity is important because, 20 years after the establishment of the ICTY, complementarity lies at the heart of international criminal justice. We see the primacy of domestic jurisdictions enshrined in the ICC's Statute. States have the primary responsibility to prosecute before their national courts those who have perpetrated serious crimes of international concern. It is only where a State is unable or unwilling to prosecute that the ICC will step in.

There has also been, in my opinion, a further related development. We have seen, in the past two decades, the gradual "domestication" of international criminal law.

Cases of national courts addressing international criminal law would have been almost impossible to imagine without the pioneering insistence on accountability by the ICTY and other international criminal tribunals. To a very large extent, national decisions have come about as a result of the rich body of case law from the international criminal tribunals. The ICTY and the other tribunals have served as high-profile enforcement mechanisms for international humanitarian and international criminal law. They have had an impact in domestic settings far removed from their particular mandates.

This brings me to one of the most important developments to which the ICTY has contributed. I consider that the nature of the dialogue surrounding situations in which serious international crimes are committed has changed.

In the statements of world leaders; in the work of journalists; and in expressions of public opinion, accountability is a pervasive theme. We hear expressions of outrage, not only at the perpetration of atrocities, but at the idea that those responsible could ever enjoy impunity. Calls to bring an end to violence and conflict are

accompanied by calls to bring perpetrators to justice. Indeed, there is an ever-growing expectation that those responsible will be held accountable, and there is a consistent rejection of amnesties for serious international crimes. This change in the nature of the dialogue is, I suggest, attributable to the fact that the age of accountability is becoming a reality.

On its twentieth anniversary, we must recognise the significant role which the ICTY has played in bringing about irrevocable changes to the landscape of international criminal justice. I would like to take this opportunity to thank President Meron, the Judges, the Prosecutor, the Registrar and all the staff of the ICTY for their service. It is thanks to their commitment, their dedication and their hard work that the ICTY has achieved the truly remarkable feat of bringing all 161 indicted persons to justice.

The development of a universal system of international criminal justice is a long-term undertaking, calling us all to perpetual vigilance and unceasing effort. I am confident that, with the resolute support of the international community, and, of course the United Nations, international criminal justice will continue to develop. We can also be confident that the next twenty years will lead to achievements as significant as the last.

Thank you, Mr. President.