



# UNITED NATIONS OFFICE OF LEGAL AFFAIRS

## ICTY Legacy Dialogues

### Closing Address

By

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I am honoured to be here in Sarajevo, for the closing of the ICTY Legacy Dialogues that the International Tribunal for the former Yugoslavia has organised in the framework of the upcoming closure of the Tribunal.

I note that according to the Conference Programme you have been discussing these days the normative, gender justice, non-judicial and operational legacy of the ICTY.

Allow me, now, a few personal remarks on what I would call the moral legacy of the ICTY.

Years ago, in October 1999, the then Secretary-General, Mr. Kofi Annan, said here in Sarajevo that the United Nations experience in Bosnia was one of the most difficult and painful in its history.

“No one regrets more than we - he said - the opportunities for achieving peace and justice that were missed. No one laments more than we the failure of the international community to take decisive action to halt the suffering and end a war that had produced so many victims”. He added that “we will never forget that Bosnia was as much a moral cause as a military conflict” and that “the tragedy of Srebrenica will haunt our history forever”. We all remember that in the same year, the Secretary-General issued his report on the fall of Srebrenica, stressing that the international community as a whole had to accept its share of responsibility for the ethnic cleansing campaign that culminated in the murder of some 7,000 unarmed civilians in Srebrenica.



Morality and responsibility, these are two concepts that are actually intimately linked to the establishment and operation of the ICTY 24 years ago. Indeed, before acknowledging the responsibility of the international community through the 1999 Report of the Secretary-General, the Security Council established the International Tribunal for the former Yugoslavia, which could be seen as the first measure addressing both the moral duty and the prosecution of those responsible of serious violations of international law. With such a measure, the global community reaffirmed its commitment to addressing the impunity that had caused so much pain and sorrow.

As I will discuss later, the moral responsibility of the international community to ensure accountability for the victims of crimes of these nature led to the development of various international mechanisms, all which can be seen as emerging from the foundational work of the ICTY.

I.

You have discussed during these days ICTY landmark decisions and the development of legal concepts of international criminal law. One of the most important developments to emerge from the ICTY is the principle of the individual criminal responsibility, even with respect to acts of senior government officials.

This is now a generally accepted principle and represents an important and core progress in international criminal law that must be protected.

Allow me today, and here in Sarajevo, to also refer to two more specific examples which show how the fight against impunity has evolved thanks to the work of the international criminal justice system established since the creation of the ICTY in 1993.

First, the siege of Sarajevo and the crimes that were committed in that context have an important place in the jurisprudence of the ICTY. In particular, two Serb officials were convicted for numerous counts of crimes against humanity committed during the siege of Sarajevo.

Generals Stanislav Galic and Dragomir Milosevic were respectively sentenced to life imprisonment and 29 years imprisonment, in 2003 and 2007. They were found guilty, among other crimes, for the shelling and sniper terror campaign against Sarajevo, including the first and second Markale (city market) massacres.

I should add that Radovan Karadzic was sentenced to 40 years in prison for, among other crimes, the siege of Sarajevo. In this case, Mr. Karadzic, as we know, was



accused of participating in the Sarajevo joint criminal enterprise and was convicted for murder, unlawful attacks on civilians, and terror, as violations of the laws or customs of war and for murder as a crime against humanity.

The doctrine of the joint criminal enterprise will remain as a major legal development of the ICTY to prosecute those most responsible, and in particular political and military leaders.

Second, as we know, Sarajevo has been one of the worst destroyed cities in Bosnia and Herzegovina.

Its cultural-historical heritage, as a symbol and base of national and religious cultures, shared the destiny of the town and its citizens. The destruction of historic monuments and buildings was indeed a strategic war objective.

Both Susan Sontag and the recently disappeared Spanish writer, Juan Goytisolo, who were virtually alone among the well-known writers and artists and performers of Europe, and beyond, in coming to Sarajevo during the siege, referred to the destruction of the cultural heritage, in particular the Library of Sarajevo. The ICTY considered several cases with respect to the destruction of cultural property and has led the way to establishing the criminalization of attacks against cultural property.

In this regard, I note that on 27 September 2016, the International Criminal Court also found Mr. Ahmad Al Faqi Al Mahdi guilty of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion in Timbuktu, Mali. This was the first case before the Court to be exclusively focused on attacks on cultural property.

While the applicable rules of the ICC and ICTY differ, the work of the ICTY has opened the door and paved the way for consideration of this crime as the sole basis for establishing a war crime.

I should add that while the ICTY decisions have been instrumental in developing international criminal law, most of the ICTY decisions have also been a major step for the establishment of the truth about the war and the terrible atrocities that were committed. Atrocities which affected generations of citizens, and which marked history.

## II.

As I mentioned earlier, the ICTY has been the foundation for the existing international criminal justice “regime”. I believe it is fair to say that the ICTY can be considered the genesis of the “global culture of accountability”. While tribunals



such as the ICTR and the Special Court for Sierra Leone followed the model of the ICTY, other ad hoc institutions with some level of international participation or assistance have also been created and others may be created in the future.

These could be along the lines of the new Kosovo Specialist Chambers and the Specialist Prosecutor's Office, established by a Kosovo domestic Law to prosecute crimes which have been the subject of criminal investigation by the Special Investigative Task Force. Another Court to come, building on the legacy of other tribunals, is the proposed Hybrid Court for South Sudan.

The parties to the Agreement on the Resolution of the Conflict in South Sudan – which was signed on 17 August 2015 – agreed that a hybrid court for South Sudan should be established to assist in ensuring accountability.

In addition, non-judicial international accountability mechanisms are now being seriously considered and even established. In contexts where it is difficult to foresee effective accountability, there is an increasing appetite for, at a minimum, gathering and securing evidence in the meantime so that such evidence can be used in national, regional or international courts that may in the future have jurisdiction over these crimes.

In this regard, the General-Assembly established in December 2016 the new investigative mechanism for Syria to preserve and analyse evidence of violations of international humanitarian law and human rights violations. There have been calls for similar mechanisms elsewhere, including in South Sudan and Iraq. As these are new mechanisms, we do not have evidence yet to say how they will fare in the future and if they will lead to actual prosecutions of crimes.

I caution that it is necessary to examine carefully the initiatives to establish new mechanisms. For example, some States could seek to delay the prosecution of international crimes by accepting the establishment of investigative mechanisms. Others may prefer to create new (and expensive) structures instead of accepting the International Criminal Court jurisdiction. The outreach and the development of capacity building at the domestic level may also consequently be delayed.

As seen with the ICTY, it is important to remember that any ad hoc tribunals, and any investigative mechanisms engaging with victims, may give rise to entities that are necessary in order to discharge the residual functions arising from international criminal justice.



These functions include not only witness protection, but supervision of enforcement of sentences, petitions for early release, contempt cases, review of judgments and sentences, and management of archives.

States need to be aware that when they create any of these structures, it is a long-term process and these structures will likely need to exist for a period of time that goes beyond the collection of evidence or the delivery of judgments. The failure to account for these long timelines can lead to fatigue regarding financial support.

As we are in a legacy event, let's now look into the future and reflect on four specific areas that could be improved in the future and which could concern all international and tribunals with any sort of international participation or assistance. One is of a financial nature while the three others relate to efficiency and governance.

- (1) The ICTY benefitted from funding through assessed contributions of UN Member States. However, the length of the trials and the cost has raised questions about the financing of these types of mechanism and the possibility of improving efficiency. Several other institutions that have followed the ICTY have been financed through voluntary contributions. Finding resources to sustainably support these institutions remains a problem. Already today, as members of the international community consider creating new institutions as the ones described above, funding for some of the existing hybrid institutions that are voluntarily funded has largely dried up, putting at risk the orderly conduct of the judicial process. Based on lessons learned and in particular on the International Residual Mechanism for Criminal Tribunals' experience, consideration may be given in other tribunals to the possibility of appointing judges who would be paid on a "when-employed" basis for functions that may not run continuously.
- (2) When we talk about efficiency, the issue of the length of the proceedings has been identified as a concern, in particular for those who fund the tribunals. It appears that one reason that funding erodes over time is that the cases take so long. Of course, the cases are complex and the proper administration of justice requires that issues be adequately investigated, proved, and judged. But there is no requirement that the decision in a criminal case stand as the definitive historical treatment of a particular incident, nor is it necessary that an accused be tried of all crimes that he or she may possibly have committed. There is an element of discretion that perhaps can be applied here.



- (3) There is also an opportunity for ad hoc international criminal tribunals and hybrid tribunals to further develop mechanisms of governance of their activities. There should be a way of monitoring judicial productivity to ensure expeditious resolution of cases without endangering judicial independence, as happens in national systems. Comparable oversight should also exist for investigations and prosecutorial functions. In addition, there are increasing calls for judicial accountability and for the need for mechanisms for responding to complaints to ensure procedural fairness and certainty for all involved when allegations of judicial misconduct arise.
- (4) Last but not least, the treatment of victims. The very nature of the most serious violations of international law leaves a victim vulnerable and often in need of assistance. Victims are, often for the very first time, involved in a criminal justice system and may have to speak to police officers, investigators, lawyers and judges and ultimately go to court. Victims can find these processes confusing and overwhelming, particularly when they have an international component. A reflection needs to be undertaken to seek to ensure that victims are recognised and treated with respect and dignity; that they are protected from further victimisation and intimidation from the offenders and further distress when they take part in the criminal justice process; that they receive appropriate support throughout proceedings and have access to justice. Important progress has been made by different international and hybrid tribunals.

Many of them have witnesses and victims support sections responsible for providing various forms of crucial support to victims at their various stages of cooperation with these tribunals, including, but not limited to, expert psychological support and measures to ensure their protection. Some Tribunals have established field offices, like the ICTR/Mechanism in Kigali, which provides essential support to victims and witnesses.

The International Criminal Court also provides support to victims through its Trust Fund for Victims, which is mandated to secure reparations and appropriate forms of assistance for victims of serious crimes.

### III.

This brings me to the conclusion.

In an ideal scenario, institutions such as the ICTY would not be necessary and domestic jurisdictions should assume the main responsibility in the prosecution of international crimes, while offering guarantees to respect international standards.



The important work of building domestic capacity in this regard continues to be necessary. However, we have seen that in the wake of the ICTY and the other international tribunals, States appear to be more able and willing to utilize domestic prosecutions for international crimes, with some assistance of the international community and with different levels of international participation.

One example is the Special Criminal Court in the Central African Republic, which includes international judges, an international prosecutor and an international deputy-registrar. Another example is the Colombia Special Jurisdiction for Peace, which will be composed exclusively of Colombian judges, but allows the participation of foreign *amicus curiae* lawyers.

Sri Lanka could be in the future a scenario for another domestic judicial mechanism with some sort of international participation.

I said the ideal scenario, as in some contexts this is simply not an option. In this regard, allow me to finish by referring to Slavenka Drakulic, a Croatian novelist, and her 2004 essay, *They would never hurt a fly*, which is a psychological analysis of war criminals being tried in The Hague. At some point she describes the strong emotions that the only mention of the name of the city “The Hague” provokes in Croatia, Serbia and Bosnia and the little desire in these societies to uncover the truth.

Ms. Drakulic concludes that, in the case of the crimes committed in the Balkans “[j]ustice simply has to come from The Hague or it will not come at all – and all because we ourselves are not capable of washing our own dirty, bloody laundry.”

And she adds “We do not even realize yet the need to do it.” In these situations, as was the case with the ICTY, the international community will need to continue to be the driving force to ensure accountability and provide justice to victims.

I commend the legacy efforts undertaken by the ICTY as they will remind the international community that our work to ensure respect for human rights and the rule of law continues, that the cause of justice endures, and that the hope to end impunity lives on. The ICTY leaves behind a powerful legacy of which we can justly be proud.

Thank you for your attention.