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Human Dimension Seminar on Upholding the Rule of Law and Due Process in Criminal Justice Systems

Office for Democratic Institutions and Human Rights (OSCE)

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Keynote Address by the President of the International Criminal Tribunal for the former Yugoslavia (ICTY), Judge Fausto Pocar

Excellencies, Ladies and Gentlemen,

Good morning. It is a great pleasure for me to take part in this Seminar and to have the opportunity to interact with a great number of colleagues from the OSCE and with NGO and civil society representatives.

The topic of this seminar, the rule of law and due process in criminal justice systems, is an area where the interests of the institution I represent and the institution hosting this seminar naturally converge. The OSCE has of course done a tremendous amount of work in this field, for instance, through its trial monitoring programmes in Bosnia and Herzegovina, Croatia, and Serbia and Montenegro. It is also an issue of critical importance to the International Criminal Tribunal for the Former Yugoslavia.

I will focus in this intervention on the measures that the International Criminal Tribunal for the Former Yugoslavia has adopted to enhance cooperation with the judiciaries in the States of the former Yugoslavia. More specifically, I will discuss the Tribunal's achievements in what I would call the transfer of investigative and judicial *know how* as part of the completion of our work and as part of our mandate to fight impunity in the region of the former Yugoslavia.

Most of you know that the ICTY was established by the Security Council under Chapter VII of the United Nations Charter as an *ad hoc* and subsidiary organ in order to halt and redress the serious violations of international humanitarian law committed in the former Yugoslavia since 1991, which were deemed by the Security Council to constitute a threat to international peace and security. The Tribunal, by bringing to justice individuals responsible for these crimes in the region, was thus intended to contribute to the restoration and maintenance of peace in the region.

Under Article 9 of the Statute, the Tribunal exercises concurrent jurisdiction with national courts over these international crimes. While the same provision stipulates that the Tribunal has primacy over national courts, I should stress that the Tribunal was never intended to act indefinitely as a substitute for national courts, particularly those in the region, which have an essential role to play in ensuring that justice is served, reconciliation is promoted, and closure is brought to the families and victims of the war.

In light of its complementary function, the Tribunal has been actively working to strengthen its cooperation with national judicial systems in the former Yugoslavia, with a view to ensure the domestic prosecution of war crimes in accordance with international standards. This is a task that has been described by the Security Council as crucially important to the implementation of the Tribunal's completion strategy, which provides for a phased and coordinated completion of the Tribunal's historic mission by the end of 2010.

There are two main components to our cooperation with domestic criminal justice systems in the former Yugoslavia, which have been both formally endorsed by the Security Council.

First, in accordance with Security Council Resolutions 1503 of 2003 and 1534 of 2004, the Tribunal's work now focuses on the prosecution and trial of the most senior leaders while referring a small number of cases involving intermediate and lower-rank accused to national courts. There are two distinct categories of cases that may be subject to referral:

1) Cases where an Indictment was already issued by the Prosecutor of the International Tribunal;
2) Cases where an Indictment has not been issued by the Prosecutor of the International Tribunal.

Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence organizes the referral procedure for the first category of cases. A decision to refer a case is rendered by the Referral Bench, which is appointed by the President and comprises three judges from the Trial Chambers. For the referral to be ordered, the Bench must be satisfied that:

- the accused will receive a fair trial;
- that the death penalty will not be imposed or carried out;
- and that neither the level of responsibility of the accused nor the gravity of the crimes alleged in the indictment would make a referral to national authorities inappropriate.

A referral may be made to a State

- in which the crimes were committed;
- the accused was arrested;
- or which has jurisdiction and is willing and adequately prepared to accept the case.

The referral order may be appealed before the Appeals Chamber of the International Tribunal. For example, the Appeals Chamber quashed on 23 February 2006 a Decision of the Referral Bench to refer *Savo Todović* to Bosnia and Herzegovina due to an error of law and the case is currently being reconsidered by the Referral Bench.

I should add that the relationship between the International Tribunal and the national jurisdictions does not stop after the issuance of the Referral Order and for instance, Rule 11*bis* also contemplates the possibility of sending observers to monitor the proceedings on behalf of the Prosecutor of the International Tribunal.

Finally, Rule 11*bis* provides that, before the accused is found guilty or acquitted by a national court, the Referral Bench may revoke a referral order at the request of the ICTY Prosecutor and upon having given to the State authorities concerned the opportunity to be heard. The revocation of the order could occur if, for example, the national proceedings are merely characterizing the crimes as "ordinary" or if there is a lack of impartiality or independence and the proceedings are designed to shield the accused. This mechanism provides the clearest demonstration that the International Tribunal has a vested interest in ensuring that trials by domestic courts of States in the former Yugoslavia are conducted in full compliance with international due process standards.

To date, the Prosecutor of the International Tribunal has filed 12 referral motions involving 20 accused. Six accused have been transferred from The Hague to the War Crimes Chamber established within the State Court of Bosnia and Herzegovina (BiH) and two accused to Croatia for trial before its domestic courts. Three other referral orders have been issued by the Referral Bench but their status is not yet final and five other individuals have their cases pending before the Referral Bench.

As I already indicated, the referral procedure is limited at this stage to a small number of cases for intermediate and lower-rank accused. However, we are currently considering the possibility of severing the indictments issued against higher level individuals so that the International Tribunal would only try these accused on the most significant incidents the charges brought against them

referred to, while the remaining charges would be referred to domestic courts. This would enable us to limit the length of trials and the length of pre-trial detention. It would also help us a great deal in ensuring the completion of our work within the deadlines set by the Security Council.

In cases where an Indictment was not issued, the Tribunal has transferred investigative materials collected by the Office of the Prosecutor for review and further investigation by prosecutorial authorities in the region. For example, the Prosecutor of the International Tribunal has handed over several cases to the Serbian War Crimes Prosecutor's Office. The first judgement resulting from a transfer of investigative material was issued by the War Crimes Chamber of the Belgrade District Court on 12 December 2005, convicting 14 people for their role in killing 192 Croatian prisoners of war at the Ovčara farm near Vukovar. A 15th accused was convicted in relation to the crimes committed at Ovčara farm on 30 January 2006. Cases referred also include those concerning crimes committed in Gospić, where three persons were convicted by the Rijeka County Court, and Zvornik, where trial proceedings started in November 2005 against six persons before the War Crimes Chamber of the Belgrade District Court. More recently, on 25 April 2006, the Serbian Prosecutor's Office for War Crimes announced that 8 police officers and former Serbian State Security Service (SDB) officers have been indicted for crimes committed in 1999 in Kosovo against Albanian civilians.

In addition to the referral of cases and the transfer of investigative materials, the International Tribunal has also been proactively involved in efforts to foster the interplay between our work and that of the judiciaries in the former Yugoslavia through our Outreach Programme, which constitutes the second component of our cooperation with domestic courts in the region.

In this regard, I should first stress that beyond the current focus on mandate completion, the close cooperation between international and domestic courts is also essential to achieve one of our key missions, that is, to move away from a culture of impunity and foster a culture of accountability. However, transferring criminal justice proceedings from the international to the domestic level will only succeed if domestic institutions have sufficient resources and adequate capacity to handle complex criminal trials. Therefore, the transfer of cases to domestic courts must be accompanied by capacity-building of the national judiciaries, which have the primary responsibility to try perpetrators and to protect human rights within their jurisdictions. International jurisdictions should only intervene when domestic courts are not in the position to effectively administer justice.

Practically speaking, the Outreach programme has organized a variety of capacity-building activities and events, including working visits for legal professionals, consisting of prosecutors and members of the judiciary from Bosnia and Herzegovina, Serbia and Montenegro, and Croatia. We recently received visits by delegations of judges and prosecutors from the Belgrade District Court and the BiH War Crimes Chamber. Our liaison officers present in the region have also given numerous trainings and seminars. Special emphasis has been placed in our outreach strategy on the need for independent and transparent prosecutions and trial proceedings. Public awareness and scrutiny are integral to the conduct of a fair trial and to the capacity of such trials to move the post-conflict reconciliation forward.

Finally, there are two other initiatives that I would like to tell you about and that are closely linked to both the completion strategy and legacy of the International Tribunal.

First, the Rules of the Road Process that was established as part of the Rome Agreement of February 1996. Under this process, an arrest warrant for an individual suspected of war crimes before a national court in Bosnia and Herzegovina could only be issued after the case file had been reviewed and approved by the Prosecutor of the International Tribunal. The Prosecutor thus reviewed thousands of cases of alleged breaches of international humanitarian law in Bosnia and Herzegovina to determine whether they contained credible allegations and evidence or whether they were frivolous and lacking serious evidence. The main objective of this process was to ensure that individuals would not be detained by the authorities of Bosnia and Herzegovina on suspicion of war crimes without credible evidence. This effectively prevented many arbitrary and illegal arrests and helped ensure greater freedom of movement throughout the country. To give you a better idea of the breadth of this process, in total the Office of the Prosecutor of the International Tribunal reviewed 1419 cases against 4985 persons and gave its approval to the arrest of 848 persons on charges of war crimes.

In October 2004, the ICTY transferred the Rules of the Road review process to State authorities in Bosnia and Herzegovina. Prosecutors at the cantonal and district level in Bosnia and Herzegovina now submit cases to the Prosecutor's Office of BiH for review and assessment as to whether the sensitivity of a particular case requires that it be prosecuted at the State level. In light of the fact that the number of persons suspected of involvement in international crimes in Bosnia and Herzegovina runs in the thousands, a majority of war crimes cases will continue to be heard before cantonal and district courts. Only the most sensitive cases will be tried before the Court of Bosnia and Herzegovina.

This takes me directly to my second point. One of our key partners in the region is the State Court of Bosnia and Herzegovina, and in particular, the War Crimes Chamber established in March 2005, which is the first permanent and specialised state-level organ designed to try those responsible for gross violations of international humanitarian law. While the Chamber has a mixed – international and national – staff, it operates under national law as part of Bosnia's state court.

Beyond the handling of referrals from the International Tribunal, the War Crimes Chamber also initiates prosecutions. Last December, for example, it issued an indictment in relation to the Srebrenica massacre against 11 suspected individuals and the trial proceedings just started on 9 May. Unfortunately, the Chamber has only received limited financial support from international donors in spite of its crucial role and the formal endorsement it received from the Security Council.

I would not do justice – no pun intended – to the institution I represent if I did not finally emphasize the substantial body of jurisprudence that we have developed over the last fifteen years, which constitutes an invaluable legal resource to guide national courts in war crimes cases. It is fair to say that the International Tribunal has made significant strides in clarifying the scope and interpretation of fundamental concepts and norms of international humanitarian law, such as the concept of protected persons under the Geneva Conventions or the treatment and punishment of sexual violence in war time. But what is equally relevant to domestic courts and often less known is that we have developed and refined procedural standards regarding, for example, the right to self-representation,[1] or the right to be informed promptly and in detail of the nature and cause of criminal charges.[2] However, this case law will be of little relevance if practitioners and members of the judiciary cannot have access to it. This is why we have made sure that judicial material from the International Tribunal is circulated widely throughout the region, including through our website and of course in the languages of the region.

Ladies and Gentlemen, as the International Tribunal's mandate is now reaching completion, one of our primary concerns is to ensure the legacy of our work and of our mission to fight impunity. The Tribunal remains fully committed to the continued prosecution of suspected war criminals and we will continue to support in any manner possible the efforts of judicial institutions in the States of the former Yugoslavia towards the strengthening of the rule of law and the protection of human rights. I thank you for your attention and look forward to your questions and comments.

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[1] *Slobodan Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, paras 11-12.
[2] *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 23.