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THE INTERNATIONAL TRIBUNAL AND BEYOND:
PURSUING JUSTICE FOR ATROCITIES IN THE WESTERN BALKANS

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Honorable Members of Congress and Chair,

Thank you for inviting me to brief you this morning, and for your longstanding and critically important leadership on the issues that are the focus of this briefing. The closing this month of the International Criminal Tribunal for the former Yugoslavia (ICTY) offers an ideal opportunity to reflect on what the Tribunal has accomplished and, perhaps more important, what remains to be done to ensure that its contributions have an enduring impact.

As is well known, the Tribunal unexpectedly became the leading edge in the contemporary era of international justice, a field and phenomenon that had been dormant since postwar prosecutions in Nuremberg and Tokyo until 1993, when the ICTY was created. In short order, the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR); the United Nations joined with the governments of Sierra Leone and Cambodia to create hybrid courts to judge mass atrocities in those countries, and a permanent International Criminal Court (ICC) was created by multilateral treaty. Other war crimes courts have operated with international participation in Kosovo, Bosnia-Herzegovina, Timor Leste and elsewhere. Because of this dimension of the ICTY's impact, my law students have grown up in a world in which leaders responsible for grievous atrocities often end up facing judgment before a tribunal instead of enjoying a quiet retirement in relative luxury—the norm when I was in law school. To be sure, governments' enthusiasm for international war crimes tribunals has diminished compared to 20 or even ten years ago. Even so, these courts will continue to operate for the foreseeable future: victims will demand as much. Thus some of my remarks will consider lessons learned from the ICTY's exceptionally rich experience that we would do well to apply to the future work of other tribunals—including the residual mechanism for the ICTY itself.

My principal focus, however, will be on the impact of the ICTY in the two countries most affected by its work—Bosnia-Herzegovina, which endured the highest level of wartime atrocities accompanying the implosion of the former Yugoslavia, and Serbia, whose wartime leader, Slobodan Milošević, brought the region to ruinous violence. I will draw extensively on the insights of Bosnians and Serbians whom I interviewed for my forthcoming book, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, forthcoming 2018),

which explores the Tribunal's evolving impact over its unexpectedly long lifetime. Citizens of both countries who enthusiastically supported the ICTY identified three principal spheres in which they expected it to make a meaningful difference in their lives; I will take their priorities as my point of departure. The three spheres are: (1) satisfying victims' need for justice; (2) dispelling denial and fostering acknowledgment of wartime atrocities; and (3) catalyzing and bolstering domestic war crimes prosecutions.

I. Victims Justice

In the course of many interviews with Bosnian survivors of "ethnic cleansing," I repeatedly heard that it was desperately important for them to receive justice. While keenly aware that no measure of justice could redeem their losses, they craved the moral satisfaction they believed the ICTY would provide. How well, then, did the Tribunal meet Bosnians' expectations?

While the answer inevitably is mixed, there is no question Bosnian survivors are overwhelmingly and unambiguously grateful for the Tribunal's work. Even so, most are disappointed in specific aspects of the ICTY's performance. In their view, for example, trials lasted too long; many sentences were too short; some defendants who represented themselves, notably including Slobodan Milošević and Vojislav Šešelj, turned the courtroom into a theater, mocking the dignity of the Tribunal; and a series of controversial acquittals, beginning in November 2012, shook victims' confidence in the Tribunal's independence. Since it is often said that survivors of mass atrocities are never satisfied with justice, it is worth noting that international jurists have echoed virtually all of their concerns. To its credit, the ICTY undertook a number of reforms to streamline its procedures, addressing victims' (and donors') concerns about trial lengths. Still, when we invest in other tribunals, we need to ensure they take on board the discrete lessons we can learn from the ICTY's experience—relatively mundane but all-important lessons about court management, for example.

In light of victims' often strong criticisms of the ICTY's performance, it is all the more noteworthy and important that Bosnian survivors are, as I mentioned, overwhelmingly happy the ICTY was created. In the words of one of the Tribunal's fiercest Bosnian critics, "the ICTY was the best thing that happened to the people of the former Yugoslavia since 1991," when the country began to implode.¹ That survivors of ethnic cleansing feel this way about Hague justice is an inestimably precious achievement.

Last month's historic verdict in the case of Ratko Mladić was, for many survivors, a powerful vindication of the hopes they invested in the ICTY more than two decades ago. I would like to quote the words of one, which capture what the verdict meant to many Bosnian victims. The day the verdict was announced, Mirsada Malagić, who lost her husband, two sons, and other relatives during the war, responded this way when a BBC reporter asked if the ICTY had made any difference in the lives of Bosnian survivors: "It is good that the Hague Tribunal exists. ... [T]he killing of so many people has been proven. They were sentenced. Just enough for us to get some peace in our souls."²

¹ Refik Hodžić, *Accepting a Difficult Truth: ICTY Is Not Our Court*, BALKAN TRANSITIONAL JUST. (Mar. 6, 2013).

² *News Hour*, BBC WORLD SERVICE (Nov. 22, 2017).

II. *Dispelling Denial and Fostering Acknowledgment*

Beyond the profound importance of what Bosnians and Serbians sometimes call “justice for its own sake,” many hoped that, by judicially authenticating the fundamental facts of ethnic cleansing, the Tribunal would dispel pervasive denial about those crimes and, more affirmatively, help advance a wide-ranging process of acknowledgment. In the view of many in the region, this type of acknowledgment is the most important foundation for reconciliation among Bosnia’s ethnic communities.

As other panelists have noted, these hopes have been frustrated. Nationalist discourses are on the rise, with toxic effect in Bosnia in particular. Strident challenges to key findings of the ICTY figure prominently in the rhetoric of nationalist leaders like Republika Srpska (RS) president Milorad Dodik, and individuals convicted of monstrous crimes are routinely welcomed home and celebrated as heroes when they complete their prison terms. There is much to say about this, but in the interests of time I will make just three interconnected points.

(1) *Raising expectations.* The first point has implications primarily for tribunals that have recently begun their work, like the Kosovo Specialist Chambers, or that might be created in the future, as well as for the ongoing work of the ICC: We must take care not to raise unrealistic expectations about what international tribunals can achieve. Claims put forth by diplomats and ICTY officials about the impact the Tribunal would have on acknowledgment and reconciliation raised expectations sure to be disappointed among those who had already suffered enough. At the same time, unrealistic expectations may have diverted many citizens’ and leaders’ attention from the hard work of social repair that can only take place locally. As one of my Bosnian interlocutors noted, “Disillusionment with the Hague Tribunal was not just a problem of the Hague Tribunal. It was also the problem of how we understood what it was going to do for us. Courts do not set political reality right.”³

(2) *Contributions to acknowledgment.* I would nonetheless challenge the claim, now made increasingly often, that the ICTY had *no* impact on acknowledgment. Notably, public opinion surveys in both Bosnia and Serbia reflected rising levels of acknowledgment of wartime atrocities in roughly the first six years of this century. Bosnians and Serbians whom I interviewed, including several who designed and administered these surveys, made a convincing case that this positive trend was a direct dividend of Hague justice.

I believe the principal takeaway from this experience is that The ICTY could and did have a meaningful impact in dispelling denial *when political conditions were relatively auspicious* in both Bosnia and Serbia. In Serbia, we saw progress in dispelling denial of Srebrenica, for example, during periods in which reformists, like Zoran Đinđić and Boris Tadić, held leadership positions in government. We have seen deeply worrying regression, however, during the era of

³ Interview with Svjetlana Nedimović, Activist, in Sarajevo, Bosn. & Herz. (Sept. 18, 2014).

governance by “reformed” nationalists, who have led Serbia since 2012. (I address Bosnia shortly.)

This should not surprise us. The ICTY does not communicate directly to citizens in Bosnia and Serbia, few of whom have ever read any of its judgments. Instead, its work is mediated by political and other elites, who have played a powerful role shaping local citizens’ reactions to ICTY judgments and their opinions of the Tribunal itself.

(3) *External engagement in addressing political challenges*

And so my third point about the ICTY’s failure to end denialism is that developments in post-Milošević Serbia and postwar Bosnian highlight the vital importance of sustained attention to the wider political challenges that are sure to arise in post-conflict countries as they emerge from debilitating violence. As I have suggested, it is naïve to assume that the work of a tribunal can itself ensure social transformation, but *in a relatively auspicious political context*, it can make a meaningful contribution. My point here is that the international community has a crucial role to play in addressing and shaping the political environment in which denialism either flourishes or recedes.

It is by no means coincidental that we saw the greatest progress in Bosnian Serb acknowledgement of wartime atrocities during a period of robust international engagement in Bosnia. In the early years of this century, with the support of the Peace Implementation Council established in Dayton, the Office of the High Representative (OHR) was the principal “motor driving Bosnia forward”⁴ during the most productive period of state-building in the post-Dayton period. Two successive High Representatives, Wolfgang Petritsch and Paddy Ashdown, helped foster a relatively positive political environment during these years.

In this setting, we saw milestones in Serb acknowledgement and condemnation of the 1995 Srebrenica massacre. For example, following the release in 2004 of an RS commission’s report about the massacre, then RS President Dragan Čavić publicly acknowledged that “atrocities were committed in the area of Srebrenica.” Čavić condemned the massacre in words Bosnians would long quote: “I have to say that these nine days of July of the Srebrenica tragedy represent a black page in the history of the Serb people.”⁵ Several months later, the RS government issued an apology.

Regrettably, the PIC and OHR have retreated from robust engagement since 2006. That same period has seen a deeply troubling resurgence of strident nationalism, often manifested in denial of fundamental facts about Srebrenica.

III. Catalyzing Domestic War Crimes Institutions

⁴ INTERNATIONAL CRISIS GROUP, EUR. REP. 198, BOSNIA’S INCOMPLETE TRANSITION: BETWEEN DAYTON AND EUROPE i (2009)

⁵ *Bosnia Herzegovina: President Dragan Čavić Acknowledges Atrocities against Muslims in Srebrenica in 1995*, REUTERS (June 22, 2004).

One of the Tribunal's most tangible and hopefully enduring legacies is its role in spurring the development of domestic war crimes institutions. In Bosnia, the Tribunal played a key role, along with the OHR and Bosnian lawyers, in designing those institutions. Although the ICTY did not set out to help Serbia launch domestic war crimes institutions, its very existence catalyzed the creation of a local war crimes chamber and the new position of War Crimes Prosecutor in Serbia. As explained to me by a former Serbian government official, the ICTY enabled reformists in the coalition government that succeeded Milošević, who operated within a contested and constrained political space, to realize their *own* aspirations to ensure accountability.

During the tenure of Mr. Brammertz, the ICTY's Office of the Prosecutor seized the opportunity that emerged, and has engaged in innovative and impressive efforts to bolster the capacity of its partners in the Western Balkans. These efforts provide a model well worth emulating by the International Criminal Court.

Yet war crimes institutions in both Bosnia and Serbia are fragile and face relentless political pressure. Dodik and other RS leaders have continuously challenged Bosnia's war crimes institutions, while the Office of the War Crimes Prosecutor in Serbia has come under heightened and overt pressure in recent years. This has taken a visible toll: its work has slowed down markedly.

In recent years, Mr. Brammertz has provided vital leadership in marshaling international support for these institutions at times of special peril. He played a key role in neutralizing serious threats to the independence and efficacy of Bosnia's Special Department for War Crimes in the past year, while he, the United States, and others have provided crucial protection to Serbia's War Crimes Prosecutor in the past. Regrettably, despite the unique influence the European Union (EU) now has in respect of Serbia, a candidate country, it has not fully used the leverage it has to address deeply worrying threats to Serbia's war crimes institutions.

It is critically important that the international community continue to provide robust support for these bodies, whose independence and effective operation can go a long way toward preserving and enhancing the ICTY's regional legacy. In the near term, these institutions can provide justice to thousands of survivors of ethnic violence whose cases have not yet been the subject of prosecution. In the longer term, their work can strengthen the rule of law and help prevent a recurrence of ethnic violence.

In closing, the Tribunal's legacy will extend far beyond its formal lifetime. After World War II, it took decades for Germany to emerge as a "model penitent," notably, when it did, its society embraced Nuremberg and the principles for which it stands. There are, of course, vast differences between postwar Germany and the Western Balkans. Yet Germany's experience reminds us that a Tribunal's future influence can be profound. If the ICTY is to have a salutary long-term impact in Bosnia and Serbia, it will not happen without the sustained engagement and commitment of the international community.

Thank you.