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for the former
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Tribunal Pénal
International pour
l'ex-Yougoslavie

STATEMENT

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PRESIDENT

New York, 4 December 2017

Remarks by Judge Carmel Agius, President of the ICTY ICTY Commemoration: Reflections on 24 Years of Fighting Impunity through International Courts and Tribunals

The ICTY Statute - A living instrument

Excellencies,
Distinguished guests,
Dear friends,

Thank you, esteemed Ambassador Cardi, for your opening remarks. I also wish to thank the Legal Counsel for such an inspiring keynote and comprehensive account of the role that the Office of Legal Affairs has played in the Tribunal's history. Thanks also to Mr Stephen Mathias, ASG for Legal Affairs, for agreeing to moderate this special event and share with us his valuable personal experience.

It is only natural that today we gather in the Trusteeship Council that throughout the year serves as the meeting place for Legal Advisers, to reflect on the 24-year journey of the International Criminal Tribunal for the former Yugoslavia. The past two weeks brought to a close our remaining judicial work and the mandates of the Judges. The last trial judgment, in the case of Ratko Mladić, was delivered on 22 November, and the last appeal judgment, in the case of Prlić et al., was rendered last Wednesday, 29 November, in circumstances that, as you know, were very distressing for all. I regret this tragic situation is being exploited by some, in an attempt to undermine the Tribunal and its judgements.

I would now like to offer some observations on the ICTY Statute, adopted in 1993 and amended ten times since then, and how this has by necessity become a "living instrument" over the years.

During the meeting of the Security Council in May of 1993, in which the Tribunal was established through Resolution 827, representatives of several Member States voiced their expectations regarding the Tribunal. Some, for example, considered that, as a subsidiary organ of the Security Council, the Tribunal would not be empowered to set down norms of international law, but rather would simply apply existing international humanitarian law.

Another point of discussion was the relatively short time in which the report by the Secretary-General had been produced, given the urgency of the situation in the former Yugoslavia, and there was an acknowledgement that the report and the Statute annexed to it could therefore not deal with all concerns in a manner that would otherwise have been desirable. One representative stated that "[g]iven the legal difficulties involved, which in the normal course of events would have required much more extensive study and deliberation and could have prevented us from supporting the initiative, it was only the consideration of the unique and exceptionally serious circumstances in the former Yugoslavia that determined the vote we cast on the resolution we have just adopted."

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As a result, there were a number of gaps in the Statute that the Tribunal has been required to fill in the years since its establishment.

The first gap was to be found in the definitions of the crimes - or rather, the lack thereof. Those familiar with the Statute will know that the crimes over which the Tribunal has had jurisdiction are set out in very brief, even skeletal, terms in the Tribunal's foundational text. This was partly due to the fact that it would have been impossible for the Member States to agree on any fuller definitions of crimes to be included in the Statute in the time frame leading to its adoption. But more importantly, for many international crimes there simply were no clear or elaborate definitions back in 1993.

It is therefore difficult to understand how Member States could have expected the Tribunal to merely apply existing law, when there was insufficient existing law to be applied! As a result, the Tribunal has had to flesh out the elements and definitions of numerous crimes in its judgements, not to mention the various modes of liability, and in so doing has left a significant and rich body of jurisprudence for other courts and tribunals to utilise.

That said, this was no easy task and required much consideration by Chambers as to which principles the Tribunal could draw upon to fill the gaps in the Statute. In the Kupreškić et al. Trial Judgement, for example, Trial Chamber II held that "any time the Statute does not regulate a specific matter, and the Report of the Secretary-General does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice." In the Aleksovski Judgement, the Appeals Chamber held however that "[r]eferences to the law and practice in various countries and in international institutions are not necessarily determinative of the question as to the applicable law in this matter." It concluded that "[u]ltimately, that question must be answered by an examination of the Tribunal's Statute and Rules, and a construction of them which gives due weight to the principles of interpretation (good faith, textuality, contextuality and teleology) set out in the 1969 Vienna Convention on the Law of Treaties." Despite the challenges posed by the Statute in this regard, the ICTY was able to make substantive contributions to the development of international humanitarian law and international criminal law. This may be considered one of its most significant legacies.

The second main gap that the Tribunal needed to fill was the complete lack of rules of procedure and evidence. Indeed the ICTY was given a Statute, but no such rules, when it was established in 1993. Article 15 of the Statute tasked the Judges with adopting said rules for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses, and other appropriate matters. Given the new terrain with which the Tribunal was dealing, however, many problems could not be foreseen at the time of the adoption of the first Rules of Procedure and Evidence. These Rules, therefore, needed to be amended several dozen times in the course of the Tribunal's life. The benefit of requiring the Judges to develop the ICTY's Rules of Procedure and Evidence was that they could respond flexibly as needs arose, and more quickly than if the Rules were amended by external stakeholders, for example. An example here is the introduction by the Judges of Rules allowing for the admission of written evidence, rather than in-court testimony of witnesses. The downside, of course, was that this took time and resources away from the core judicial work.

A further presumed gap in the Statute is the absence of any reference to jurisdiction over contempt of court, which as we know has led to problems in terms of State cooperation in recent times. While contempt is not explicitly foreseen in the Tribunal's Statute, it is

dealt with in Rule 77 of the Tribunal's Rules, and the Tribunal held early on that it possesses "an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded." The Tribunal's power to hold persons in contempt thus was not created through Rule 77, but was held to be inherent since it was necessary for the Tribunal to be able to effectively deal with conduct that interfered with its administration of justice. Throughout its existence the Tribunal has concluded contempt proceedings against 25 persons, and until the case of *Jojić & Radeta* (formerly *Jojić et al.*), its powers to deal with contempt cases had never been called into question by Member States. Notably, however, the Security Council did things differently with respect to the Residual Mechanism, and it explicitly included contempt of court within the MICT Statute. Had the Security Council in any way disagreed that the Tribunal had the inherent power to deal with contempt of court, the MICT would never have been given such an explicit power.

These are but three examples of where the Statute did not provide guidance on issues that the Tribunal was required to grapple with, and there are many more. As a result, the Statute has constituted a living document that allowed the Tribunal room to manoeuvre, and create, and respond, as necessary. Whether or not this was desirable, is a matter for reflection by those who will be tasked with setting up courts and tribunals in future. It is important to acknowledge, however, that while the Statute might not have been perfect, it enabled the Tribunal to start operating and gave it a solid foundation upon which to carry out its work. At the very least, it can be seen that a journey into the unknown, such as the one undertaken by the Tribunal over the last quarter of a century, will certainly be a challenge, but can also bring enormous rewards. In my opinion, and I say this with some pride, the ICTY has managed to successfully navigate not only the foreseeable challenges, but also those that could not be predicted. In so doing, it has advanced international criminal law to a degree that no one back in 1993 would ever have expected.

I have tried to highlight some of the elements that make the Statute and the operation of the Tribunal a useful example or reference point in the fight against impunity and in bringing justice to the victims. Despite shortcomings, we were able to build a system and make it work. How? This is easily explained: because the success of an institution is never due only to its founding document and mandate. In reality it is dependent on the work done by the people who breathe life, purpose and meaning into the organisation, the people entrusted to carry out its mission. In order to be able to face the critical challenges I have just described and come up with workable solutions, we have had to rely on the outstanding staff, Judges, and Principals of the Tribunal, to whom I convey my heartfelt thanks and highest respects for their commitment and dedication.

In the same vein, I would like to pay tribute to all of the countries that during these years have steadfastly supported the Tribunal in the United Nations context, politically, diplomatically, and financially; who have given visibility to our work and provided invaluable resources with which to carry out our daily functions. As a concrete example I wish to particularly thank Ambassadors Cardi, van Oosterom and Rosselli, from the Permanent Missions of Italy, the Netherlands and Uruguay, respectively, along with their fantastic Legal Advisers, for allowing this event to come to fruition and to serve as a testimony to what these 24 years have meant for all of us and will mean for the international community in future.
