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International Support for International Criminal Tribunals and an International Criminal Court

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INTERNATIONAL SUPPORT FOR INTERNATIONAL CRIMINAL TRIBUNALS AND AN INTERNATIONAL CRIMINAL COURT

CLAUDIO GROSSMAN
THE HONORABLE GABRIELLE KIRK McDONALD
THE HONORABLE ARLEN SPECTER
STEVEN "SKIPPY" WEINSTEIN

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INTRODUCTION

CLAUDIO GROSSMAN

PROFESSOR OF LAW AND DEAN, WASHINGTON COLLEGE OF LAW

Dear friends, I am honored to open today's program and welcome you all; in particular, Senator Arlen Specter. Senator Specter, you may be aware that you are in a school created 102 years ago by two women, Emma Gillett and Ellen Spencer Mussey. They created this school because they thought that legal knowledge and a commitment to fairness were essential to achieving equality and important values of justice.

I am sure if they were here today, they would be proud to know that we are hosting this conference on War Crimes Tribunals, and on accountability and responsibility in international relations. They would also be honored to know that you are here with us celebrating the continuation of the tradition they started.

I am sure all of you know that Senator Specter, a former prosecutor, has provided Senate leadership and support of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, as well as for the proposed permanent International Criminal Court. He is a member of the Judiciary and Governmental Affairs Committees, and he chairs the Intelligence Committee in the 104th Congress. He is the senior United States Senator for Pennsylvania and chairs the Senate Veterans' Affairs Committee and the Appropriations Subcommittee on Labor, Health, and Human Services. He oversees all Federal expenditures on health, education, and labor matters.

Senator Specter is a powerful force in the Senate and a strong advocate for the War Crimes Tribunals today.

Welcome to our law school, Senator.

* * *

CONGRESS SUPPORTS AN INTERNATIONAL CRIMINAL COURT

PRESENTATION BY THE HONORABLE ARLEN SPECTER
SENATOR, UNITED STATES SENATE

Thank you very much, Dean, for those very generous words of introduction. If I am such a powerful force in the Senate, as you say, I better leave here promptly and get back to the Senate Floor, where we are taking up the budget resolution to decide on the allocation of \$1.7 trillion, which is a considerable sum of money. I would like to see at least a small part of it going to help support the War Crimes Tribunals and to promote the International Criminal Court.

I am delighted to be at your law school and to hear that this institution was created by two women. This faculty stands with a considerable quantity of company on that subject. It is quite a distinction for a law school to be created 102 years ago by women.

I went to law school not too many years ago and in a class of 125 students, only four were women. Now, I see the crowded elevators in this building and I know what is happening in law schools across the country—there are many, many more women students. I think this is beneficial to our society, and a benefit to the legal profession.

I heartily support the work that is being done to create an International Criminal Court. As part of my position on the Senate Judiciary Committee, I have worked on that project for the past twelve years. In fact, I authored my first resolution in 1986.

Overall, there is considerable support in the United States Congress for an International Criminal Court. Senator Christopher Dodd of Connecticut has co-sponsored many resolutions and Congressman Jim Leach of Iowa, Chairman of the Housing Banking Committee, is an exponent of the criminal court. Moreover, when we passed resolutions to try and promote the international rule of law, they have by and large succeeded.

One of the reasons I wanted to come here this morning to talk to this very distinguished group is to say that there is a great deal of support in the Congress for an International Criminal Court. You may read stories from time to time in the media regarding Interna-

tional Criminal Courts. For example, last week Senator Helms raised questions about the proposed International Criminal Court. In apposite to his viewpoint, however, I believe we can structure an International Criminal Court without conceding United States sovereignty. Nobody is going to give away the sovereignty of the United States of America. The United Nations has veto power for the United States as well as for others in the big five, and I do not think the sovereignty issue is really a question.

In a sense, you are wise to hold this meeting here on the campus some forty minutes from the Capitol. If you were closer to the Capitol, you would be in striking distance of 535 speakers. Only extraordinarily brave people have their meetings close to Capitol Hill with that many potential speakers available; but at the same time, I think you might have drawn more of my colleagues had you been a little closer. I think it is important for you to know, however, that you have a lot of support on Capitol Hill.

The work of the international rule of law came before the Senate a few weeks ago on a resolution to have Saddam Hussein tried as a war criminal. In proposing that resolution, and on the 93 to 0 vote in the United States Senate, my colleagues and I were well aware that the resolution may be more symbolic than real. Nonetheless, it is not inconceivable that it could be real.

To have the War Crimes Tribunal expanded—currently it functions for the former Yugoslavia and Rwanda—would take action by the United Nations. That is problematical, however, since we are trying to negotiate with Saddam Hussein for weapons inspections. Regardless, I think it is something that ought to be done.

Saddam Hussein has committed atrocious crimes against humanity. He used chemical weapons against his own people, the Kurds, and Iran. He fired Scud missiles into Israel, a non-belligerent country, during the Gulf War. He conducted a war of aggression against Kuwait. Saddam Hussein fits the definition of an international war criminal. I think we have been too easy on him. This is not a view that I came to three weeks ago. It is a view I had when the Gulf War ended on March 5, 1991. On that date I introduced a similar sense of the Senate resolution, which passed 97 to 0. I believe it would give the United States some high moral ground on whatever it is we intend to do to Saddam Hussein.

As noted in the introduction, I am a former prosecutor. I spent four years as an assistant district attorney in Philadelphia, which is quite a smelting pot. While I am sure you have heard of a melting pot, the criminal courts in Philadelphia are a smelting pot. You go into a list room with a dozen cases that are tried on waivers, that is, bench trials without juries. You go into the jury courtrooms where there are thirty thousand cases a year, five hundred homicides.

Following my four years as an assistant district attorney, I was elected district attorney. I served in that position for eight years. It was largely an administrative job, but I tried some cases during that eight year time period.

I strongly believe that deterrence is a big factor in life. If you prosecute and punish people and they know that punishment is a possibility, it will affect their conduct. I believe that what is going on right now in The Hague is very important as an international precedent and as a matter of deterrence.

I visited The Hague on three occasions and had an interesting discussion several years ago with the next speaker, the distinguished Judge and President of the International Criminal Tribunal for the former Yugoslavia, the Honorable Gabrielle Kirk McDonald. We have helped to try and bring additional resources to The Hague. We had \$3 million in an appropriations bill in 1993, which was rejected in Conference. We are presently trying through a letter signed by a group of legislators, both Representatives and Senators, to try to get President Clinton to use an account he has on a \$25 million draw down to help bring more funding to the War Crimes Tribunals.

President Clinton is currently in Africa and is talking about what went on in Rwanda—a mistake that ought not be repeated. The War Crimes Tribunal there has a vital function in establishing the rule of law. I had occasion to visit Africa several months ago, and the people there are very anxious to see the War Crimes Tribunal succeed as a precedent. Of course, the War Crimes Tribunal in The Hague is moving forward. On my first visit there, I received a long laundry list as to needs, and received input from the Central Intelligence Agency.

I was chairman of the Intelligence Committee at that time, so when I went to then-Director John Deutch and said, "John, I'd like to have A, B, C, D, and E, and I'd like to see you share intelligence

with the War Crimes Tribunal and provide security for people who go over there." He was very cooperative, considering, of course, the fact that I provide his budget.

It is nice to be on the Appropriations Committee. Our current subcommittee distributes \$80 billion in discretionary funds. You can make a lot of friends with \$80 billion to distribute.

Director Deutch is a terrific man. He and I are now working on the Commission on Weapons of Mass Destruction, which he chairs and I co-chair. At any rate, the State Department, Federal Bureau of Investigations, and Justice Department have all helped out. A great deal more, however, needs to be done.

On a trip I made to the War Crimes Tribunal in January 1998, I spoke with General Wesley Clarke, the Commander of NATO, and Admiral Lopez of the Southern Command, and the generals in charge of the United States military effort in Bosnia. I discussed with them the subject of taking into custody people who are under indictment. That is a matter that I have pushed over the years.

I was briefed recently about four individuals who were taken into custody. One person was killed when he fired upon an IFOR team trying to arrest him. He was killed during the arrest attempt. IFOR has a curious assignment in the former Yugoslavia. They are to take people under indictment into custody if they come upon them by chance, but are not allowed to seek out such individuals.

The definition of taking them into custody when they come upon them is now expanded just a little bit. If they find out where they are, they do not have to take them into custody instantaneously to comply with the rule, but can make a plan to go back and get them. I believe it is important that Karadzic and Mladic be taken into custody. It has to start at the top.

That is what I have on my mind. To repeat once more, because I think it is worth repetition, you have a lot of support in the Congress for the War Crimes Tribunals and for the International Criminal Court. When you plan your next symposium, if you have a little extra time, locate it a little closer to Capitol Hill and you will have a lot of visitors from the Senate and the House.

Thank you very much.

* * *

DEAN GROSSMAN: Thank you very much, Senator Specter. I hope you make it to the vote and get it for the Tribunals. Thank you very much.

I would like to invite to the podium, Steven "Skippy" Weinstein. Skippy Weinstein is one of the most notable alumni of the Washington College of Law. A room on the fifth floor of the law school proudly bears his name and a new generation of students learn some values of the profession in that room. He was recently honored by the Midas Society for his commitment to this institution and his contributions to the profession.

* * *

INTRODUCTION OF THE HONORABLE GABRIELLE KIRK MCDONALD

STEVEN "SKIPPY" WEINSTEIN

Thank you, Dean Grossman. It is certainly an honor for me to introduce someone who has been described as intelligent, inspirational, adventurous, competitive, ambitious, daring, and a dynamic force in a changing world. In my view, she is electrifying, and, quite frankly, magnetic.

This mission for Judge McDonald was launched back in Saint Paul, Minnesota, and clearly influenced by the energy and independence of her mother, Francis, and the pride of purpose shared with her by her father and grandfather about their travels and employment on the Northern Pacific Railroad. We certainly have to also pay attention and give credit to the loving and warm relationship she had with her grandmother.

Immediately after graduating first in her class from Howard University School of Law, she turned to the task of promoting human rights within the United States. As a staff lawyer for the NAACP in the late 1960s, she helped win important cases enforcing the Civil Rights Act of 1964. In 1977, President Jimmy Carter appointed her as a Federal District Court Judge in Houston, Texas. She was the first African American to serve as a federal judge in Texas and the third African American woman in the entire nation to hold that position.

Judge McDonald's remarkable contribution to international human rights law began in 1993, when she was elected by the United Nations General Assembly to serve as one of the original eleven judges of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in The Hague, Netherlands. She was re-elected in 1997 and still serves as the only United States national on the Tribunal.

She and her fellow judges from around the world meticulously drafted and refined the rules of procedure and evidence of the ICTY. This historic document draws upon the experience of the world's different legal systems and is the first ever international code of criminal procedure.

Later Judge McDonald was the presiding judge of the ICTY's Trial Chamber II. In this capacity, she was responsible for conducting the first full international criminal trial since the international military Tribunals at Nuremberg and Tokyo. The trial certainly was a difficult one.

Tadic was accused of helping to "ethnically cleanse" his home town, killing Muslim policemen, and beating and torturing prisoners of local prison camps. Judge McDonald listened as witness after witness told stories of unimaginable brutality at the hands of former friends and neighbors. Sometimes you would see Judge McDonald take off her glasses or reach for a glass of water, anything to distract her from the gut wrenching testimony. The stories often followed her home. She and two judicial colleagues who act as both judge and jury at the Tribunal found Tadic guilty of eleven counts of crimes against humanity.

When the time came to sentence Tadic to twenty years behind bars, Judge McDonald looked across the courtroom at the man surrounded by uniformed policemen and Tadic stared back without emotion. She said, "You committed these offenses intentionally and with sadistic brutality." She continued to say, "Using knives, whips, iron bars, the butt of a pistol, sticks, kicking the victims and tightening a noose around the neck of one until he became unconscious." She asked, "Why?" Tadic did not answer. Judge McDonald continued reviewing the testimony of the organized plan for ethnic cleaning, rounding up neighbors and sending them to prison camps, leaving the region ethnically pure. She concluded by saying, "You must bear responsibility for your criminal conduct. To condone your ac-

tions even when committed in this context is to give effect to a base view of morality and invite anarchy.”

With that, Tadic was escorted from the courtroom. In addition to her critical contributions as a presiding judge of the ICTY trial chamber, she served in 1997 as a member of the appeals chamber, which reviewed the ICTY’s first sentencing judgment. In her capacity as appellate judge, she also participated in a plenary session with the International Criminal Tribunal for Rwanda.

She has been a vigorous advocate for the establishment of strong ties between the two international criminal tribunals and strongly supports the establishment of a permanent International Criminal Court.

In December of 1997, the judges of the ICTY elected Judge McDonald by acclamation as president of that institution. Quoting the outgoing president, he said:

I am not alone in widely admiring the very able way in which she conducted herself at the proceedings in the trial chamber, showing great competence, integrity, and impartiality. She demonstrated admirable equanimity and a deep sense of humanity, in particular in dealing with witnesses. Judge McDonald represents to me the best that America can offer.

Washington College of Law welcomes you, Judge McDonald.

* * *

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

THE HONORABLE GABRIELLE KIRK McDONALD
JUDGE AND PRESIDENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

INTRODUCTION

Thank you, Skippy, for that introduction. I call him Skippy and I have told him to call me Gabby. When we met last night, he told me that he follows my career and he knows a lot about me. Notwithstanding what he knows about me, he still has tremendous respect, which warms me.

I read the article that appeared in the Washington College of Law's publication last night when I got home, exhausted. I found that we have a lot in common. To look at us, however, people might not think we have a lot in common.

Although we do not look the same, what we are doing in the former Yugoslavia, and in a sense what we are doing here in the United States, is to focus on what we have in common. If you look beneath the surface, sometimes you find out that you have more in common than you thought. That is my response to you.

This conference organized by the American University, Washington College of Law, brings together some of the key players who have worked in the vineyards for the establishment and effective functioning of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

My first legal assistant, Olivia Swaak-Goldman, is a graduate of this law school. Also, Diane Orentlicher, Professor of Law at Washington College of Law, has made tremendous contributions to the International Criminal Tribunal for the former Yugoslavia, visiting us on several occasions. This conference is just the most recent of her important contributions.

I am honored to have the opportunity to participate in this conference. It promises to explore thoroughly the needs and the records of the Tribunals, both institutionally and conceptually.

Self evaluation is one of our greatest assets, and thus, it is a rare privilege to be able to reflect on the work of the Tribunals with such distinguished supporters. I expect that this conference will offer an honest assessment. Therefore, I hope to hear from friendly critics who are invaluable if we are to achieve a realistic appraisal of our work.

I was elected President of the International Criminal Tribunal for the former Yugoslavia this past November. In that capacity, I preside over the Appeals Chamber and I hear appeals from both the Yugoslavia Tribunal and the Rwanda Tribunal. However, as you know, Judge Laity Kama is the President of the Rwanda Tribunal. Another distinguished jurist from the Rwanda Tribunal is sitting right in front of me.

Navanethem Pillay is here, and you will hear from her. She is a judge for the Rwanda Tribunal. Also, Deputy Prosecutor Bernard Muna is here and you will hear from him regarding Rwanda. The Chief Prosecutor of both the Yugoslav Tribunal and the Rwanda Tribunal, Justice Louise Arbour, is here. The three of them will talk about the Rwanda Tribunals. I will focus mostly on the Yugoslavia Tribunal.

Unfortunately, Gerald Gahima, who is the Deputy Minister of Justice for Rwanda, is unable to be here today. I wish he could be here at this Conference. A very dear friend of mine, Robert Van Lira, prepared a report regarding the Rwanda Tribunal and the situation in Rwanda. It appeared in the *International Lawyer*. It is an excellent report and very thorough and I concur with many of the findings. Unfortunately, he is not here today to relate those findings.

One of my priorities, however, is to work very closely with the Rwanda Tribunal. In June, we will have a plenary with the Rwanda Tribunal. I expect that after I return, I will have more information about the current situation there.

I was asked to discuss my principal concerns about the Yugoslavia Tribunal and international support for its work. Recently, that support has yielded substantial results, which has led the judges to consider a number of necessary changes to our normative procedures and our judicial structure.

After briefly outlining these measures, I will describe the different forms of international support for the Tribunal, focusing on State co-operation and the record to date. Finally, I will discuss the need to improve on that record with reference to the Tribunal and to the proposed permanent International Criminal Court.

I. PRINCIPAL CONCERNS ABOUT THE THE YUGOSLAVIA TRIBUNAL AND INTERNATIONAL SUPPORT FOR ITS WORK

Let me begin with my predecessor's assessment in November of 1997 that the Tribunal is "a vibrant, fully operational judicial body." In his address to the General Assembly of the United Nations, Judge Antonio Cassese, then President Cassese, also stated that, "we are now moving to a totally different phase. In the next four years, we will hold a number of important trials with utmost expedition compatible with the principles of fairness and justice."

It is apparent that with some of these trials now underway and with twenty-three accused persons now in custody and a real expectation of more to be surrendered or arrested, it is imperative that we assure that the accused receives both a fair and expeditious trial.

After we completed the *Tadic* trial, I remarked that this application of our rules was like building an airplane. We were not sure whether it would fly. Well, it did. It encountered some turbulence, perhaps at times a lot of turbulence, but it succeeded, I believe, and we landed intact.

Indeed, I participated in various pre-trial matters in other cases; and based on my experience gained while serving with the Federal Judiciary, I know that active management by judges makes for more efficient trials. Thus, one of my priorities as President was to focus on our rules, with the specific aim of giving the judges a more prominent role in the handling of pre-trial and trial proceedings.

I appointed a working group of judges for this purpose and offered the Office of the Prosecutor and the defense counsel an opportunity to present suggestions for amendments. We also received materials from the United States and proposals from France. This need for active management is made more urgent by the fact that in a few short months, we will move from having one courtroom to having three in which to conduct trials simultaneously. The construction of the

courtrooms was made possible by donations from Great Britain, the Netherlands, the United States, and Canada.

This increase in courtroom space reflects the increase in our judicial activities. Today, we have four cases at trial, one of which is on appeal. In the next twelve months, we expect to begin trials in each of the seven cases that are currently in the pre-trial phase.

Earlier this month the judges met in plenary session and considered procedures from both the common law and the civil law systems to introduce more active judicial management of proceedings. In order to assure that these cases are tried expeditiously, however, the Tribunal needs additional judges.

Last month, I addressed the Security Council, urging members to pass a resolution that would amend the Tribunal's statute by providing for additional judges to create a third trial chamber. Our actual and potential caseload makes it critical that the present complement of eleven judges, five of whom serve on the Appeals Chamber, is increased. Within a few days, we will submit to the Security Council a report reflecting the increased needs of the Registry and the Office of the Prosecutor, due to the additional courtrooms and the proposal for additional judges. We hope we have the support of the prosecutor in that regard.

II. FORMS OF INTERNATIONAL SUPPORT AND STATE COOPERATION

Moving to the question of international support and State cooperation, Judge Cassese also stated in November 1997 that he "would like to urge all member States to lend to the International Criminal Tribunal for the former Yugoslavia in The Hague, all the support the Tribunal is entitled to receive." Yet, the fact remains that in many important respects, this support has not been forthcoming. Without a demonstration of commitment by active support for the Tribunal, we cannot truly become a vibrant, fully operational judicial body.

I would suggest that if we succeed in this phase, this support from the international community is imperative. External support is the life-blood that sustains the Tribunal. The two sources that provide it, governmental and non-governmental, do so in fundamentally different ways.

The role that the non-governmental organizations ("NGOs") play in promoting and supporting the Tribunal and the principles on which it is founded is indicative of their increasing involvement at the heart of the international community. Before establishing the Tribunal, NGOs carried out a tremendous amount of research and support, which continues to be of immense value to the Tribunal. Such support has been proffered voluntarily and on an ad hoc basis, rather than as a part of a structured institutional framework or in the fulfillment of any legal obligation.

States of the international community, on the other hand, operate within that structured legal context. Through their membership in the United Nations, States are inextricably linked to the Tribunal, which is of course a subsidiary of the Security Council. The Tribunal depends entirely on member States acting in concert or through the United Nations individually.

Thus, as we were birthed by States, in many respects, the umbilical cord is still attached. Their support is our oxygen supply. That responsibility gives States a stake in the success of the Tribunal. Further, the nature of the modern State and its place in the international community means that it is they who are expected, in fact required, to provide the structured and systematic support necessary to sustain the Tribunal.

There are two distinct species of State cooperation. First, there are a variety of specific measures, some obligatory, that States acting individually are able to undertake. Additionally, States may cooperate with the Tribunal by acting in concert to compel non-cooperating States and entities of the former Yugoslavia to perform their obligations towards the Tribunal.

With respect to measures specific to individual States, under the terms of the Security Council's Resolution 827, all States are under an obligation to take any measures necessary under their domestic law to facilitate cooperation with the Tribunal. Typically, implementing legislation is needed to regulate the relationship between the Tribunal and States. Legislation provides the framework for a panoply of cooperative measures. However, even in the absence of such legislation, States can provide resources necessary for the effective functioning of the Tribunal. Moreover, the obligation of certain States and entities of the former Yugoslavia are reinforced by the

Dayton Agreement, which specifically requires parties thereto to cooperate with the Tribunal in the prosecution of serious violations of international humanitarian law.

The legislative framework provides individual States with the mechanism for meeting three of the Tribunal's basic needs. First, as a criminal system that is not based on any territory, we are denied one crucial benefit that most national systems take for granted—we cannot on our own offer practical protection to witnesses who are at risk by virtue of the fact that they have assisted the Tribunal. The nature of many of the crimes committed in the former Yugoslavia increases both the trauma suffered and the risks borne by these brave individuals. Yet outside the Tribunal, we can do little to defend these witnesses against the dangers they may face.

Their testimony is vital to the Tribunal's contribution to the maintenance of international peace and security. Thus, all States have an interest in their protection. Accordingly, we have established a witness protection program to relocate witnesses to the territory of States. Such relocation is governed by an agreement between the Tribunal and the State concerned.

The second type of cooperation required, and one that is currently the most pressing, concerns the enforcement of sentences imposed by the Tribunal. A further consequence of our lack of territory is the absence of a facility for the incarceration of persons convicted by the Tribunal. We have no prisons. Under Article 27 of our statute, States may express a willingness to accept persons who have been convicted. The legal character of the Tribunal and the national penal systems is such that it is necessary to regulate the imprisonment process through enforcement agreements concluded between the Tribunal and the State concerned.

The urgency of this matter, that is the need for enforcement agreements, is best illustrated by a few figures. As I have stated, we have twenty-three indictees in custody. Over the coming months and years, we will complete their trials and appeals and may then face a situation where we have more convicted persons than there are States that have agreed to enforce their prison sentences. As we expect to obtain custody of more accused persons, this deficiency will become even more critical.

Third, although we are a Tribunal vested with criminal jurisdiction, we lack some of the powers characteristic of national criminal institutions. Article 29 of our statute provides that States must comply with requests and orders issued by the Tribunal. Moreover, they must comply without undue delay. Thus, the whole enforcement mechanism is dependent on States.

Without a police force, we have to rely upon others to make the arrests. While our power to compel production of evidence and the attendance of witnesses is mired in a political controversy surrounding claims of State sovereignty, like other criminal Tribunals we issue orders. Unlike these other courts, however, the Tribunal has few means to enforce these orders.

Outside the legislative framework there is the whole issue of the need for resources. In 1998, for the first time, the Tribunal began its calendar year with an approved budget. Although sizable—a significant increase on previous allocations—there are still requirements that are not addressed in the budget. This is due in part to the nature of the budgetary process.

Thus, because until recently, we had custody of only a small number of indictees, requests for a second courtroom were rejected in both the 1996 and the 1997 budgets. Therefore, we have relied heavily, and continue to do so, on additional sources of funding.

The Secretary General established a trust fund to which States and organizations are able to make payments to fund items not covered by the budget and make donations in-kind of facilities or equipment. Trust fund monies have been used to fund such critical projects as a second courtroom, the exhumation of mass graves in the former Yugoslavia, and the electronic collation and coordination of documentary evidence in the custody of the prosecutor. The prosecutor needs additional support in this regard.

The second species of State cooperation, the notion that States may act in concert to compel compliance with the obligation of States and entities of the former Yugoslavia, stems from Resolution 827, Article 29 of the Tribunal's statute, and the Dayton agreement. This is a relatively new phenomenon. Although the 1949 Geneva Conventions do impose upon High Contracting Parties obligations to address grave breaches committed by other High Contracting Parties,

obligations pertaining to the Tribunal are specific to States and their individual capacities. Compelling compliance, however, is both consistent with and a consequence of, the international community's role in the peace process in the former Yugoslavia.

The effect of this type of cooperation is to enlist the collective moral and material influence of the international community to provide tangible support to the Tribunal by enforcing both its orders and its requests.

III. THE STATUS OF STATE COOPERATION WITH THE TRIBUNAL

What then is the status of State cooperation with the Tribunal? I recently read a report that characterized the relationship between the Tribunal and the international community as one of first, neglect; second, irritation; and finally, revelation. Indeed, many were the voices that dismissed the Tribunal in its early days as an idealistic and naive enterprise that could not succeed.

In the 1993-1994 budget, we had a staff of 102 persons and a budget of only \$11 million. The Tribunal survived and now has a staff that will exceed 600 persons by the end of this year. Our survival is due in no small measure to the tenacity and courage of my predecessor and the compassion, yet firm and moral prosecutorial leadership of our former chief prosecutor, Justice Richard Goldstone. They applied pressure and kept our Tribunal afloat when many thought and perhaps indeed hoped that we would sink into the realm of a noble but very unworkable experiment in international justice. Nevertheless, until recently, there was a real danger that the neglect and irritation reflected in the near total lack of cooperation would paralyze the Tribunal. In January of 1997, Theodor Meron warned: "The Tribunal may soon approach the end of its working life. It should not be continued only to serve as a fig leaf for the impotence of the international community to enforce international law." In our first three years of existence, only twenty States adopted implementing legislation. None adopted enforcement or relocation agreements. More than 90% of the publicly indicted individuals remained at liberty.

As the Tribunal approaches the fifth anniversary of its creation, it has entered the period of revelation. This phrase has been character-

ized by what I will call a "collective activist" approach of a number of States of the international community that have utilized various means to ensure that the Tribunal will not be rendered impotent by the illegal actions of these States and entities that refuse to comply with our orders to issue arrest warrants.

States—especially the United States, Great Britain and the Netherlands—have made it clear that continued non-compliance with the Tribunal's warrants of arrest will not prevent the Tribunal from obtaining custody of indictees. If they do not surrender, they will be detained when conditions permit.

The Tribunal owes a debt of gratitude to the States that have committed themselves so comprehensively to this success. Further, SFOR has apparently encountered—you heard Senator Specter this morning talk about the recent efforts of what was IFOR—indictees on a more frequent basis. Thus, since June 1997, five persons have been arrested by SFOR and UNTAES. Thus, diplomatic pressure has yielded further significant results.

Since October of last year, fourteen indicted persons have surrendered and the Government of the Republika Srpska has demonstrated what appears to be a marked increase in cooperation. Particularly, this Republic has allowed the execution of search warrants in Banja Luka, and provided the necessary guarantees to satisfy a trial chamber at the Tribunal that a detained accused will reappear for trial, if released on health grounds, to the territory of that entity. On the latter matter, just last week, a trial chamber granted the motion for provisional release of the accused who has now returned to the Republika Srpska.

As I stated, we now have twenty-three persons in custody. We had twenty-four until, I think, about four days ago. We now have twenty-three persons in custody. Actually, we had as many as twenty-eight persons in custody. The prosecutor has withdrawn three of those indictments and two have been granted provisional release. The fact that the majority of indictees in custody surrendered themselves is an extremely significant development.

Although we have the power to issue arrest warrants and international organizations can execute them, which they have already done, a predicate to the process of reconciliation, which is the ultimate

purpose of the Tribunal's judicial proceedings, is that all those affected by the conflict—abused and abusers—are themselves able and willing to move beyond the tyranny and the terror that engulfed them.

For the abused, forgiveness is possible only when they know, and in exceptional circumstances understand, the reasons for their suffering. For the abusers, forgiveness is possible only when they accept accountability.

Indictees, of course, are innocent until proven guilty beyond a reasonable doubt; but their willingness to participate in the judicial process is an important vindication of the process, and it is what Ben Ferencz refers to as the force of law over the law of force. We looked for Ben Ferencz last night. I do not know whether he is here today.

As you know, he was a prosecutor at the Nuremberg trials and tried the *Einsatzgruppen*. As a former prosecutor, you should be impressed that he completed his case in approximately eight days or four days or something like that, and they were all found guilty. He is an amazing man.

In any case, we believe that these surrenders constitute what he has said is the force of law over the law of force. However, the revelation should not engender complacency. As a Chapter VII mechanism, we expect assistance. Notwithstanding recent progress, the record as a whole remains extremely unsatisfactory.

The relative success of the collective activism approach of some of these States should therefore be viewed in that context. Until very recently, the majority of the Tribunal's orders and requests were effectively ignored.

We have issued some 205 arrest warrants against seventy-nine individuals, and countless other orders relating to the production or search and seizure of evidence. To date, only six arrest warrants have been executed by States, and five have been executed by international organizations. Moreover, while the Tribunal welcomes the recent surrenders, the first did not occur until nearly two years after the arrest warrants were issued to the relevant States and entities in the former Yugoslavia.

Therefore, although there has been a reduction in resistance to the Tribunal's orders, recalcitrance remains the norm. In judicial pro-

ceedings, the transfer of the accused is but one phase of the process. The effectiveness of the proceedings depends on the prosecution and the defense being able to prepare their respective cases.

In this regard, in the *Prosecutor v. Tadic* case, pending before the Appeals Chamber, it was recently ordered that the Republika Srpska must allow defense access to witnesses and evidence in its territory. Thus, while the Republika Srpska now apparently evinces a more cooperative approach, it is still lacking a framework that we need for a consistent and comprehensive cooperation and compliance.

Although the Tribunal is indebted to the small number of States that have not only fulfilled their obligation to the Tribunal but also have been the driving force behind a disproportionate amount of the recent positive developments, the responsibility for the continued existence and expansion of an International Criminal Court belongs to all States.

It is wholly unacceptable that a very small minority of States should have to bear the burden because the majority has obviously advocated its responsibility. Still, in five years, only twenty States have adopted implementing legislation, while a further four have advised the Tribunal that their domestic law already meets Resolution 827.

No legislation has been enacted by any State since June 15, 1996. Thus, 164 States have not yet performed their legal duty of compliance with Resolution 827, including the Federal Republic of Yugoslavia and one permanent member of the Security Council.

Only six States have commenced negotiations to reach agreements for the enforcement of sentences and of those, only two have signed agreements, while a further thirteen States have indicated they are willing to accept convicted persons. None of them, not a single one, however, has yet to commence negotiations. It is imperative that we receive this assistance from those States and from others that have not yet offered firm support in this area.

With respect to the need for resources—although there are sufficient monies in the trust fund to finance current projects—there are no funds for any of the additional activities that the Tribunal wishes to undertake. While the short term future for the mass grave exhumations being conducted by the Office of the Prosecutor has recently

been guaranteed by a very generous donation from Great Britain, the ongoing investigative work and analysis that produces the core evidence required to mount successful prosecutions requires continued assistance. Lack of funds for these purposes continues to obstruct the operation of the Tribunal.

The most obvious symbol of the gulf between commitment and compliance is the continued freedom of forty-nine indictees against which the Tribunal has issued indictments. This freedom of forty-nine indictees makes a complete mockery of the Tribunal and international criminal justice.

The Tribunal has the right to expect more than this dismal demonstration of support by the vast majority of the international community. The expectation that we will be supported and empowered by the international community has practical, legal, and moral underpinnings.

Practically, the Tribunal's performance will at best be seriously impaired if certain specific measures are not taken by States. The principal area of concern is presently the low number of agreements for enforcement of sentences. In addition to the lack of agreements, one of the two agreements that have been concluded has yet to be ratified by the State's parliament.

The issue therefore is not whether those in custody are convicted or acquitted. Instead, with respect to the indictments issued to date, there are currently no means for the enforcement of more than a small number of sentences. It is folly to defer action on this matter until such time as we are presented with a situation that we cannot address because of lack of incarceration facilities.

With respect to witnesses, we have a number of agreements in place that will allow us to relocate those who are most vulnerable. However, as most indictees come to the Tribunal's custody, the demands on the relocation program and on the victims and witnesses unit will increase.

Last year, seven staff members cared for 142 witnesses. In the first three months of this year, the four ongoing trials have already involved one hundred witnesses.

Although there are sufficient personnel and resources to meet these requirements through the end of the year, the commencement

of seven additional trials in the next twelve months and the opening of two court rooms will have serious implications for the unit's capacity to respond to witness needs. These needs are complex and extend beyond the seat of the Tribunal. It is critical to the continuing functioning of the judicial proceedings that the recent increase in resources for the victims and witnesses unit is sustained.

The legal obligation imposed on all States in Resolution 827, the basis of Article 29 of the statute, is unequivocal. It provides, "all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and Statute of the International Tribunal" Moreover, the norms prohibiting genocide, crimes against humanity, and war crimes that have crystallized in the last half-century since Nuremberg and Tokyo require States to take action to uphold fundamental human rights.

Whereas all States are bound by these international legal proscriptions and by Security Council actions under Chapter VII, as noted earlier, the Dayton accord reiterates a clear and explicit duty on the part of the parties to that agreement to cooperate with the Tribunal. It is, therefore, wholly disingenuous of certain States and entities in the region to continue in their refusal to assist the Tribunal or to cite constitutional obstacles that they claim bar full cooperation. You cannot be sovereign and consent to an obligation and then claim sovereignty as a bar to implementing that very obligation.

Our concern for events in the former Yugoslavia is founded on our sense of morality and on abhorrence for a society that countenances the absence of the rule of law that leads to these abuses.

At our Tribunal, we have heard accounts of barbarity and criminality that defy reasoning. I mention the following examples, not to shock, but to explain the moral imperative for action.

A witness testified before the Tribunal about multiple rapes she had suffered and then described finding her husband's body, "on his left leg, I think there was the bone left. The flesh was missing from his leg. When I reached his head, when I saw what they had done to him, they had gouged out his eyes, his nose, his ears, so the only way I could recognize him was by his skull, by his teeth." One indictment describes how a victim was gang raped by fifteen men over a three

hour period, sexually abused in all possible ways, and then later subjected for a whole night to multiple rapes by more men.

One of my colleagues, Judge Riad, in confirming the indictment for crimes committed during the fall of the safe area of Srebrenica, detailed some of the evidence presented to him. He spoke of a man forced to eat his grandson's liver and mothers forced to watch the slitting of their children's throats. He referred to them as truly scenes from hell, written on the darkest pages of human history, and so they are.

The moral imperative is not limited to the former Yugoslavia. Our duty extends to all those victims of atrocities who await justice. Just last month, the media marked the anniversary of one event, whose victims are still seeking redress.

On March 16, 1988, the Government of Iraq attacked the town of Halabja with biological weapons. The nerve gas and other toxins killed five thousand people, many dying in agony. Ten years later, many more endured the physical and mental consequences of the attack.

As I have said, these accounts are not meant to shock. We should be outraged by the commission of atrocities anywhere. How could anyone with any care for humankind deny an obligation to do what they can and to acknowledge these atrocities, and if possible play a role in preventing their re-occurrence?

States are uniquely positioned not only to play a role in securing redress, but to be the driving force. Can we honestly say, therefore, that at the end of the twentieth century, we will accept State apathy and non-cooperation in the face of such sadism and suffering? It is a crime not to act, but it is a greater crime to say that you will act and then remain indifferent.

Moreover, peace and justice are complementary and inextricable. The dream of a world in which all men and women can live free demands that no one should escape responsibility for their actions. Those who killed and raped did so with freedom during the Cold War.

The atrocities that they committed and the impunity the perpetrators enjoyed are burned into our very consciousness. Their legacy should not be allowed to shape the new world. If the Tribunal is to

suffer the consequences of non-cooperation and non-compliance, it is the people of the former Yugoslavia who will once again bear the immediate burden of the international community's inaction. There can be no reconciliation and no lasting peace while those charged with responsibility for unimaginable atrocities continue to flout the rule of law.

Two other dimensions of the moral imperative are memory and deterrence. The dead are but memories. Action by the Tribunal, by the international community, will ensure there is a record of what happens, that the deaths and the torturers do not disappear with their victims. When asked what they most value about the Tribunal, many from the former Yugoslavia reply, "it will remind people what happened here."

By creating that record, we are presented with a chance to deter future crimes, yet deterrence is only achieved through dissemination and publication. We, or rather the States, must seize the day and support and promote the Tribunal.

Finally, the failure to act effectively implicates us all. To paraphrase Martin Neimoeller, if we do not speak up while we can because we are not Slavic, or African, or Jewish, who will speak up for us when we cannot?

What have we done about this situation is rather bleak to me. It may sound very detailed to you when I speak of implementation agreements and enforcement agreements and relocation agreements, but these are very necessary. It may sound like sometimes you are reading a United Nations report, but it is about life blood.

If we do not have enforcement of sentences agreements with States, we can do nothing with the persons if they are convicted. Nothing. As I have indicated, we have twenty-three persons in custody and expect, because of this collective activism on the part of some States and because of the recent encountering by SFOR, that we will have more in custody. That is fine and well.

What do we do if they are convicted? With respect to the relocation of witnesses, what do we do with these people?

Mr. Wladimiroff, counsel for the defense, and I sat together for seventy-three days. We heard from 120 witnesses and the tales that

they told from both the prosecution and for the defense were absolutely mind-boggling.

The courage that they showed by coming forward because they believed in justice deserves, at least on the part of the States, a reward. They will have the opportunity not to have to return to the country from which they came, and instead the opportunity to go to a country where they will have some peace and freedom. This is what they deserve after having potentially given their lives in order to help the world community perform its function of securing justice.

What do we do about it? We need relocation of witnesses agreements. We have very few.

In the past four months, although it seems much longer, I have spoke about this before numerous people. First, as I indicated when I visited the United Nations in February, I spoke with the Security Council primarily for additional judges.

In addition to that, in four days I spoke with at least twenty-one permanent representatives of the United Nations. I spoke to them about the need primarily for enforcement of sentence agreements and agreements for the relocation of witnesses. They promised me that they would return to their governments to advocate for us, and of course, we will follow up on that.

Additionally, in The Hague, I have met with probably a dozen ambassadors in the short period of time that I have been President, to impress upon them the need and the obligation and the requirement of States to cooperate. Also, I asked for enforcement agreements and the relocation of witnesses. They, too, have promised me that they will go back to their government with that mission.

The Registry has told me and the Registrar—Dorothy de samayo Garrido-Nijgh, a former judge—has told me that in the last few months, we have seen some results. States have begun to step forward, at least to offer relocation of witnesses agreements; but unfortunately, the big hurdle has to do with the enforcement of sentence agreements. We have worked hard, at least to our capacity, to encourage this development; but it is now left to States to see whether they will respond.

IV. INCREASED INTERNATIONAL SUPPORT IS NECESSARY TO EFFECTUATE THE PROPOSED PERMANENT INTERNATIONAL CRIMINAL COURT

The performance of the Tribunal will have and has had a very significant impact on the proposed permanent International Criminal Court. However, it is State cooperation, once again, that will make or break the court.

Current proposals would give it—the permanent International Criminal Court—less authority than the Tribunal statute or rules. Under these proposals, the court would lack any real component of compulsion. If it is to have teeth, the language of the statute should parallel that of the Yugoslav Tribunal's Article 29 and state explicitly that States are required to comply with orders without undue delay. Again, this is not what is in the draft statute. Instead, what the draft statute provides is that States are only obliged to respond to requests. There is a difference between responding and complying.

Based on the experience of the Tribunal, there must be provisions that impose upon States the unequivocal obligation to comply. Perhaps more importantly, the grounds for refusing to comply must be narrowly construed and the court must have the final authority for determining whether a refusal is justified.

Faced with consistent and obstinate refusal to execute its orders, the only response taken by the Tribunal has been to report non-compliance to the Security Council, as my predecessor did on five occasions, which the Council duly noted.

This deficiency—the absence of a means of compelling compliance—is to a certain extent reflective of international law and the nature of the relationships between sovereign States and supranational organizations.

Sovereignty concerns will have to be addressed; but as I have indicated above, international law is gradually moving away from a State-centrist approach towards a more moral, human rights approach. It is imperative that this reality be recognized in the jurisdiction and the powers of the court.

CONCLUSION

In conclusion, the Tribunal was established by the international community to ensure that those responsible for perpetrating, in the former Yugoslavia, the most unspeakable affront to the dignity of humankind are held accountable before the bar of humanity.

Five years later, the support is at such a level that we are finally approaching a time when we will be able to achieve our objective. The result of the recent efforts of those States proves the efficacy of that support.

Its success is far from assured, however. An effective Tribunal depends on the advances of the last several months being sustained and, more importantly, increased. The level of cooperation and compliance evinced by the vast majority of States of the international community is an affront to the memory of the victims and an effective endorsement of the acts of the perpetrators.

Approximately eighty-five percent of States have yet to establish the framework that would enable them to provide the support mandated by international law. Why is it that many States can continue to breach their legal obligation to support the Tribunal? The fact that they have breached their legal and moral obligation to support the Tribunal should temper any complacency at the Tribunal's recent success.

The whole of the international community, not just a few States, has a stake in that success; and thus, all States must play their part. To ensure that international criminal justice has a future, we need active assistance beyond what States are required to do. Compliance must become the norm. States must execute our orders. States must arrest individuals. States must respond to our requests for facilities for convicted persons and for vulnerable witnesses. States must provide the resources that we require to be truly effective.

In short, we need States not only to profess a belief in the Tribunal, we need them to act quickly and effectively, or we will fail. If the Tribunal is not allowed to realize its potential, it will have been failed by an international community that has forsaken its commitment to the rule of law.

Thank you very much.