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Establishing the Truth in the Aftermath of Conflict: Current Initiatives and Perspectives in the Western Balkans

THE ROLE OF COURTS IN ESTABLISHING THE TRUTH

Address by Judge Wolfgang Schomburg

**Judge of the Appeals Chambers at ICTY and ICTR<sup>1</sup>**

*Won est iustitia, non est veritas.*

There is no justice. There is no truth. It is extremely difficult for a Judge to reconcile these fundamental maxims of Roman law with the mandate vested to the Judges of the ICTY.

Yes, it is true that there will never be perfect justice. Yes, it is true that there will never be absolute truth. This is not only because everybody is entitled to have his or her own truth, but also because we neither have the mandate of historians nor are we able to define what is justice in a concrete case. However, and this is of utmost importance, what we have to do is **to come as close as possible to both, justice and, in particular, truth.**

It is mandatory to do so because **there is no justice without truth and there is no sustainable peace without justice.** This famous triangle - truth, justice and peace - is (as Secretary-General Kofi Annan said) the fundament of our Tribunal. It is established in all societies and also in all religions of the world.

I would like to use my limited time to briefly contemplate

- on achievements of the ICTY in the past:
- inherent obstacles of international criminal courts vested with a particular truth finding mission;
- specific problems emanating from the common law system; and finally.
- how to achieve a successful transition in that finally Bosnia and Herzegovina reassumes full ownership also with regard to an independent and impartial judiciary as a European democratic State.

**The Achievements of the ICTY in the Past**

The establishment of an **international criminal tribunal as such was mandatory.** You know in greater detail what would have happened if there had been no such international tribunal. Already the fact that, based on compelling evidence, most of the senior political and military leaders had to **step down** by fleeing or being transferred to The Hague is a unique achievement. Furthermore, "it would be terrible if the Tribunal had not been established, since we would then live in the belief that mass crimes could

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<sup>1</sup> This intervention reflects the individual opinion of Wolfgang Schomburg only and cannot be attributed to one of the *ad huc* Tribunals or the United Nations as such. Valid is only the spoken word.

be committed with **impunity.**" This quote originated from nobody else than Mr. Blaskic, convicted himself for war crimes<sup>2</sup>

It is my firm belief that the work of the ICTY until today has proven that international criminal tribunals can function in a way that justice can be seen to be done. **Irrespective of their function.** for example, as leading politician or military, sentenced persons may now be called what they deserve to be called, *e.g.* murderer, rapist, war **criminal.** However, as we all know, a lot remains to be done until all those who believe to be "untouchables" are brought to justice.

From the beginning of its work, the ICTY has paid special attention to afford a detailed account of the events in the former Yugoslavia. This is especially true **in** relation to the genocide committed in Srebrenica, which has been **firmly established by compelling evidence** in numerous cases so that nobody can deny this fact any longer. The ICTY insofar has accomplished its fact finding mission which leaves no more room for any kind of revisionism.

However, concerned only with the individual guilt of the accused, ICTY Judgements analyze the conflicts in the former Yugoslavia only in so far as it is relevant to the individual case. We have collected **more than 5 million documents; more than 4.000 persons** have been heard in court. No doubt, these impressive numbers cannot convince those victims or their relatives having not yet been heard by an impartial court of justice.

Let me state on a very personal note that the mere fact of having given a victim a chance to speak about his or her ordeal, to hear the gratitude not only to have survived, but also to have the chance to confront the former "untouchables", can be more impressive than meting out the appropriate sentence for the accused. Not to be misunderstood: It was a correct decision of the international society not only to hear the truth, but also to impose sanctions."<sup>3</sup>

### **Inherent obstacles of international criminal courts vested with a particular truth finding mission**

**"Truth" has its own specific meaning within the context of criminal proceedings.**

**Unlike historical experts,** the Tribunal cannot aim at the "big picture", but must concentrate on events which have been singled out by prosecution against individual perpetrators.

In addition. **Rules of Criminal Proceedings** establish a duty to exercise strict self-constraint to relevant evidence only.

The search for material truth before the Tribunal is also limited by **other procedural principles.** I should like to draw your attention to the importance of the **rights of the accused** as laid down. *inter alia*, in Article 21 of the ICTY Statute, partially *verbatim* repeating the fundamental rights of an accused as enshrined in Article 14 of the *International Covenant on Civil and Political Rights* and Article 6 of the *the European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>4</sup>. The principle *in dubio pro reo* creates to a certain extent an imbalance in favour of an

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<sup>2</sup> Croatian Weekly «Globus», July 2005.

<sup>3</sup> Art. 14 of the *International Covenant on Civil and Political Rights* of 16 December 1966

[UNTS Vol. 999. p. 171] stipulates that "all person\*, shall he equal before the courts and tribunals

<sup>4</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 in its Current version [ETS No. 0051.

accused. This, however, is necessary and justified because a human being can only be deprived of his or her liberty if the Judges come to the conclusion that he or she is guilty beyond reasonable doubt.

Again, not to be misunderstood: I am fully aware that some victims and, in particular, those who have taken the burden to testify before the ICTY, may be disappointed with the outcome of a concrete case. But it is mandatory to acquit in whole or in part an accused instead of running the risk that, based on the evidence before us, an innocent human being is found guilty and deprived of his or her liberty without justification. Any search for truth in international criminal proceedings must be adequately balanced against the fundamental rights of the accused. The **presumption of innocence** and the **principle of individual guilt** are absolute and cannot be disregarded.

It would be wrong to speak in this sense of only a limited role of international criminal proceedings in search for truth. The judicial criminal process is based on the idea of impartiality. Facts which are established in criminal proceedings have passed strict threshold tests that furnish them with great authority. However, it is necessary to keep in mind that criminal proceedings exclusively deal with individual guilt of individual persons. They can only cover certain aspects of conflicts.

Finally, I have to recall that Judges in all legal systems are in the hands of the prosecutor. Where there is no indictment there cannot be a trial.

### **Particular Problems Emanating from the Common Law System**

Unfortunately, the **role of the Judges** in both *ad hoc* Tribunals is extremely limited. The position of the Tribunals' Judges is largely comparable to that in adversarial systems in common law countries. There, the Judge renders the final judgement based exclusively on the facts that have been presented to him by the parties. The parties thus enjoy the primary power to decide what shall be brought to the attention of the Judge.

In my opinion, however, this is **too passive a position for Judges in international criminal proceedings**. Taking into account the complexity of the trials, the Judges should be informed about all evidence potentially relevant to the case at hand. This, however, requires that also the Judges have access to the entire evidence available on the premises of this Tribunal, in particular, the database accessible for the Prosecutor, however not for Judges. In light of the Tribunal's mission acting under Chapter VII of the UN Charter, I personally feel extremely uncomfortable having to decide about the fate of an accused (possibly for the remainder of his or her life) without being personally able to evaluate all accessible evidence.

One issue of particular concern is the question of **plea bargaining**. No doubt there is a need to break the wall of silence. No doubt that the admission of guilt might even be an expression of genuine remorse which can be held in mitigation of sentence in all courtrooms of the world. Also, a fair plea bargaining under the strict control of Judges is globally accepted. I doubt, however, whether charge bargaining can be of any assistance in the truth and justice finding mission of an international criminal tribunal.

### **Referral Proceedings**

Finally, let me comment on the **ICTY referral proceedings**. The ICTY has started to transfer cases to domestic courts in States on the territory of the former Yugoslavia. Here, I see the link to the speech given by the High Representative, Mr. Schvarz-Schilling, to the UN Security Council on 18 April 2006 when he said "in order to achieve a successful transition an important principle is at stake; OWNERSHIP."

I have to recall that already five years ago, the Judges of the Tribunal themselves decided that there have to be time limits for an *ad hoc* court. It was the Judges who asked the Security Council to accept a completion strategy giving back jurisdiction in its entirety to the States on the territory of the former Yugoslavia. This completion strategy is now in the process of being implemented. There will be no new indictments. After having heard all the remaining cases and appeals, the Tribunal will close its doors on its own initiative.

In my mind, also the policy of transferring sentenced persons has to be changed in line with modern criminal law in that sentenced persons, whose cases would now be eligible for referral, may serve their sentence in their home countries. This would be in line with, the fundamental guidelines laid down in the *European Convention on the Transfer of Sentenced Persons*<sup>5</sup>.

Pre-requisite, however, is a functioning democratic and impartial judiciary. Our Rules of Procedure and Evidence provide for referral only if a fair and impartial trial is guaranteed in the country to which a case will be transferred or referred, that death penalty will never be imposed or executed, and that, finally, internationally recognized minimum conditions for detention centres are met. Otherwise, cases would have to be transferred or referred to third countries being willing and able to exercise jurisdiction.

For the international community, and in particular for the European Union, additional efforts are necessary to fulfil these criteria in all areas of former Yugoslavia. It is necessary that all Judges having to deal with these war crimes are able to act impartially more than 10 years after the conclusion of the Dayton Agreement.

In conclusion, let me express my hope that the expectations of the international community (also expressed by the completion strategy) will be met. The pre-requisites are well-founded. All States on the territory of the former Yugoslavia today are members of the Council of Europe, thus bound to apply in particular the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, but also all Conventions aiming at an effective co-operation in criminal matters especially when it comes to extradition, transfer of sentenced persons and other forms of mutual assistance. The chance is unique, it should not be missed, Let me express my optimism in quoting Goethe from *Iphigenia* where he refers to the fundamentum of European humanism:

*"Alle menschlichen Gebrechen sühnet reine Menschlichkeit. "*

*"For each human fault and frailty pure humanity atones."*

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<sup>5</sup> European Convention on the Transfer of Sentenced Persons of 21 March 1983 [CETS 102], ratified by all States on the territory of the former Yugoslavia.