

President Theodor Meron
International Residual Mechanism for Criminal Tribunals ('MICT')
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Oslo, 7 April March 2016

Copy:

- ICTY President Carmel Agius, UN-ICTY, P.O. Box 13888, 2501 EW The Hague
The Netherlands
- ICTY Prosecutor Serge Brammertz, E-mail address: ContactOTP@icty.org

Re: Need for you to take responsibility for situation at ICTY

President Theodor Meron,

We write to you to convey deep concerns related to the situation at the International Criminal Tribunal for the Former Yugoslavia ('ICTY') created by a range of ICTY acquittals in 2012-2013. As the then ICTY President, current judge and key player of this important institution, as well as the current President of the MICT, we think that you bear the greatest responsibility. The situation is marked by a split among judges on important issues of legal doctrine and facts, as well as the erosion of external trust in the institution's ability to fulfil its mandate.

There are still important ICTY judgments to come. It is therefore of utmost importance that the ICTY resolves its problems.

We are fully aware that controversy around the ICTY was nothing new, but the disunity caused by the split and subsequent reduced trust in the ICTY was both new and harmful.

Our organisation, The Norwegian Helsinki Committee, has since the establishment of the ICTY defended the institution on numerous occasions. We have built on its jurisprudence in challenging distorted versions of the conflicts in the Western Balkans, and we have criticised media reports and documentaries that neglect ground-breaking ICTY judgments. We have invested significant resources on this over the years.

For many victims of core international crimes in the 1990s in Bosnia-Herzegovina, Croatia and Kosovo, the ICTY served as their hope of justice. Victims and civil society actors sought accountability for those bearing the greatest responsibility for the crimes, from the ICTY. We know from first-hand experience the importance of ICTY judgments for those who suffered

from the crimes. We know the effect of ICTY on those who still supported the leaders that ordered or accepted crimes as tools of furthering their perceived interests.

Acquittals in 2012 and 2013 of high-ranking Croat and Serb commanders – including Ante Gotovina, Mladen Markač, Momčilo Perišić, Jovica Stanišić and Franko Simatović – shook this aspiration and generated serious concerns about the quality of the legacy of the ICTY. How effective is international justice in ensuring accountability for commanders and political leaders, was the question most frequently asked. Civil society actors and victims' organisations reacted strongly against the rewriting of legal standards that the acquittals were based on.

Even profiled politicians reacted. Carl Bildt, the then Swedish foreign minister, and an important long-term actor in facilitating peaceful developments in the Western Balkans, expressed a feeling shared by many: "It is becoming increasingly difficult to see the consistency or logic in the different [ICTY] judgments".

Criticism of the acquittals was supplemented by proof of a deep split among ICTY judges. Professor Frederik Harhoff, then ICTY Judge, sent a letter on 6 June 2013 to 56 friends, questioning the Tribunal's credibility and international media reported extensively.

On 23 January 2014, the Šainović Appeals Judgment unequivocally overturned the view that "specific direction" of crimes is a requirement for aiding and abetting; a fundamental premise for acquitting Perišić, Stanišić and Simatović. According to the ruling, aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime". A ruling in the Charles Taylor case by the Sierra Leone Tribunal also refuted "specific direction" as a requirement for aiding and abetting. Several recent ICTY judgments have confirmed that the acquittals were based on a faulty legal doctrine.

However, due to the 20 March 2014 ICTY Appeals Chamber decision to deny a motion from the Prosecutor for reconsideration of the Perišić case, we have to live with an acquittal, which is based on a refuted legal doctrine, and goes against well-documented and unbiased historic records on how the 1992-95 armed conflicts in Bosnia-Herzegovina unfolded.

The changes of direction at such a late stage of the ICTY's life were unfortunate. It disorients victims, their families, and the wider struggle against impunity.

It seems to us that you played a crucial role in bringing these changes about. Much of the criticism has focused on your role, alleging undue influencing of other tribunal judges.

The question of bias on your part has also been raised. Indeed, if the test applied to Judge Harhoff – whether a reasonable, informed outside observer, with knowledge of all the relevant circumstances, would apprehend bias – was applied to you, it is regrettably not clear to us that you would pass.

Victims and human rights organisations have looked to the ICTY for justice and for a reliable historic record after the extremely abusive armed conflicts of the 1990s in the Balkans. No

other institution represented such a degree of quality of documentation, evidence and legal argument, they believed.

The 2012-2013 acquittals and the split among the judges on key points of factual and legal analysis have put in jeopardy the ICTY's ability to fulfil its mandate. Even though the latest ICTY decisions seem to have "corrected" some mistakes, concerns remain whether the institution will be able to deliver – and will be perceived to be delivering – the highest standards of justice.

A recent quote from a comment in *The Economist* on the 24 March 2016 judgment in the case against Radovan Karadžić is telling:

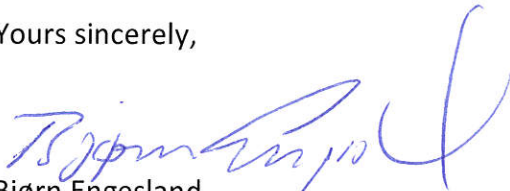
The Yugoslavia tribunal ... has played a pioneering role in international justice. The tribunal indicted 161 people; while some had their cases withdrawn and others died before they could be remanded, the rest have all faced trial. (Slobodan Milosevic, Serbia's leader during the war, died of a heart attack in his prison cell in The Hague in 2006 before the court could render a verdict in his trial.) The court has laid down precedents adopted by other international tribunals, such as those on Rwanda and Sierra Leone as well as the permanent International Criminal Court. **Yet on one key issue, the doctrine of command responsibility (under which commanders can be sentenced for crimes committed by their subordinates), it has recently tightened its standards of proof in ways that critics argue make it difficult to convict some of the most senior accused war criminals. While Mr Karadzic was found guilty, others have been acquitted.** [Highlighting added.]

The Norwegian Helsinki Committee – as well as many other actors who we have consulted – has come to the painful conclusion that there is persistent reason to doubt your impartiality. We are so-called 'informed observers', a part of the community of actors that has helped make and protect the ICTY for more than 20 years. If such 'informed observers' perceive bias on the part of an ICTY judge, that has immediate relevancy under the ICTY's law.

Losing trust among the informed part of the public is detrimental for a key player of an institution whose authority depends on being – and being perceived as – impartial.

Regrettably, there remains a strong, unanswered case for you as to take responsibility for the unfortunate situation at ICTY.

Yours sincerely,



Bjørn Engesland
Secretary General



Gunnar M. Ekeløve-Slydal
Deputy Secretary General