

**Address by Carla Del Ponte,**

**Prosecutor of the International Criminal Tribunal for the former Yugoslavia**

**Permanent Council of the OSCE, 7 September 2006**

Mr. Chairman,  
Excellencies,  
Ladies and Gentlemen

It is a pleasure and an honor to be back in Vienna and to speak in front of an organization that has placed the Rule of Law at the centre of its work. We are all aware that the Rule of Law, which is the cornerstone of all of our efforts to promote democracy, respect for human rights and the development of a functioning market economy, is never finished. The fight for these values, which are at the core of the OSCE, is a never ending battle. In the past year, the OSCE and the ICTY have stepped up their cooperation, for the benefit of Justice and the rule of law in South-Eastern Europe, which also helps consolidate democracy and stability in that region and in the whole of Europe. The collaboration between our respective organizations is an excellent model of two institutions fully utilizing their respective comparative advantages.

However, we can and must do more. There are still hundreds, probably thousands of perpetrators of war crimes and crimes against humanity who are walking freely the streets of the former Yugoslavia. They cannot be prosecuted by the ICTY, because we are winding down our work as a result of the completion strategy adopted by the Security Council. Moreover, at present, they also cannot be prosecuted locally either, because of obstacles unfortunately imposed by domestic law. Namely, none of the States of the former Yugoslavia allows for the extradition of nationals, and neither do they permit the transfer of proceedings to another country, when the possible sentence is greater than ten years.

Therefore, when someone who is citizen of country A, resides in country A and has committed a war crime in country B, domestic law effectively bars his prosecution. We are thus confronted with what can be called an impunity gap. This impunity gap denies any hope of justice to tens of thousands of victims and their families from all ethnic groups. Addressing this impunity gap is not difficult. It requires the political will to change the relevant legislation so as to allow for the extradition of nationals and the transfer of all proceedings, without limitation. These amendments are not extraordinary; they are part and parcel of modern European justice systems. For example, you will recall that, in the European Union, as a result of the recently introduced European Arrest Warrant, EU member-States can extradite their nationals to other EU States if they have committed serious crimes in these States. So, for the countries of the former Yugoslavia, adapting their laws accordingly and adopting

without reservation the relevant European Conventions, in particular the European Convention on Extradition and the European Convention on Transfer of Proceedings in Criminal Matters, would also be part of their efforts to join the EU.

The “Palic process”, ably steered by the OSCE has achieved a lot terms of regional cooperation between prosecutors. They now regularly exchange information and documents directly. The recent release in the media of a video showing Serb civilians being maltreated and even executed at the time of Operation Storm, in the summer of 1995, has demonstrated how useful the Palic process has been. The three Prosecutors from Serbia, Croatia and Bosnia and Herzegovina met immediately to cooperate on this highly publicized and politicized case. In addition, access to witnesses living in other States has also been greatly facilitated. We now must build on these promising first steps to push the regional cooperation on judicial matters to a higher level so as to address the impunity gap. The OSCE is naturally well-placed to build on what has been accomplished thus far and to take the lead so that the impunity gap can finally be filled. In my view, most of what could be accomplished at the level of the judiciary has been achieved. Namely, the Palic process has produced the expected results in the cooperation between Prosecutors. The regional cooperation must now be brought to the political level. The next step could be to convene a meeting of the Ministers of Justice from the region, together with the European Commission and the Council of Europe. The objectives of the meeting would be first to raise awareness about the concrete problems created by the impunity gap and second to envisage practical solutions, in particular to create the political will to adopt the laws necessary to allow for the transfer of war crimes proceedings and the extradition of those accused of war crimes. My Office would be ready to take an active part in such a meeting and in its follow-up.

The impunity gap refers to cases involving direct perpetrators, and not high-level decision-makers and leaders. There is an intermediate category of mid-level commanders who were indicted by the ICTY, but who will not be tried in The Hague, because they do not meet the criteria of the “most senior leaders” as prescribed by the Security Council. In accordance with the ICTY Rule 11*bis*, these cases are being transferred to the domestic jurisdiction, and you will recall that the OSCE has agreed to monitor these proceedings. Let me express my deep appreciation to you for having authorized the OSCE Missions to carry out this task. I am positively impressed by the quality of the five reports I have received so far.

It is, of course, of tremendous importance for the confidence in these proceedings that the OSCE continues its monitoring activities. The monitoring of cases has been critical in identifying important issues such as the security of witnesses and the integrity of investigations. These activities are as a consequence also useful to enhance the domestic judicial systems as a whole. Indeed, we certainly want to avoid double-standards where only the trials monitored by the international community would correspond to the highest international standards. To prevent this, it would be important that the international community demonstrates its interest not only for highly-publicized cases transferred by the ICTY, but also for proceedings that are taking place without media attention. In Croatia, for example, there is a fruitful interaction between the local judiciary, the OSCE, the European Commission and the ICTY field representatives in this regard.

One particular issue that should draw the attention of the international community is the return of four cases to the former Yugoslav Republic of Macedonia. Because of the completion strategy, these cases, which were originally transferred to the ICTY in 2002, need to be returned to the local judiciary in Skopje. These are not Rule 11bis cases with ICTY indictments or accused. We are simply going to hand over to the national authorities binders with investigation materials related to the relevant crimes. These materials will have to be completed through further investigations by the local authorities. Earlier this year, in February, I agreed with the then Minister of Justice that these cases would be returned progressively starting at the beginning of 2007. As far as I am concerned, this timeframe remains valid.

The return of cases to domestic jurisdictions is a key component of the ICTY Completion Strategy. This process is now well underway. Out of the 13 motions submitted to the ICTY Chambers for a deferral in accordance with Rule 11bis, final decisions were made on eight of them and four cases have been transferred, three of them involving six accused to Bosnia and Herzegovina, and one involving two accused to Croatia. On the basis of present experience, and of the monitoring reports sent by the OSCE, there are no reasons at this juncture to envisage re-calling these cases to The Hague. We are also progressing well in the transfer of the approximately 60 non-indicted cases, which were at different stages of the investigation when the Completion Strategy was adopted.

This part of the Tribunal's legacy is now on track, and we are concentrating the bulk of our activities on the completion of all trials in The Hague. 2006 is the busiest year of the Tribunal's life. Currently, a record number of 24 accused are standing trial in six simultaneous proceedings. Earlier this year, a multiple accused trial opened with six former Bosnian Croat leaders. In July, two landmark trials began. Six former political and military leaders of Serbia are in court for the crimes committed against the Kosovo Albanian population in 1998 and 1999. The trial of seven senior military and police of Republika Srpska, all very close to Ratko Mladic, commenced on 14 July. Most of the Accused are charged with the gravest crime, the crime of genocide, for their role in the killing of 8000 Muslim men and boys in Srebrenica in July 1995. Let me remind you that, on 19 April 2004, the ICTY Appeals Chamber found in a final decision that the crimes committed in Srebrenica meet the legal definition of genocide. Therefore, the only legally correct way to refer to Srebrenica is not simply as a massacre, not even as a tragedy, but as a genocide – that is what it is.

Apart from these important cases, the Tribunal is also dealing with a number of contempt of court cases. Three cases involving 4 accused are in various stages of the proceedings against journalists because they have released the names of protected witnesses or the contents of their testimony. Three of them have been sentenced in a first instance judgment to a fine of respectively 15'000 and 20'000 Euros. The fourth one is awaiting his trial. I know that these cases have raised some concern within the OSCE. In particular, the OSCE Representative on the Freedom of the Media has intervened with ICTY officials. Let me underline that these are not cases which touch on issues of freedom of expression. Instead, they involve the blatant violation of court orders intended to protect witnesses. The Accused are involved in trying to undermine the Tribunal's work by intimidating these witnesses and thus having a chilling effect on all ICTY witnesses. As you will appreciate, at the ICTY, witness protection issues are questions of life and death. Should witnesses lose faith in the

ICTY's ability to protect them, we might as well close the Tribunal. Furthermore, if we would fail to react in case of a blatant violation, as was the case with the Croatian journalists, we would de facto encourage others, in Croatia or elsewhere, to leak names of protected witnesses. Witness protection is a very serious issue throughout the former Yugoslavia. Potential ICTY witnesses were killed in Kosovo because of the mere fact that they could have been potential witnesses against former KLA leaders. The international community has unfortunately failed so far, especially in Kosovo, to put in place adequate witness protection mechanisms. Indeed, the whole judicial system in Kosovo suffers grave shortcomings.

In addition to the accused currently in court, 15 accused are still in the pre-trial phase, notwithstanding those who should be transferred to domestic jurisdictions. And, unfortunately, six indictees are still at large. This may look like a small figure if one considers that, overall, 161 persons have been indicted by the ICTY. However, not all accused bear the same degree of responsibility in the crimes committed in the former Yugoslavia. Radovan Karadzic and Ratko Mladic are the most responsible persons for the worst crimes committed on the territory of the former Yugoslavia. They must be tried in The Hague.

Mr. Chairman,

My message is simple. All crimes must be punished, all criminals must face justice. We are confronted with an impunity gap. Those who cannot be tried in The Hague because of their lower rank must be tried locally. The assistance of the OSCE has been and continues to be invaluable in this regard, in creating the proper legal, administrative and political conditions. Through its numerous activities, such as training, monitoring and fostering inter-State cooperation in the Western Balkans, the OSCE is a key player. I hope that we can further work together to solve the remaining issues I have highlighted at the beginning of this address.

This impunity gap may have far-reaching consequences. It may negatively impact on the relations between the States and people in the region for decades to come. Is it not striking how much unsolved, unpunished crimes that occurred sixty or even hundred years ago are still today causing major strains between some countries? Often, deeply-rooted disagreements about what really happened and about who is responsible for the atrocities are feeding inter-State tensions. In the case of the former Yugoslavia, we are in a unique position, because the potential is there for both truth and justice to be given to the peoples of the Western Balkans. The ICTY has already established the facts related to most of the worst crimes committed during the conflicts there. We can fulfill the work of justice if the impunity gap is solved and if Karadzic and Mladic are brought to The Hague. The opportunity is historic. The consequences of a success or of a failure will be historic as well.

To conclude, I wish to quote the words of a great Viennese, Simon Wiesenthal, who left us nearly exactly one year ago: "*without memory, mankind is condemned to repeat the same mistakes and the same atrocities over and over again. (...) Tracking must continue. Criminals must never sleep quietly.*"