MICT
UNITED NATIONS
Mechanism for International Criminal Tribunals

The Mechanism for International Criminal Tribunals ("MICT" or "Mechanism") was established on 22 December 2010 by the United Nations Security Council to continue the jurisdiction, rights, obligations and essential functions of the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY") after the completion of their respective mandates. The MICT has two branches, one in Arusha, Tanzania, and one in The Hague, Netherlands.

STATEMENT

PRESIDENT

(Exclusively for the use of the media. Not an official document)

The Hague, 16 May 2017

Remarks of Judge Theodor Meron
President, Mechanism for International Criminal Tribunals
Judge, International Criminal Tribunal for the former Yugoslavia

"The Future of International Criminal Justice"
Embassy of the Republic of Poland in The Hague
On the occasion of the awarding of the Officer's Cross of the Order of Merit
16 May 2017

Excellencies, Distinguished Colleagues, Ladies and Gentlemen:

Before turning to the substance of my remarks, I wish to express my deep gratitude to Mr. Kobza, the Embassy's Chargé d'affaires ad interim, and his staff for organizing this event, and offering this opportunity for me to offer some thoughts on a subject dear to my heart: the future of international criminal justice. As I shall discuss shortly, the sustained involvement and investment of States in the future of international criminal justice is essential if we wish to see the progress made over the past quarter-century endure. Poland in particular is already playing a vital and much appreciated role in supporting the work of the Mechanism, including by enforcing sentences in its national prisons. For this, Mr. Kobza, and for all that you and your colleagues have done to make today possible, you have my sincere thanks.

I would also like to express my appreciation to Professor Elżbieta Mikos-Skuza of the University of Warsaw for her kind words today and for her friendship over a number of years.

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When first the International Criminal Tribunal for the former Yugoslavia (or "ICTY") and then its sister court, the International Criminal Tribunal for Rwanda (or "ICTR") were established by the Security Council in the early 1990s, it was a watershed moment in the fight to end impunity.

We may not have been certain of what those pioneering ad hoc Tribunals could or would achieve at the time, but many of us were optimistic—and this optimism carried us forward in a wave that led to the Treaty of Rome of 1998 and the establishment of a number of other hybrid courts and bodies from Cambodia to Sierra Leone.

In the years that followed, these courts have made many ground-breaking contributions—from fleshing

out of norms of international criminal and humanitarian law, to developing a corpus of procedural and evidentiary decisions rooted in fair trial principles, to the creation of a relatively cohesive civil and common law synergy in the practices and procedures followed. Importantly, over this same period, national jurisdictions have increasingly sought to ensure accountability for violations of international law in their own courts.

And as a result of all of this, accountability is increasingly a basic expectation—at least among those who form part of civil society and in public opinion—when we are faced with horrific atrocities committed in armed conflicts.

But notwithstanding all that was achieved over the past quarter-century, we find ourselves today in something of a precarious moment for international justice. In my remarks today, I would like to discuss some of the reasons we are at a critical juncture for international criminal justice now, as well as some of the ways we may move forward and advance the fight to end impunity.

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First, and most simply, it is, perhaps, inevitable that the abstract aspirations of the 1990s would have had to give way to certain hard realities.

Establishing international institutions that must harmonize different legal systems and address novel issues while ensuring fundamental fairness, that must establish their own administrative infrastructure and obtain cooperation across borders and without police forces of their own, that must try cases of an evidentiary magnitude rarely seen in national courts—all of this is expensive and time-consuming. And all of this is particularly challenging when the international court is operating in heavily politicized or even hostile environments.

As we know, international courts have increasingly been criticized for the expense and duration of their work (particularly given the number of individual cases they have handled).

At the same time, courts like the ICTY and the ICTR have also been subjected to a wide range of often conflicting expectations concerning their mandates and what results they can or will achieve.

Indeed, as courts of fundamentally limited resources and jurisdiction, as courts whose work must be rigorously guided by the applicable law and the available evidence rather than outside opinion, popular narratives of guilt or innocence, or the entirely understandable desires of victims or their advocates, and as courts responsible for trying cases in highly charged political contexts, it is inevitable that basic decisions as to whether an indictment should be sought or whether a conviction is unsafe will create controversy.

The selectivity of international justice (in terms of which situations or cases become the focus of accountability efforts, and which not) may be inevitable in many respects due to both the limited jurisdictions and resources of international courts and the differing capacities of various national jurisdictions. At the same time, selectivity may also arise in a particularly nefarious manner when it is the result of political maneuvering or alliances, such as when permanent members of the Security Council protect their own or close allies. Such selectivity is anathema to the rule of law (which requires equality in enforcement), and has eroded support for and cooperation with international judicial institutions, as we see with the ICC in particular.

A second reason that international criminal justice finds itself at a precarious stage of its development stems from the recent rise in scrutiny of, and distrust for, international or global endeavors and institutions. (International courts are, of course, not alone in this respect, as we see from Brexit and the European Union to the United States' support for the United Nations itself.)

The ascent of anti-globalist tendencies may be attributable, at least in part, to the natural ebb and flow of international affairs and to the current tide of nationalist and populist sentiments in many parts of the world.

With regard to international courts in particular, part of this increasing distrust in global institutions may also be attributable to the moment in which we find ourselves in the development of the still very

new field of international criminal justice itself. With the ICTR and the Special Court for Sierra Leone having recently closed, the ICTY expected to close later this year, the International Criminal Court (or "ICC") having nothing in pre-trial proceedings at the moment (due, in part, to a lack of State cooperation), certain hybrid courts and specialized chambers winding down their work, and other bodies (such as the Special Criminal Court in the Central African Republic) yet to get underway, we find ourselves at not only a moment of contraction after a remarkable period of expansion, but also, perhaps, the moment at which, with bloom now off the rose, it is unavoidable that international judicial institutions will come under intense scrutiny and their future importance and role tested.

A third reason that international criminal justice finds itself at a critical point in its evolution is because of the increasingly fraught interactions between political institutions and international judicial institutions and the increasing degree to which political gridlock stymies efforts aimed at ensuring accountability—in short, because of the politicization of international justice.

What do I mean by this? If international criminal justice is facing, in many ways, a cloudy future, it is at least in part because of politics—because of stalemates in the Security Council (leading to a failure to refer clear cases of atrocities to the ICC), for example, and because of controversial decisions by other political bodies such as the Assembly of States Parties or the African Union.

(We cannot forget that the ICTY and the ICTR came into existence at a special stage in international relations, during a detente in the Cold War, and that Security Council referrals of several situations to the ICC since then may have also come at particularly opportune times—so in many ways it was exceptional political moments that have given rise to international justice as we know it.)

Finally, we must recall that the challenges posed by politics do not only arise in intergovernmental fora; one of the continuing, core challenges for international justice has been the lack of cooperation and engagement by States, both when it comes to providing cooperation to international courts (through, among other things, the implementation of arrest warrants and other orders) and in terms of internalizing international justice norms and taking steps at the national level to pursue accountability for international crimes.

We often speak about international criminal justice and focus on international institutions—but the fight to end impunity for international crimes is one that requires engagement at all levels. Indeed, international justice depends upon the investment and engagement of States in a number of different ways, from the integration of international norms into national legislation to local prosecutions to support for capacity-building in other States.

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So, looking to the future of international criminal justice, we see, in many ways, a cloudy picture.

This does not mean that international justice or the fight to end impunity for international crimes has failed or will fail—far from it. Nor, of course, does it mean that there is no longer a need for accountability efforts—to the contrary, from South Sudan to Syria, we are reminded every day of atrocities committed the world over.

But now is the time for those of us who are committed to justice and to respect for the rule of law—as I know many of you in this room are—to take stock and to ask ourselves serious questions as to how best to ensure that what I sometimes refer to as a nascent "era of accountability" can truly take hold.

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What sort of questions should we be asking ourselves?

First, we would do well to ask ourselves how justice at the international level can be rendered more cost-effective and efficient, whether through institutional design or ongoing reforms and benchmarking activities designed to take into account best practices at other institutions. Indeed, finding better ways of doing things, more economic ways of doing things, more transparent ways of doing things, may be critically important if we are to turn around negative perceptions of international justice and its long-term feasibility.

We are already witnessing a variety of reforms and evolution taking place at the institutional level. Among the new features introduced by the Security Council when it established the Mechanism for International Criminal Tribunals (or "MICT"), for instance, are (1) the utilization of single Judges for various judicial tasks, (2) the possibility of Judges working remotely from their home countries, and (3) the payment of Judges per day of work, as is the case for the ad hoc Judges of the International Court of Justice.

The Mechanism is constantly looking for additional ways to enhance its efficiency and cost-effectiveness—and indeed, all courts should have the courage to reform themselves with this aim in mind. If the Mechanism and other courts are able to show real change is possible, and to learn from each other's experiences in this respect, it may go a long way toward addressing existing concerns about efficiency and effectiveness of justice at the international level.

On the other hand, we must remember that new approaches to international justice are not without their challenges—while, for instance, the Mechanism's judges are expected to work remotely from their home countries, the arrest and continued detention of Judge Akay in Turkey, notwithstanding the assertion of his diplomatic immunity by the Secretary-General, points to a profound challenge for the feasibility of this model of remote judging.

Indeed, the situation of Judge Akay represents not simply an issue of humanitarian concern for the Judge himself and a matter of serious concern for the case to which he was assigned; it points to a far larger issue. The immunity enjoyed by the judges of the Mechanism is of fundamental importance to the proper functioning of the institution as a whole and is essential to ensuring to their independence in the exercise of their judicial functions. The principle of judicial independence is, of course, a bedrock principle of the rule of law more generally. If national authorities are permitted to prevent a judge from carrying out his or her judicial duties (as has been the case for Judge Akay) or to otherwise interfere with the judge's work, it would undermine this fundamental principle and have a chilling effect on the administration of justice, thereby threatening the integrity of the judicial system as a whole. Such interference in the independence of the judiciary cannot be accepted at the international level any more than it can be countenanced or permitted at the national level. Yet, even now, judicial independence is under pressure in a number of countries around the world. All of us who care about justice and are committed to the rule of law must do our utmost to defend this fundamental principle, both in the international context as I have done with regard to Judge Akay but, perhaps more importantly, at the national level, wherever it may be threatened.

Respect for the bedrock principle of judicial independence at the national level is particularly important in the context of the second question that we should be asking ourselves as we look to the future of international justice: what part States should play.

While there may always be a need for international judicial institutions, we must remember that accountability at the international level cannot and should not be the only way, or even the primary way, to seek accountability for grave violations of international law. Indeed, international justice must be thought about globally and holistically, without a focus on any one international court and, indeed, with a greater emphasis on the role of States.

What does this mean in practice? States can and should do more to support accountability efforts in national courts, in line with the complementarity principle that underlies not just the ICC framework but the establishment of the ICTY and the ICTR as well. This requires those States who haven't done so yet to incorporate the Rome Treaty into their national legislation. This requires States to help other States to build greater capacity, particularly in developing countries. This requires advocacy efforts at the grass-roots level to push for prosecutorial and judicial authorities to act, whether by means of universal jurisdiction or otherwise. And this requires States to ensure that their judicial systems adhere to the fundamental requirements of fair trials, including through ensuring the independence of the judiciary.

States can and should do more to support accountability at the international level too, by complying with orders issued by international courts and by finding other ways to offer cooperation.

At the same time, we cannot ignore or discount other possible avenues to ensure accountability, such as

through the establishment of criminal jurisdiction in regional courts or the creation of hybrid courts or specialized chambers within existing national court systems—or even through the establishment of new ad hoc international courts as necessary.

Third, if we are to ensure that the era of accountability takes hold going forward, ways must be found to insulate international criminal justice from the corrosive effects and gridlock of politics as much as possible and to enhance State cooperation. Sometimes, for instance, when one political avenue is gridlocked, others will provide a way forward. Faced with paralysis in the Security Council, for instance, the General Assembly has, as many of you know, taken steps to develop a mechanism to address atrocities committed in Syria. But we should ask ourselves what more can be done to insulate international justice efforts from the deleterious effects of politics—a question to which I, myself, do not have a comprehensive answer.

Fourth, we must find better ways to communicate effectively about what it is that international criminal justice is all about, what international courts are mandated to accomplish, and what limitations they face if we hope to address some of the anti-globalism trends, to reduce the frustration and disillusionment to which conflicting expectations can give rise, and to harness greater public support (which can, in turn, help to break political stalemates and to galvanize national governments to cooperate more fully with international courts and other States).

Finally, and notwithstanding the very real challenges we face, we cannot afford to be either pessimistic when considering the future of international criminal justice or complacent. Quite simply, now is the time to redouble our resolve and to address the issues that I have raised. Now is the time to take concrete steps to advance the cause of accountability at the national, regional, and international levels and in a wide variety of fora. It is by doing so that we will, I believe, narrow the gap between the important normative and rhetorical advances made in recent years, on the one hand, and our actual results in the fight to end impunity, on the other.

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