

Speech by Specialist Prosecutor David Schwendiman at the Grotius Centre of Leiden University in The Hague, Thursday 22 March 2018

Reflections on My Time as Specialist Prosecutor and the Challenges Ahead

Introduction

In July 2014 I was just rounding the corner on my fourth year in Kabul, Afghanistan.

When I checked my personal e-mails one evening, I found one from a friend and colleague I first met in Bosnia and Herzegovina in 2006 when I took over as the International Registrar of the War Crimes and Organized Crime Departments in the State Prosecutor's Office in Sarajevo.

Kwai Hong Ip – Kip – and I got to know each other well over the almost four years we spent investigating and prosecuting atrocity crime together in Bosnia and Herzegovina.

As the Head of the Special Department for War Crimes and the Deputy Chief Prosecutor during most of those four years, I grew to respect and admire Kip for the work he took on – work that involved the most difficult, most demanding and highest profile prosecutions in the office.

I had not heard from Kip in some time and was keen to know why he had tracked me down in Kabul.

In his e-mail he asked me to call him.

I called the next day.

Kip told me that Ambassador Clint Williamson, a mutual friend of ours, was finishing his three-year stint as Lead Prosecutor of the European Union Special Investigative Task Force which had been set up by Clint and Kip.

“Would I consider taking over for Clint when he left the post at the end of July?”

Not one to ever say no to anything, especially when someone like Kip or Clint is asking, I told Kip I was interested – who wouldn't be? But I also told him I was already engaged in work I thought was important and worthwhile as the Director of Forward Operations in Kabul for the Special Inspector General for Afghanistan Reconstruction (SIGAR).

I had serious commitments in Kabul and obligations to family that I needed to consider before getting back to him.

At the time, I was working for someone I greatly admire – the Special Inspector General, John Sopko – and I was loyal to the mission and the people for whom I was responsible in Afghanistan.

I told Kip I would have to talk to my wife Bobbi and to John before I could give him an answer.

If they were good with it, I would call him back as quickly as I could and let him know.

He asked me to talk to Clint as soon as he could arrange a call.

I talked to Clint the next day.

Clint and I discussed the work of the Special Investigative Task Force, its origins, and some of the challenges he and Kip and the staff had faced since the Task Force was formed in 2011.

We talked about the challenges his successor would face in the next three years or more.

He was frank about the demands of the job and about the less than certain future of the Task Force.

He talked with genuine conviction about the need to do what was possible to hold people accountable for what they did during the conflict years in Kosovo to help restore the dignity of those who suffered and were affected by crimes committed during that period.

We did not talk about the substance of the investigation or the prospects for charges.

As we spoke he sensed I was getting more interested.

Once he knew he'd set the hook, he told me there was a hitch; no court yet existed before which to try any criminal case that might come out of the work the task force was doing.

I would be taking over an investigation, he said, that didn't have a court to work with, no prosecutor's office, and no certainty there would be a court or proper prosecutor's office any time soon.

There wasn't even a law yet that would create and empower the court and prosecutor's office, let alone rules to guide them.

The opportunity was irresistible.

He reeled me in before we finished our conversation, but I told him, as I told Kip, that I had to get the support and approval of my wife, Bobbi, and the Special Inspector General.

I needed to talk to them first because they were the people who would be asked to make the sacrifices necessary for me to do the job if I said yes and was selected.

In Bobbi's case it would be another in a long line of sacrifices she and the family have made for four plus decades; sacrifices that have made it possible for me to do some pretty extraordinary things in some pretty extraordinary places under some pretty extraordinary circumstances.

After I explained it to John Sopko, he asked if he could come, too.

Bobbi asked me if I thought I had the energy and could do what I was being asked to do and whether I thought it was worth doing.

If I could contribute to something worthwhile, she said, she would support me, as she always has.

I called Kip back and said yes.

And here we are.

Change

These are the last formal remarks I will make as the Specialist Prosecutor.

I am indebted to Carsten Stahn and Leiden University's Grotius Centre for honouring me with the chance to make them in this distinguished forum.

I can't think of company I'd rather be in to do this.

Carsten is teaching and mentoring all of you who are the future of this kind of work.

It is not cliché to say that the enforcement of international criminal norms is now the norm.

Many of us in the room tonight, myself, Judge Trendafilova, my colleagues in the Prosecutor's Office, in Chambers and in the Registry, James Stewart, Kathryn Bomberger, my friends from the MICT, the STL and the ICC – our learned friends in the defence bar who are here – are living proof of that.

Because of what has been done here in The Hague, in the City of Peace and Justice, a place I will miss very much, and because of what will be done here for years to come, the prospects of holding people accountable for atrocity and conduct that violates universally accepted criminal norms in fair, universally respected proceedings are as good as they have ever been.

There is a future for many of you in this room who are committed to entering the practice, not just the study, of international criminal law.

It will be difficult for me to say goodbye to it all.

For me, this has all been quite a ride.

I will miss you all.

My time has come to an end, but the work of the Specialist Prosecutor's Office and the work of Chambers has not.

The firm is not closing.

It will simply be under new management on 01 April.

As all of you know, I did not choose for this to happen.

I did not resign – I was just told by my government that my time was up.

I also want to make sure you know that for me and for the Specialist Prosecutor's Office my leaving is ***nothing more than a personnel change***, not a change in focus or commitment, not a change in US policy or commitment, not a time or event that signals anything.

It is just a momentary stop along the continuum of what the Task Force and the Prosecutor's Office have done since this started in 2011 and what the Specialist Prosecutor's Office will do in future.

I have been privileged and honored to work with people for whom I will always have immense admiration and respect – and I confess great affection – Joe, Kip, Chris, Alan, Dan, Nadia, Sean, Daggi, Rupert, Ras, Nathalie, Iva, Luigi, Silvia, Matteo, everyone else who has played a part in the work of the Specialist Prosecutor's Office and given me encouragement in my time as the Specialist Prosecutor.

I am flattered that they were a little disappointed when I announced that it would not be possible for me to stay beyond 31 March.

What I admire most about them is their dedication to the work of the Prosecutor's Office and its mandate and their commitment to international criminal justice.

They may have been disappointed, but they have never been discouraged.

I've never known any of them to be discouraged even at times when that would have been normal behaviour – even expected under the circumstances.

As I said, this is just change.

It will mean little insofar as the work of the Prosecutor's Office is concerned.

That is particularly true because, in the interim, the Office will be led by my Deputy, the person who got me into this in the first place, Kwai Hong Ip.

Kip will be Acting, seized of full authority as the Specialist Prosecutor, until a new Specialist Prosecutor is installed.

I couldn't be leaving the Office in better hands – or in better shape.

We aren't where we want it to be just yet.

But we are where we need to be.

Tonight's themes

I am going to assume that many of you are wondering what the Specialist Prosecutor's Office is and who we are, what we do – some of you, no doubt, came hoping to learn how to get a job with us.

Some of you came believing, perhaps, that you were *attending the "big reveal"* – thinking I would offer something new about the investigation and where it is headed – who might be charged, whether anyone will be charged, what they might be charged with, how the Prosecutor's Office plans to meet its burden of proof or deal with the legal challenges that will undoubtedly be brought in future.

That, as I'm sure you know, is not something I am going to talk about.

Prosecutors let their actions speak for themselves.

As far as the specifics of our investigation are concerned, that, I'm afraid, will just have to be the standard tonight.

That said, I don't think what I say will disappoint you.

In the brief time I have I want first to set the Specialist Prosecutor's Office in its *historical and institutional context* – how it came to be so you can get an idea, your own idea, of what this says about how this experiment in the enforcement of international criminal norms might influence or affect future efforts to hold people accountable for atrocity crimes.

This is, in many respects, a unique twist on the notion of complementarity.

Kosovo has demonstrated it is willing, but recognized it is not able.

The EU has made it possible.

And a bespoke set of institutions and procedures in the style of the Kosovo judiciary but situated outside Kosovo and staffed solely by internationals has been created by Kosovo with the help of the EU and member states to give it life.

I also want to share with you some of the *policy guidance* I have given that has affected the work of the Specialist Prosecutor's Office during my time as the Specialist Prosecutor.

This isn't new, but it will be the first time I've talked about it in public.

The new Specialist Prosecutor will, of course, give his or her own policy guidance, perhaps on the same matters, but I want to open a window on how I tried to do my job for those of you who might not know how a prosecutor, especially an executive prosecutor, works.

It will help you understand better what we are doing to achieve our goal of producing legitimate outcomes that are perceived as legitimate by those they affect.

I also intend to *highlight a few of the challenges* that had to be dealt with, issues that had to be addressed, and problems that had to be overcome on the road that got us to where we are today.

As I will explain, not all of these challenges are historically unique.

This will be neither a comprehensive inventory nor an in depth discussion of everything we've had to deal with.

There isn't time and I am certain you don't have the patience for anything like that tonight.

Many of the challenges the Prosecutor's Office has faced, is facing and will face are challenges for the Specialist Chambers as well.

I will leave you to discuss that in future with my successor and the Registrar, Dr. Fidelma Donlon, my close and valued friend and colleague, and Her Honor, my distinguished colleague and dear friend President Ekaterina Trendafilova, the President of the Specialist Court.

Finally, if you will permit me, I want to end what I have to say by *reflecting briefly* in a personal way on a decade of doing this kind of work.

I hope I can inspire you to get involved if you aren't already and to stay involved if you are – to leave with more energy than you brought with you this evening.

As you will hear me say at the end of my remarks, this work – all of this – is much more than a way to make a living.

I am convinced it is a wonderful way to spend a life – next to being paid to play baseball, maybe the best way.

Origins

Now, how did we get here?

Michael Montgomery. In early 2000, a team of journalists led by Michael Montgomery, an investigative reporter with long experience in South Eastern Europe, began looking into troubling information he'd received about camps in Albania, including stories of prisoner executions and organ harvesting.

He travelled with a colleague to Albania in 2002 and early 2003 to collect information on detention facilities in Albania and on the abduction from Kosovo and transfer to Albania of Serbian men and others after June 1999.

Among the claims Montgomery and his colleagues looked into were allegations that organs were harvested at the detention centres; organs that were subsequently trafficked beyond Albania.

UNMIK. In 2003, Montgomery summarized these allegations and sent them to the Office of Missing Persons and Forensics of the recently established UN Interim Administration Mission in Kosovo (UNMIK).

Based on the information Montgomery supplied, UNMIK and the ICTY participated in a joint investigative and forensic visit to Albania in February 2004.

For a variety of reasons, however, the investigation came to a halt.

It was another five years before the information reached the public.

ICTY. The ICTY eventually mounted prosecutions of Kosovar leaders, but none dealt with the organ-trafficking claims.

The two best known prosecutions – those of Ramush Haradinaj and Fatmir Limaj – ultimately ended in acquittals.

Carla Del Ponte. In one of the chapters of the memoir she published in 2008, Carla Del Ponte, the former Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia or ICTY, claimed that senior leaders in the Kosovo independence movement bore responsibility for the organ trafficking alleged by Michael Montgomery to have involved a Kosovo Liberation Army (KLA) detention center allowed to operate for a time in 1999 in Northern Albania.

Marty Report. Carla Del Ponte's allegations so shocked the Council of Europe that it tasked Dick Marty, a Swiss Senator, member of the Parliamentary Assembly of the Council of Europe, and a former Swiss prosecutor, with conducting an inquiry that eventually led to a report he produced in 2010 for the Council of Europe Parliamentary Assembly's Committee on Legal Affairs and Human Rights.

Senator Marty's report was made public on January 7, 2011.

The "Marty Report," as it has come to be known, concluded that serious crimes, including war crimes and crimes against humanity, were committed between the beginning of 1998 and the end of 2000 by senior leaders of the KLA, some of whom now hold positions at the highest levels of government in Kosovo.

The inquiry conducted by Senator Marty focused primarily on organ trafficking, but covered other activity as well.

PSC and EULEX. Not long after the Marty Report was published, the EU Rule of Law Mission in Kosovo (EULEX) was directed by the Council of the European Union's Political

and Security Committee (PSC) to conduct a criminal investigation starting with the report's findings.

EULEX was created in 2008 to help Kosovo institutions acquire sustainable competence that would eventually make it possible for Kosovo to take over the judicial and law enforcement functions the UN Mission in Kosovo (UNMIK) assumed in June 1999 under UN Security Council Resolution 1244.

Under the authorities that established the Kosovo mission, EULEX enjoyed executive authority to conduct criminal investigations and try cases involving war crimes, ethnically motivated crimes, organized crime and crimes deemed too sensitive to be dealt with by local authorities.

The investigation, based on the claims made in the Marty Report, was covered by the EULEX mandate.

Special Investigative Task Force (SITF). In 2011, a Special Investigative Task Force (SITF) was created within the framework of EULEX for the purpose of carrying out an independent criminal investigation of the conduct Senator Marty addressed in his report.

In setting up the SITF, the EU and EULEX took significant organizational and administrative measures to ensure that its work would be insulated against outside influence and interference; that it would not be politicized.

It has been a key feature of everything that has been done since, a guiding principle for everyone who has been involved since the SITF was created, that the work of the SITF and now the work of the Specialist Chambers and the Specialist Prosecutor's Office be safeguarded from such influence and interference.

The US seconded former Ambassador-at-Large for War Crimes Issues, Clint Williamson, to lead the Task Force.

April 2014 exchange of letters. In April 2014, Catherine Ashton, High Representative of the European Union for Foreign Affairs and Security Policy, and Atifete Jahjaga, President of the

Republic of Kosovo, entered into an exchange of letters, subsequently ratified by the Kosovo Assembly as an international agreement [treaty], whereby Kosovo invited the EU to provide support – political, financial, administrative, and logistic – for a “specialist court within the Kosovo court system and a specialist prosecutor’s office” for “trial and appellate proceedings arising from the SITF investigation.”

In view of the nature of the allegations and the people under investigation, Kosovo agreed that “sensitive proceedings, including hearing of witnesses, would take place outside of the country.”

In addition, “filings and sensitive records would be introduced and maintained exclusively outside the country.”

To accomplish all of this, Kosovo promised the EU it would set up a “dedicated separate judicial chambers, which would be relocated to a third State pursuant to an Agreement with that State and which would include all levels of the court system, including the Constitutional Court, for any criminal proceedings, that arise out of the SITF’s work.”

Kosovo agreed that such “structures” would be staffed with and operated by international staff only.

Kosovo agreed to “adopt appropriate legislation” and “constitutional amendments as needed” to provide for the relocated chambers, prosecutor’s office and proceedings and to negotiate and ratify an agreement with another state to host it all.

The High Representative, Baroness Ashton, noting that “close co-operation” between the EU and Kosovo contributes to “strengthened stability and prosperity in the region,” accepted President Jahjaga’s invitation to provide support for the Specialist Chambers and Prosecutor’s Office.

With respect to continued EULEX support to the SITF and beyond, Baroness Ashton confirmed what President Jahjaga had committed Kosovo to; that is that EULEX would support the work of the SITF and proceedings that derived from it until the work and the proceedings concluded.

The High Representative noted in her reply that the work of the Special Investigative Task Force (“SITF”) and “any judicial proceedings deriving from it” would continue until such time as the Council of the European Union notified Kosovo that the investigation and subsequent proceedings were concluded.

Law on Specialist Chambers and Specialist Prosecutor’s Office (“Special Law”). In August 2015, the Kosovo National Assembly passed a constitutional amendment and the ***Law on Specialist Chambers and Specialist Prosecutor’s Office (“Special Law”)***, in keeping with the commitment Kosovo made to the EU in 2014.

The constitutional amendment and the Special Law went into effect in September 2015 after the Constitutional Court of Kosovo determined there were no constitutional defects in either.

The stage was set for the EU to make good on the commitment the High Representative made to Kosovo in April 2014.

The European Union. In late 2015 and early 2016, the European External Action Service (EEAS) began the technical work necessary to create the practical and legal bases for meeting its commitment to fund the new Specialist Chambers and Specialist Prosecutor’s Office and to manage the forthcoming financial, personnel, and logistical challenges the new institutions posed for the EU as donor.

The entire enterprise was a new and unique experience for the EU, one it bravely embarked upon with only limited understanding of what it takes to investigate and prosecute crimes against humanity and war crimes, especially under circumstances like those that exist in Kosovo and in relation to conduct that occurred almost two decades earlier.

Host State Agreement. In early 2016, the Republic of Kosovo and the Kingdom of the Netherlands reached an agreement for the Netherlands to host the institutions and proceedings provided for in the Special Law.

Privileges and immunities and other concessions were granted under an interim arrangement allowing the institutions created by the Special Law to relocate to The Hague and to function throughout the better part of 2016.

The bilateral agreement became fully effective on January 1, 2017.

EU funding. In June 2016, the PSC gave instructions for establishing and funding the Specialist Prosecutor's Office and the Specialist Chambers created by the Special Law and for funding and supporting the "relocated proceedings" contemplated by the Special Law for an initial period of five years beginning June 15, 2016.

Specialist Prosecutor's Office. On September 1, 2016, the SITF formally became the Specialist Prosecutor's Office as provided by the Special Law.

The same day I accepted appointment to a statutory four-year term as Specialist or Chief Prosecutor of the Specialist Prosecutor's Office.

I had every reason to think I would be able to finish my term.

For reasons that have nothing to do with the Office, the work of the Office, or the commitment anyone has to seeing all of this through to the end, that is no longer possible.

I am hopeful that a new Specialist Prosecutor will be selected and that he or she will be appointed soon, but as I mentioned earlier, the work and the Office are in the best hands regardless.

On September 1, 2016, the Office entered a new phase.

We assumed all of the authorities, the obligations, the responsibilities and tasks the Task Force had undertaken.

The Specialist Prosecutor's Office simply picked up where the Task Force left off – a seamless handover as provided for in the Special Law.

But as of September 1, 2016, the burden on the Specialist Prosecutor and the Office changed.

The Specialist Prosecutor became responsible for the decisions that have to be made regarding prosecution and those working in the Office took on the daunting task of assessing and evaluating all that had been done with an eye to preparing the Specialist Prosecutor to make the very lonely decisions only a prosecutor can make regarding who to charge and what to charge them with if evidence existed to justify it.

We were not longer simply making reports or issuing statements regarding the subject matter.

Indeed, when I spoke with Ambassador Williamson in July 2014, the Special Law was a year from being passed and even that was uncertain; there was no court; there was no prosecutor's office; there were no rules of procedure, no budget yet for the next phase if there was going to be one.

As I have noted already, that is no longer the case.

The legal bases, the institutions, the rules, the financial support exist.

The Specialist Prosecutor must now prove beyond a reasonable doubt, whatever he or she accuses someone of – beyond a reasonable doubt as to each person and each charge put forward and confirmed.

Mandate and Some Fundamental Policy Guidance

So what can the Specialist Prosecutor and the Specialist Prosecutor's Office do?

The mandate. As set out in the Special Law, the mandate of the Specialist Prosecutor's Office is to *investigate and prosecute*:

- “grave transboundary and international crimes” as defined by the Special Law – primarily war crimes and crimes against humanity as defined by customary international law;

- that are related to the conduct covered by the Council of Europe Parliamentary Assembly report produced by Senator Dick Marty – the *Marty Report* – as *investigated by the SITF and its successor, the Specialist Prosecutor’s Office*;
- that were committed during the period covered by the Special Law – 1998, 1999, and 2000;
- that were committed by people over whom the Specialist Court has personal jurisdiction; and
- that were committed in the places over which the Specialist Court has jurisdiction; or
- crimes that involve conduct that interferes with or jeopardizes the integrity of investigation or of proceedings before the Specialist Court.

Well-grounded suspicion. Under Article 86 of the Rules of Procedure and Evidence (RoPE) promulgated by the Specialist Chambers, before an indictment can be filed the Specialist Prosecutor must be satisfied that “**there is well-grounded suspicion** that a suspect committed or participated in the commission of a crime within the jurisdiction of the Specialist Chambers.”

Though not “expressly incorporated and applied” by the Special Law, the requirement in Article 19 of the Special Law that the Specialist Chambers be guided by the existing Kosovo Criminal Procedure Code in the creation of the Rules of Procedure and Evidence, together with the absence of any independent or contrary definition of the term “well-grounded suspicion” in the Special Law or in the rules adopted by the Specialist Chambers suggests that the term as used by Chambers in Rule 86 of the Rules of Procedure and Evidence should be interpreted in light of the current Kosovo Criminal Procedure Code definition of “well-grounded suspicion” found in Article 19 (1.12) of the Code; that is,

... **Possession of admissible evidence** that would satisfy an **objective observer** that a criminal offence has occurred and the defendant has committed the offence.

This, then, is the basic test for deciding who and what to charge.

Additional criteria. Based on best professional practice, I have directed that we make a further assessment to determine whether charges ought to be filed; that is, whether a proposed charge is supported by:

- evidence that will be available to present at trial; and
- evidence that after it is tested by a well-informed, responsible and vigorous defense will likely be sufficient in quantity and quality to result in verdicts of guilty that can be sustained on appeal as to each accused and each charge proposed for confirmation.

Human rights obligations. Under the Kosovo Constitution and the Special Law the Specialist Prosecutor and Specialist Chambers are bound, along with other international human rights instruments, by the European Convention on Human Rights.

Thus, together with the responsibility to help ensure an accused receives the benefit of the right to liberty and security, and the fair trial and due process rights guaranteed by the Kosovo Constitution, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights, the Specialist Prosecutor is also responsible for helping victims achieve the benefit of the rights guaranteed to them by the same instruments.

Principal among them is the obligation to reasonably investigate the death and disappearance of victims of the crimes within the mandate of the Specialist Prosecutor, and to locate, exhume and identify those still missing so they can be given back their identity and returned to those who survived them.

My policy has been to give this our best effort consistent with our mandate and to the extent our resources permit.

This is a personal commitment and one about which we all feel strongly.

Challenges

National Military Tribunals. It is helpful and somewhat comforting to see things from a historical perspective.

When that is done, some of the challenges the Specialist Prosecutor's Office faces are remarkably similar to ones encountered and overcome in connection with the establishment and operation of the National Military Tribunals (NMT) before which the United States conducted thirteen trials in Nuremberg under Control Council Law No. 10, following the close of the International Military Tribunal (IMT) in October 1946.

Brigadier General Telford Taylor, the US Chief of Counsel for War Crimes in 1946, describes what some of these challenges were and how the National Military Tribunals handled them in the report he made to the Secretary of the Army at the conclusion of the trials which were conducted between 1946 and 1949.

Among others, the challenges the general dealt with setting up the Tribunal included:

- finding competent staff to serve as prosecutors;
- recruitment and organization of staff to support the prosecution and the tribunal;
- “actual procurement and evaluation of evidence, documentary and oral;”
- “screening the mass of documents that existed in the captured document centers and other repositories in Germany, the United States and elsewhere;”
- the evaluation of the results of interrogations conducted by intelligence teams and others shortly after the war and interrogations conducted in connection with the International Military Tribunal.

“As the documentary and oral evidence grew in volume and was ‘sorted out’ by the lawyers and research analysts,” the general noted, “it became possible . . . to embark on the next task: the determination of what individuals should be accused, and of what they should be accused.”

Only after that had been accomplished and charges prepared, could preparations for holding trials be started.

The qualifications judges would have to meet were settled.

Judges were recruited.

Qualifications for defense counsel were fixed.

A *Central Secretariat with an Administrative Branch* was created to support the Tribunals, including the obtaining of defense counsel and the “provision of facilities for use in their work, and the creation and management of a Defense Center that provided a wide range of services to defense counsel.

Physical arrangements for the Tribunals and staff also had to be made.

There are, of course, significant differences between what was and could be done in 1946 and the tasks facing the Specialist Prosecutor’s Office in 2018, but as you can see much was the same.

Dealing with the mass of material that must be assessed. What was learned doing the main trial in Nuremberg, taking advantage of what was left in place when it concluded in 1946, coupled with the vast resources at the general’s disposal – by the end of October 1946 he had 400 people, most of them on the prosecution side, working for him and the number was growing – made meeting the logistical challenges and the assessment of evidence, selection of accused, and charging decisions happen relatively quickly.

The great caches of material and documentation that had evidentiary value, though posing their own problems for analysts and prosecutors, nonetheless were immediately available to review.

In the case of the Specialist Prosecutor’s Office and the Task Force before it, a good deal of the evidentiary material is held by a variety of states and organizations, some of which are reluctant for various reasons to allow access.

Gathering documentation, locating witnesses, finding other material that may have evidentiary value is more fraught in our case, requiring patience and perseverance as well as diplomacy.

The Specialist Prosecutor's Office is now assessing and evaluating approximately 700,000 pages of documentation, comprising around 70,000 documents, along with some 6000 related items – videos, photographs, transcripts and other items collected during the investigation to date.

The number is growing as our investigation continues.

We are also assessing and evaluating hundreds of witness interviews and conducting more interviews as we continue to work to discharge our responsibilities under the mandate.

It takes time and expertise to do all of that and do it well.

We have fewer resources to work with than the general had in 1946.

But we make up for it in organization, expertise, and the dedication and commitment of the people working in the Specialist Prosecutor's Office.

They are fully engaged and well led and directed in their efforts by the leaders of the trial and legal teams.

The tasks I've mentioned must be completed before the criteria I described earlier can be met.

It will take more time to do it all and do it well.

We must do it right and do it well to ensure that we meet the standard I spoke of earlier and avoid significant delays and problems later on.

It is also essential if we are to meet our goal of producing outcomes that are legitimate and are perceived as legitimate by those they affect.

Accountability. Once a post-conflict state commits itself to a criminal justice approach for dealing with conduct committed during or in connection with conflict, as it must under a variety of international conventions and treaties as to which it is almost certainly bound, as is Kosovo, ***accountability becomes the paramount goal.***

The business of the prosecutor is accountability; individual accountability for crimes proven beyond a reasonable doubt by evidence acquired through means accepted as fair and reliable not only according to international standards but also in the domestic systems involved.

Accountability must be for individual acts not group liability for any of the conduct covered by the Special Law.

The work of the Specialist Prosecutor and Specialist Chambers is not an attack on a historical narrative such as the Kosovo independence narrative or the Kosovo Liberation Army veterans' narrative.

The EU is not investing as much as it is, the US did not send me here to do this, none of us are involved in what we are doing to change history, or to attack a narrative, or an organization, or a group, or ethnicity.

Our sole objective is to do what the law and the evidence allow us to do to put people to proof ***for their own acts.***

The genius of modern international criminal law is that it focuses on individual accountability for the violation of international criminal norms.

Individuals in groups, of course, can be liable for their roles in action they take together in pursuit of criminal purposes, but the liability is still personal; personal liability for acts committed with criminal intent.

If an organization to which an accused belongs, or which he or she controls or directs, or uses for criminal purposes is discredited by what the accused is accountable for, it is the crimes of the accused that are to blame, not those who investigate or prosecute the accused.

Sensitive and vulnerable witnesses. Establishing the “crime base” in cases involving atrocity will almost always involve evidence given by victims of the crimes alleged and documentary

or other evidence, including physical evidence and the evidence of observers, that corroborate the victims' accounts.

Proving responsibility for the crimes will invariably involve evidence given by those who participated in them, people who have criminal exposure themselves in many cases, people close to those who committed crimes and can testify first hand regarding their acts and intentions, and others who have direct knowledge of things that must be proven to establish culpability.

These people are likely to be the most vulnerable to intimidation, threat and interference.

Donors and contributing states must be committed to undertaking responsibility for helping protect those witnesses and help us ensure they will be available when the time comes for them to give evidence.

Treatment of this sort must not be considered a benefit to the witness or an inducement and measures must be taken to manage this in the most effective, most professional and ethical way.

Managing expectations. Recognizing and understanding the expectations people who are affected by our work have of us is a recurring challenge.

It is one that must be met in order to help educate and inform those affected by what we do in ways that promote confidence in those we need to involve in order to do our work.

In this regard, we must never promise more than we can deliver nor more than our mandate and resources permit.

We must never deliver less than we promise.

We must remain independent in fact.

To the extent we can control it or influence it, we must do all we can to be perceived as independent by those affected by what we do.

We must also be transparent within the limits – legal, professional and ethical – that apply to prosecutors.

Well-meaning donors must avoid making institutions like the Prosecutor's Office more vulnerable by failing to grasp the nature of criminal investigations and prosecutions of atrocity crimes and expecting too much of them.

Without experience to guide them, donors may fail to see atrocity crime as anything other than a kind of complex crime routinely dealt with by their own domestic prosecutors and established courts.

They may expect investigations and prosecutions to be done in a relatively short period of time with the kind of resources that might be adequate when an established judicial system is available.

Seeing things this way fails to take into account the unique features and attendant demands of atrocity crime investigation and prosecution.

This inevitably has an adverse impact on planning, budgeting and staffing.

Atrocity crime investigations and prosecution are not only complex.

They deal with conduct committed in the midst of chaos on a scale that is usually so large, both with regard to territory and damage – personal and property – and so dramatic and wide spread in terms of its impact that it makes the identification, collection and preservation of evidence uniquely challenging and protracted, calling for skills and expertise that are uncommon.

The conduct under investigation often involves the dislocation of vast numbers of people making finding and collecting evidence from survivors and displaced persons difficult and tedious.

Many times the investigation and prosecution of atrocity comes only after the conditions evolve to make them possible, often years or even decades after the conduct occurred.

This, too, makes these kinds of investigations unique, time-consuming and resource intensive.

Donors who sign on to support these kinds of investigations and prosecutions must re-orient their thinking to ensure that political will does not wain and a loss of interest does not interfere in the short or long-term with the institutions created to do the work.

The same goes for political expediency.

This doesn't mean, of course, that the donors and contributing states should not insist that the work of the institutions be done as expeditiously and efficiently as possible, building on what can be learned and adapted from the work of other experiments in the enforcement of international criminal norms.

Haste is no friend of justice, but neither is unreasonable delay.

The further things get from when crimes were committed, the less credible efforts to address them are going to seem and the weaker the perception of their efforts as legitimate is going to be.

This expectation must be managed within the constraints of the legal, professional, and ethical limits that a prosecutor must respect and the resources available to him or her to use.

Conclusion

I promised you when I began that I would give you something to think about.

I also promised you that I would tell you who we are and how we came to be.

You now have an idea of our mandate and what we are doing to discharge it.

Hopefully, you also have a better idea how we see ourselves as prosecutors in this new institution and you have a sense of what the Specialist Prosecutor's role is.

I've given you a taste of *some of the challenges* we have worked with to date; what we are dealing with now; and what we will have to deal with in future.

I hope I have succeeded in getting you to think how what can be learned from this experiment may be applied in other situations that will require attention in future – situations that may not fit under the umbrella of the International Criminal Court; situations that are better dealt with domestically, but where domestic institutions are willing, or can be made to be willing, but simply aren't capable of delivering legitimate outcomes that are likely to be perceived as legitimate by those they affect.

As I said in the beginning, I would like to be able to see this through, but I leave it in very capable hands.

I will follow this closely now – but as a spectator.