



March 3, 2005

VIA FACSIMILE/ (+352 46 27 49)

His Excellency Jean Asselborn
Minister of Foreign Affairs and Immigration
The Grand Duchy of Luxembourg
5, rue Notre-Dame
L-2240 Luxembourg

Re: **Breach of EU Member States' International Obligations
In the Case of Croatia's Accession to the European Union**

Your Excellency:

I write to you as president of the Croatian American Association, which is the voice of the Croatian American community in the United States. I write specifically in regards to the European Union's threat to suspend accession talks with the Republic of Croatia which are due to start on 17 March 2005, unless there is "full cooperation" with the International Criminal Tribunal for the former Yugoslavia ("ICTY"). Left unclear in the EU's position is to whom the EU will look to determine the status of Croatia's cooperation with the ICTY. I write this letter to advise you that, according to the jurisprudence of the Appellate Chamber ICTY, Croatia is already in full compliance with its obligations to the ICTY, and any determination that Croatia is not "fully complying" with its ICTY obligations can only be made by the judiciary of the ICTY, **not** the European Union or Carla del Ponte. In fact, according to a decision of the Appellate Chamber of the ICTY, *the member states of the European Union would be in violation of the UN Charter and the spirit of the Statute of the ICTY* if they penalized Croatia for "lack of full compliance" even though there has been no judicial finding to this effect by the judges of the ICTY.

I draw your attention to the decision of the Appellate Chamber of the ICTY in the case of *Prosecutor v. Tihomir Blaskic, Judgement on the Request of the Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997, (29 October 1997)*. (hereinafter referred to as the “Appellate Chamber Judgement”).¹ There, the Appellate Chamber of the ICTY was explicitly clear in explaining not only the obligations of UN Member States to fully comply with their obligations to the ICTY, but also the obligations of UN Member States in enforcing compliance with ICTY obligations by other UN member states deemed not in compliance. First, the Appellate Chamber ruled that it is the judges of the ICTY (and not the Security Council, the Prosecutor or other UN member states) that determine whether a UN member state is in breach of its obligations to fully comply with its ICTY obligations. The Appellate Chamber wrote:

It is appropriate at this juncture to illustrate the power of the International Tribunal to make such a judicial finding. When faced with an allegation of non-compliance with an order or request issued under Article 29, *a Judge, a Trial Chamber or the President must be satisfied that the State has clearly failed to comply with the order or request*. This finding is totally different from that made, at the request of the Security Council, by a fact-finding body, and *a fortiori* from that undertaken by a political or quasi-political body. Depending upon the circumstances the determination by the latter may undoubtedly constitute an authoritative statement of what has occurred in a particular area of interest to the Security Council; it may set forth the views of the relevant body on the question of whether or not a certain State has breached international standards. In addition, the conclusions of the bodies at issue may include suggestions or recommendations for action by the Security Council. *By contrast, the International Tribunal (i.e., a Trial Chamber, a Judge or the President) engages in a judicial activity proper: acting upon all the principles and rules of judicial propriety, it scrutinises the behaviour of a certain State in order to establish formally whether or not that State has breached its international obligation to cooperate with the International Tribunal.*

See *Appellate Chamber Judgement*, at paragraph 35 (emphasis added). Note that the Appellate Chamber makes clear that it is a “Trial Chamber, a Judge or the President of the Tribunal” that establishes whether or not a State has breached its international obligations to cooperate with the ICTY after engaging in a judicial process to examine allegations of non-compliance. Nowhere does the Appellate Chamber allow for the possibility of the Prosecutor to make that determination, unilaterally and without the benefit of judicial review.

¹ A copy of this decision can be found on the ICTY’s website at the address <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html#II-B-4>

The Appellate Chamber went on to explain the role of other UN Member States and “intergovernmental organizations” (such as the EU) in enforcing compliance by a Member State found to be in violation of its ICTY obligations. The Appellate Chamber explained that “arbitrariness” in evaluating compliance with ICTY obligations should be avoided, and therefore **UN Member States and intergovernmental organizations could only take action after there had been a judicial finding of non-compliance by the ICTY.** The Appellate Chamber stated:

Faced with the situation where a judicial finding by the International Tribunal of a breach of Article 29 has been reported to the Security Council, each Member State of the United Nations may act upon the legal interest referred to; consequently it may request the State to terminate its breach of Article 29. In addition to this possible unilateral action, a collective response through other intergovernmental organizations may be envisaged. *The fundamental principles of the United Nations Charter and the spirit of the Statute of the International Tribunal aim to limit, as far as possible, the risks of arbitrariness and conflict.* They therefore give pride of place to collective or joint action to be taken through an intergovernmental organization. **It is appropriate to emphasise that this collective action:**

(i) **may only be taken after a judicial finding has been made by the International Tribunal**; and

(ii) may take various forms, such as a political or moral condemnation, or a collective request to cease the breach, or economic or diplomatic sanctions.

See Appellate Chamber Judgement, at paragraph 36. Accordingly, the European Union may take collective action against Croatia for “lack of full compliance with ICTY obligations” only after there has been a judicial finding by the International Tribunal that Croatia is not in full compliance with its ICTY obligations.

As you know, in April 2004 the ICTY reported to the European Commission that Croatia was in full compliance with its obligations to the ICTY. It was on this basis that the European Commission issued a positive *avis* to Croatia, and it was on the basis of “full compliance” that Croatia was formally declared a candidate for EU membership in June 2004. Since that time, there has been no judicial finding whatsoever that Croatia is in violation of any of its obligations to the ICTY.

The position of the ICTY Prosecutor is not authoritative on the issue of a Member State's compliance with its ICTY obligations. As demonstrated above, a finding of non-compliance can only be made by the ICTY's judiciary. There has been no such finding. Moreover, as demonstrated above, if the European Union were to take punitive measures against Croatia on the basis of its own conclusion that there was "less than full cooperation" even though there had been no judicial finding to that effect, then the European Union would be in violation of the UN Charter, the spirit of the ICTY Statute, and prior ICTY jurisprudence on this issue as clearly expressed in the Appellate Chamber Judgement cited in this letter.

Accordingly, the Croatian American Association respectfully requests that the member states of the European Union seek the advice of the President of the ICTY (Judge Theodor Meron) as to whether there has been a judicial finding of non-compliance by Croatia with its ICTY obligations. It is not for the European Union or for the Prosecutor of the Tribunal to determine the definition of "full compliance" with ICTY obligations. This is a judicial determination that must be made by the judges of the ICTY, as has already been explained by the ICTY judges in the Blaskic case.

We would respectfully request that you circulate this letter to the other member states of the European Union.

Your Excellency, please accept the assurances of my highest consideration.

Sincerely,



George Rudman
President, Croatian American Association