

**THE OPERATION OF HUMAN RIGHTS BEFORE AN  
INTERNATIONAL CRIMINAL COURT:  
THE CASE OF THE YUGOSLAVIA TRIBUNAL FROM A DEFENCE  
COUNSEL'S PERSPECTIVE**

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**The Yugoslavia Tribunal**

This Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law was established by the Security Council in 1993.<sup>1</sup> This historic development created the first international tribunal after the post-war Nuremberg and Tokyo Tribunals and was followed by the establishment of the Rwanda Tribunal in 1994.<sup>2</sup>

The introduction of an international<sup>3</sup> criminal tribunal created new problems in terms of human rights. Before touching on this issue, let me first briefly explain the framework of this new system. There is a statute<sup>4</sup> regulating the organization of the judges<sup>5</sup>, the Prosecutor<sup>6</sup> and the Registry<sup>7</sup>, and this statute also sets out, in general, issues such as jurisdiction<sup>8</sup>, criminal responsibility<sup>9</sup> and the rights of the accused<sup>10</sup>. The Statute, however, does not contain substantive law with a view to offenses since it does not describe the elements that constitute a serious violation of international humanitarian law. The Statute only indicates these violations by describing the competence of the Tribunal<sup>11</sup>.

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<sup>1</sup> Security Council Resolutions 808 of 22 February 1993 and 827 of 25 May 1993.

<sup>2</sup> Security Council Resolution 955 of 8 November 1994.

<sup>3</sup> Since the tribunal is not established by convention between States it seems better to see both ad hoc tribunals as supranational tribunals

<sup>4</sup> Adopted by 827 of 25 May 1994.

<sup>5</sup> Articles 11-14 of the Statute.

<sup>6</sup> Article 16 of the Statute.

<sup>7</sup> Article 17 of the Statute.

<sup>8</sup> Articles 1 and 8 (territorial and temporal jurisdiction), articles 2-5 (subject matter jurisdiction), 6 (personal jurisdiction), 9 and 10 (concurrent jurisdiction) of the Statute.

<sup>9</sup> Article 7 of the Statute.

<sup>10</sup> Article 21 of the Statute.

<sup>11</sup> See footnote 8.

The Statute<sup>12</sup> assigns the judges with the regulation of formal law, this was done by drafting and adopting the Rules of Procedure and Evidence<sup>13</sup>. These Rules are more or less of a common law nature with a blend of civil law elements. The unique mixture, however, only provides for minimum guidance. Much is left to the discretion of the judges to be dealt with by case law. The Statute and Rules of the Rwanda Tribunal follow the same pattern.

## **Fair Trial**

Rumour has it that the Rules function as pioneer law with the defendants of the first cases to be tried as guinea pigs. Everyone appreciates that a focus on the human rights of defendants does not mean that criminals should not be prosecuted. But such undertaking should only be instituted by a fair trial. Indeed, all civilised States (and less reputable States too) claim that their criminal justice system provides for a fair trial. However domestic systems differ a lot. Criminal lawyers working in common law jurisdictions may express views about the requirement of a fair trial that may differ from the views of criminal lawyers, who work in civil law jurisdictions. International criminal lawyers will tell you that the concept of a fair trial is ambiguous and that it should be understood in the context of the system in which it should operate.

You will appreciate that the value of a mature legal system derives from the checks and balances within that system, structured and restructured by generations of legislators and refined by case law. Being so, the creation of a typical own context seems to be inherent to the functioning of any legal system. Given this phenomena of sociology of law, the European Court of Human Rights interprets the conventional concept of a fair trial in the context of the domestic legal system of the case at hand. What is acceptable in one system may be unacceptable in another.

The legal system of the Yugoslavia Tribunal, though, is a novelty in the sense that it is supposed to respond to the specific needs of international trials. The Tribunal does not function as a domestic judicial organ within the legal system of a State. Being a supra-national tribunal, it functions on the basis of procedural rules of a common

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<sup>12</sup> Article 15 of the Statute.

<sup>13</sup> Adopted on 11 February 1994 and frequently amended since then.

law nature with a blend of civil law elements, providing for a bench trial. The judges sit as triers of fact and rule on the admissibility and sufficiency of any evidence presented. So far this melting pot has raised a couple of questions on the concept of a fair trial. I will describe some of these questions.

### **Putting your case**

In inquisitorial systems where public prosecutors are in charge of police investigations and where magistrates deal with the instruction of criminal cases, a defence lawyer does not have the same powers and rights as common law defence lawyers have. In civil law jurisdictions, defence lawyers do not present their case. The bench has an obligation *ex officio* to find the truth. A hallmark of the accusatorial system, though, is that each party will have and will be able to put its case forward.

Presenting your case means that the defence puts forward their position towards the allegations. If, for example, they claim to have an alibi, the defence will have to substantiate that claim by calling witnesses. The defence will act in the interest of their client during cross-examination of prosecution witnesses.

### **Access to witnesses**

Equality of arms, means in an accusatorial system that both parties should be able to locate, interview and present relevant witnesses. If not, domestic systems respond to inequalities by providing for legal instruments or for procedural compensation. Usually this causes no problems when witnesses live in the country where the court is located. If one or more witnesses live abroad, the conventional system of mutual assistance in criminal matters between States enables rogatory commissions to hear the witnesses. In cases before an international tribunal, the situation is structurally different. Witnesses seldom live in the country of the seat of such a tribunal.

The tribunal system has dealt with this problem thus: The prosecution may summon and question witnesses.<sup>14</sup> The defence can not.<sup>15</sup> Comparable to provisions of treaties dealing with mutual assistance in criminal matters, the prosecution may

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<sup>14</sup> Rule 39(i): summon and question suspects, victims and witnesses.

<sup>15</sup> The defence may only request a Trial Chamber to summon a witness under the general provision of Rule 72 after the initial appearance. The Prosecutor can file such request from the very beginning under Rule 39(iv).

seek the assistance of any State authority as well as of any international body<sup>16</sup> the defence can not. Under the Statute, States have to comply with requests of the prosecution.<sup>17</sup> This inquisitorial input in an accusatorial oriented trial system where both parties will have to present their case, may cast doubts about the provision of a fair trial by the Rules. Without the necessary legal instruments, the defence will have problems in calling witnesses.

In the *Tadic* case before the Yugoslavia Tribunal, in which I was defence counsel, this was a serious problem. All defence witnesses resided in Republika Srpska where the alleged crimes had been committed. This entity is a part of Bosnia-Herzegovina but is not recognized by international law as an independent state. The Tribunal did not recognize Republika Srpska and this *de facto* state did not recognize the Tribunal. The state of Bosnia-Herzegovina responsible for compliance with the Statute had no factual authority in this area. For this reason, I had to do discovery in a legal vacuum. Calling witnesses to testify in The Hague was not effectively supported by international or domestic law. All prosecution witnesses, however, lived outside this so-called rebel State in countries that comply with the Statute.

Besides this inequality of legal arms, factual obstacles may also cause a form of inequality for example if any of the parties is affected by specific circumstances on location, such as an ongoing war or floating refugees. At the time Bosnia was still at war, it was almost impossible for me to carry out effective investigations. I could not enter war zones. Most adult male were mobilised and witnesses I had previously located disappeared. The accessibility of witnesses did not really improve after the Dayton agreement as local authorities frustrated discovery by arresting potential witnesses. Others were threatened by the police not to give evidence. Many were afraid to speak with the defence. This specific problem, due to the exceptional circumstances in the area, was not addressed by any legal instrument.

The key problem is that an international tribunal does not function in the framework of domestic facilities, and it does not have any executive organ to enforce the administration of justice outside the court<sup>18</sup>. The theory that the defence can

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<sup>16</sup> Article 29 of the Statute and Rules 39(iii) and 40.

<sup>17</sup> Article 29(2) of the Statute

<sup>18</sup> The Arms and Legs of the International Criminal Tribunal for the former Yugoslavia, Roeland Kolen, University of Utrecht 1997

ask local authorities to subpoena<sup>19</sup> witnesses to appear at the hearing of the international tribunal or request the tribunal<sup>20</sup> to order the local authorities to give the necessary cooperation, does not hold true. Firstly not all domestic legislation allows the enforcement by local authorities of a summons on behalf of the defence or by the international tribunal. Secondly, in many cases local authorities do not want to enforce such summons<sup>21</sup>. Finally, orders of the tribunal to local authorities are disobeyed. Although the tribunal can report such refusal of cooperation to the Security Council, the result of this cumbersome procedure is practically nil<sup>22</sup>.

The reality, therefore, is that the defence is entirely dependent on what is allowed by the local authorities or the willingness of private individuals to voluntarily cooperate with the defence. This is a serious flaw for which no solution has been found as yet.

The right to examine the witnesses against the defendant is not simply a matter of equality of arms, but, indeed, a fundamental component of the right to a fair trial. The defence must have an opportunity to conduct an in-depth examination of the background of prosecution witnesses to test the veracity of the testimony of the witness and to identify potential bias. This is particularly important with respect to the core crimes within the jurisdiction of the tribunal. In many cases, the objectivity of the prosecution witnesses will have to be thoroughly examined.

### **Witness protection**

A special feature in international trials is the protection of witnesses of war crimes or crimes against humanity, as well as the victims of such offenses. The prosecution may seek special measures to protect their witness against re-traumatization or possible retaliation. Such protection may include confidentiality<sup>23</sup> and anonymity.<sup>24</sup>

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<sup>19</sup> Witnesses before the International Criminal Tribunal for the Former Yugoslavia, A. Klip, *International Review of Penal Law*, Vol. 67 1st and 2nd trimester, 1996.

<sup>20</sup> General provision of Rule 72: footnote 15

<sup>22</sup> In general for political reasons because of disputable State involvement of policies and in particular, because of personal involvement in the case at hand.

<sup>23</sup> Non-disclosure to the public and the media by hearing the witness in camera or in open court.

<sup>24</sup> Whereby the identity of the witness is not disclosed to the defendant or counsel.

Under the Statute, a trial chamber of the tribunal has to apply the dual obligation of a fair trial for the defendant<sup>25</sup> subject to protection for witnesses.<sup>26</sup> Balancing these obligations, the judges have applied strict criteria before granting anonymity.<sup>27</sup> The dilemma was whether to have anonymous witnesses or not.<sup>28</sup>

In the *Tadic* case, the Trial Chamber, while noting that Article 21 of the Statute reflected the standard of due process set forth in Article 14 of the International Covenant, stated that the terms of that provision must be interpreted within the context of the object and purpose and unique characteristics of the Statute. In this regard, the Trial Chamber considered it relevant that the tribunal was operating in the midst of an on-going conflict and was without a police force or witness protection programme. In the opinion of the Trial Chamber, these considerations were unique, as neither Article 14 of the International Covenant, nor Article 6 of the European Convention listed the protection of witnesses as one of their primary considerations.

I will not address the question whether the tribunal was correct in reasoning that both the International Covenant and the European Convention do not consider the protection of witnesses to be balanced against the right to a fair trial of a defendant. The interesting issue, though, is a new concept of fair trial developing at the level of international trials.

One should realize, however, that the defence may benefit from this case law too. Defence witnesses may, for example, have had two kinds of concerns: retribution by the local authorities if they testify in The Hague and/ or arrest by the prosecution. This problem can not only be compensated by witness protection but also by creating new legal instruments and giving evidence through video link.

It can be inferred from the obligation of States to comply with the Statute that the prosecution had access to information documented by official bodies outside the former Yugoslavia.<sup>29</sup> The defence did not. This was not only a problem related to the

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<sup>25</sup> Article 21 of the Statute.

<sup>26</sup> Article 22 of the Statute.

<sup>27</sup> See *Prosecution v. Tadic*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 August 1995, see also Monroe Leigh, *The Yugoslav Tribunal; Use of unnamed Witnesses Against Accused*, 90 *American Journal of International Law* (1996).

<sup>28</sup> The use of anonymous witnesses is prohibited by the ICCPR; see the Human Rights Committee General Comment 13(21); the American Convention on Human Rights; see *Second Report on the Situation of Human Rights in Colombia*, 14 October 1993, p. 98, and the ECHR; see ECHR 23 April 1997, par.62 (*van Mechelen case*)

<sup>29</sup> See Article 29(b) and particularly Article 29(c) of the Statute.

factual aspects of the defence of alibi, but specifically to the legal elements of the alleged crimes. These include elements in relation to war crimes, such as whether the conflict was of an internal or an international character.<sup>30</sup> In the *Tadic* case we were not provided with information by any State or agency. We know, though, that the prosecution got materials from US intelligence services, such as satellite photos and military documentation.

## Evidence

Another area of interest is the rules of evidence of the tribunal. There are only few rules<sup>31</sup> dealing with matters of evidence. The other rules are those dealing with verification,<sup>32</sup> judicial notice,<sup>33</sup> consistent pattern<sup>34</sup> and confessions<sup>35</sup> as well as special provisions in cases of sexual assault.<sup>36</sup> The rules of evidence come down to this: any evidence may be admitted when the Trial Chamber deems it to have probative value, unless its probative value is substantially outweighed by the need to ensure a fair trial or when it is obtained by methods which cast substantial doubt on its reliability or if its admission is unethical and would seriously damage the integrity of the proceedings.<sup>37</sup>

In general, it seems inherent in the character of a supra-national criminal tribunal, dealing with a hybrid law system rather than on a national justice system, to develop most of the rules of evidence rather than to incorporate detailed rules of evidence in a statute. A good foundation that may secure a fair trial to the defendant should provide for rules that do not bind trial chambers by national rules of evidence, and that ensures that trial chambers apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of general legal principles<sup>38</sup>.

Another problem arises when States or (military) officials claim privileges on the basis of national security or State sovereignty. In such a situation, the supra-nation-

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<sup>30</sup> See for example the grave breaches of the Geneva Conventions of Article 2 of the Statute

<sup>31</sup> Rules 89-90 and 92-96

<sup>32</sup> Rule 89 (E).

<sup>33</sup> Rule 94.

<sup>34</sup> Rule 93.

<sup>35</sup> Rule 92.

<sup>36</sup> Rule 96.

<sup>37</sup> See Rule 89

<sup>38</sup> See Rule 89 (B).

al character of an international criminal court may cause problems that are principally different from those of a domestic court in the same situation. So far, the case law of the Yugoslavia Tribunal has shown a lack of enforcement.<sup>39</sup>

As already mentioned, the judges sit as triers of fact and rule on the admissibility and sufficiency of evidence presented. It follows from the rules described above that the judges are not bound by strict rules of evidence. The key for admissibility and sufficiency of evidence is of probative value. I have no problem recognizing that a bench trial reduces the need for elaborate rules, but in the framework of the present rules the judges have too much discretion in the admissibility of evidence.

This can lead to a degree of uncertainty regarding the admissibility of evidence especially when it comes to hearsay evidence.<sup>40</sup> It seems to me that a further elaboration on hearsay evidence is required to protect a defendant against trial on the basis of rumours.

In the *Tadic* case, we informed the judges that the peculiar situation at the time was likely to have led to the proliferation of stories and rumours which may or may not be reliable. We explained that the length of time since the hearsay statements were heard by the witnesses may adversely affect their irreliability and that the trauma suffered by most of the prosecution witnesses may also have affected their memory.

Rules of procedure and evidence need to be elaborated. Concepts of a fair trial must be uniform. There must be equal access to witness. Witness protection and rules of evidence must not be prejudicial. Without these things the right to a fair trial becomes a fiction.

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<sup>39</sup> *Prosecutor v. Blaskic*, Order to Bosnia and Herzegovina with a subpoena and Order to Croatia to comply with a subpoena, 14 February 1997.

<sup>40</sup> See *Prosecutor v. Tadic*, Decision on the Defense Motion on Hearsay, 5 August 1996.