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ICTY and the first years

> *"That wild beast, which lives in man and does not dare to show itself, until the barriers of law and custom have been removed, was now set free. The signal was given, the barriers were down. As has so often happened in the history of man, permission was tacitly granted for acts of violence and plunder, even for murder, if they were carried out in the name of higher interests and against a limited number of men of particular type and belief".*
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> Ivo Andric
> *'The Bridge over the Drina'*

The Bosnian born Nobel Prize winner Ivo Andrić (who was of Croatian heredity but identified more as a Serbian - this Yugoslav *avant la letter)* brilliantly depicted the Balkan tragedy in the epic novel The Bridge over the Drina about the ups and downs of the population of a small village at the Drina River. That community, like every other community, had its own dark and evil side, and in the name of some or other course, the various powers in that community unleashed the beast, which brought only dead and destruction. Indeed, a reflection of the social background of the violent conflicts captured in a literary manner.

It is difficult to grasp the dramatic change of social coherence in the former Yugoslavia, triggered by social and political instability in the late eighties and early nineties. Is the ethnic component of the conflict based in the history of the former Austrian double monarchy and the former Turkish Empire? And dates the religious component perhaps back to the contrast between Byzantium and the Roman Empire, as some argue? The dynamics of the conflict are extremely complicated for outsiders.

Different to earlier conflicts elsewhere, the West appeared not to be indifferent. A violent conflict in the backyard of Europe after the cruelties of the Second World War gave rise to concerns and fear of contamination. It was time to do more than only political statements or peace keeping. The creation of an international criminal tribunal by the Security Counsel was the unprecedented answer of the global community to stop the beast of impunity in the former Yugoslavia and an effort to bring peace in the area and to restore justice.

This seminar to examine the legitimacy of this effort and to explore the image of the Yugoslavia Tribunal is a unique opportunity to discuss a number

of issues from a Dutch perspective and Yugoslav perspective. I will speak on the legal image of the International Criminal Tribunal for the former Yugoslavia, the functioning of the tribunal in the first years of its existence. My perspective is that of a legal practitioner not that of a criminologist or journalist.
For a better understanding of the first years I recall that the purpose of the establishment of the tribunal was to try the most responsible only and certainly not all perpetrators of the heinous crimes committed in the area. Nevertheless the expectations were high but reality appeared to be different. In the first years the tribunal failed effective means to investigate and to make arrests. That reality tampered the public support in the West and caused disappointment for the victims in the former Yugoslavia. The Office of the Prosecution turned out to be unable to exercise effective powers in the area and none of new states of the former Yugoslavia was prepared to assist. Despite obligations of international law deriving from the UN Charter and the ICTY Statute, there was a lack political will to commit to the needs of the ICTY, neither from the new states or from the West. Not surprisingly, the first defendants were 'small fry' and only after five years the first 'big fishes' showed up in the courtrooms of the ICTY. The presidents of Croatia and Bosnia died before trials were prepared and Milošević, though arrested and transferred to the tribunal, died during his trial. Prosecution of the military top and the political sub top started after the turn of the century. Two of them are still not arrested. How different to the ICTR. The top of Rwanda is tried in Arusha reasonably short after the establishment of the tribunal. Indeed, the circumstances in the former Yugoslavia are different to Rwanda and its neighbours. But whatever the case is, it took the ICTY substantial time to put its marker on the area and to get to the right people in the court rooms.
I also recall that an important component of the effort to bring peace and restoration of justice in the area was the idea of informing the public at large of the administration of justice in The Hague. From the very beginning the ICTY had (and still has) the mission to bring the trials in The Hague to the area by means of video recording and broadcasting through local media. The people, and more especially to the victims should know what was happening in The Hague. In the beginning the media covered the work of the tribunal extensively and unlike domestic courts the Registry of the ICTY has a press office/Public Information Centre to service the media and developed an active policy to reach out to the former Yugoslavia. Now in most cases the attention of the media is limited to start and end of a trial. The same for the public

gallery. Trials of war crimes have become routine, daily practice. The message to the public was and is clearly to assure that justice is done fairly and impartially, moreover that there would be no impunity for the perpetrators.

Yet, the idea of a biased Tribunal with more Serb defendants than of any of the other nations haunted the ICTY from the beginning. The neither press office nor spokespersons appeared to be able to address this image adequately, most likely because of legal and political restrains. One cannot communicate over ongoing investigations for example to get the record straight. The public in the west had no problem with the image of Serbs being the bad guys. Media reports were one-sided if not biased and the politics seemed not to be unhappy with this distortion of the reality, nor did anyone question the reasons of that bias. In hindsight the tribunal could have done better to address the unbalanced balanced public image or – at least - to accommodate the Serb sentiment of being unfairly treated. In the period op 1995-2000 the tribunal concluded for example 5 trials encompassing 8 individuals. The public image is that most of them were Serbs; in fact only 4 were Serbs. The insufficiently contested presumption of bias in media coverage rallied Serbian public opinion against the ICTY and fortified the national feeling of being the victim of foreign manipulation. The supposed biased image of the tribunal may have facilitated the Croat and Bosnian governments to support – within acceptable political limits - the Office of the Prosecution with the collection of evidence against Serbs. The Serb government clearly did not. This unfortunate situation caused an unbalanced build up of files. The ICTY prosecutors were hardly fed by the Serbs on Croats and Bosnians but more extensively by the Croats and Bosnians on Serbs.

Another concern is the presumption that the establishment and functioning of the ICTY cannot be separated from politics. Yes, law arrive from politics indeed, but in theory politics decides whom the lawmaker and what the formulation of the law shall be, the law formulates these decisions and makes them binding. I think it was Werner Levi who observed that those who would draw a clear distinction between law and politics are to be bound more in ivory towers than in the corridors of powers. On an international level it is even more complicated. Indeed, international law is intertwined with international politics. The ICTY was clearly the result of a political decision and politics plays a part in the functioning of the ICTY all the way. Because of politically meaningful matters like peace keeping, legal assistance and national security, the judges have to find their way between international

politics, domestic politics and national interests. I observe that the West did not really bother about the impact of politics on the ICTY. Probably because most people would agree with the view that supranational powers of the ICTY are reasoned by the need to secure a fair administration of justice in the area. And that concurred with the popular view that new states of the former Yugoslavia were responsible for their own misery. What was forgotten, however, is the understanding that these supranational powers are in the same time restrictions of domestic judicial or legal sovereignty. At least the impact of the subordination of jurisdictional powers of the new states of the former Yugoslavia has hardly been debated, if not arrogantly ignored. In the beginning cooperation with the tribunal was perceived by the intellectual elite of the new states as being forced to negate the *nemo tenetur* principle.

Talking about principles, an interesting feature that has fiercely been debated before the ICTY is the principle of *nullum crimen sine lege*. Some civil law trained lawyers argued that the jurisdiction of the tribunal would encompass behaviour that was not described by law as a crime at the time. The ICTY judges rejected such challenges by invoking criminalization under domestic law in the former Yugoslavia (a feature often forgotten) or by referring to the customary nature of the crime or the acts being criminal according to the general principles of law recognised by the community of nations. Civil law lawyers with strict ides about *lex certa* are less familiar with this line of thinking.

The fairness of the trials has been an issue in the public debate and in the court room from the very beginning. The fairness has been challenged because of issues of partiality and lack of independence. Most serious issues, however, arose from classical features like equality of arms, examination of witnesses and disclosure. In interpreting the Statute and the Rules the judges take guidance from the International Covenant of Civil and Political Rights and other international instruments on human rights. I note that ICTY case law reflect that the principle of fair trial is to be understood in the context of the applicable system. And indeed, the uncommon circumstances related to the trails before the ICTY require uncommon solutions not seen before in domestic jurisdictions. Witness protection is a good example of the way the ICTY judges found their way in the jungle of conflicting interests and the absence of a territorial legal and social network. The problems were apparently hardly foreseen, because the neither Statute nor the original Rules properly addressed the position of witnesses. The present law is dominantly case law. Lawyers from common law jurisdictions seem to have more

difficulties with the way witnesses' protection transpires in the ICTY court rooms than those from civil jurisdictions. Some believe that domestic law in civil law jurisdictions drifts towards the way the tribunal deals with witnesses.

A true flaw of the law of the ICTY is that neither the Statute nor the Rules provide for reparations to or compensation for victims as for example the law of the ICC does. The law is unclear on the power to seize assets or silent on the power to order a sentenced person to compensate victims. There is no trust fund in place to award reparations. Having said this it does not surprise that the law of the ICTY is ambiguous on indigency of the accused. The Statute, Rules and the relevant Directive do not provide any test for the determination of the financial resources of an accused, either to assess assignment of counsel or his ability to be sanctioned financially or to compensate his victims. It is remarkable that this was hardly perceived as a shortcoming of the tribunal.

All these issues are important in examining the legitimacy and the image of the Yugoslavia Tribunal, but more important is the standard pre-trial custody (in 1995 – 2000 about 12 month) and the unprecedented length of the trials (in 1995 -2000 about 16 month), while dealing with only 6 cases and 8 individuals. A supranational tribunal is supposed to be the ultimate example of compliance with well accepted standards of human rights. In fact the ICTY has a very bad track record on both issues.

The difficulties with provisional detention revolve around the denial of statutorily guaranteed rights of the accused. The Statute and the Rules are silent on principles of *habeas corpus*. The usual reasons for pre-trial detention are danger of suppression of evidence, repetition of offence and absconding. With the ICTY is availability at trial and subsequent service of sentence. Against the presumption of innocence pre-trial detention must no be the general rule. In the first five years the case law standard denied provisional release and bail save a few rare exceptions with the argument that the circumstances in the home states barred a guarantied return. In the period of 1995 -2000 about 27 individuals were in custody, only 8 were tried. Later when normal life more or less restored in the former Yugoslavia this case law changed for a more flexible approach.

In the terminology of human rights instruments an accused person has the right to a trial within a reasonable time or without undue delay. The problems here are twofold: lapse of time between service of the indictment and the trial and the length of the trial itself. The standard late start of the trials and exceptional length of the proceedings has been an issue from the very

beginning and this has unfortunately not changed. For example: the Tadić trial – the first trial – pre-trial detention lasted 17 month, and at trial there were 86 prosecution witnesses, 40 defence witnesses and 367 exhibits. The transcript of evidence was more than 7,000 pages, the prosecution case lasted 100 days, the defence case 50 days.

Pre-trial detention and the length of trial are a constant source of concern that seems almost impossible to remedy due to the inability of the ICTY system to function effectively. A part of the problem is late and redacted disclosure, the court being far away and the frequent poor availability of witnesses. Most observers, however, believe the major obstacle to be the policy of the prosecution issue abundant charge sheets, rather than selected charges.

More in general I observe that in the first years case law of the ICTY failed a uniform enforcement of the rights of defendants. Live witnesses not documentary evidence is in the bulb of cases the main evidentiary issue. For that reason it troublesome that the right to cross-examine witnesses - note statutorily mandated - sometimes is denied or severely curtailed with protected witnesses.

However, despite all these observations, the ICTY has passed the test. The tribunal contribute immensely to the jurisprudence of international humanitarian law. The procedural law of the tribunal and the practises are interesting. The decisions are - in most cases - extensively reasoned, some exceptional well reasoned, and certainly serious stuff to study. The amalgam of common law and civil law provided an interesting model for the ICC, the world criminal court that derived from the ICTY. In my view, the tribunal turned out to be a successful undertaking of international administration of justice rather than a western instrument to curtail the former Yugoslavia.

1. Soon after the establishment of the ICTY I got involved as chairman of a committee of the Dutch Bar that wrote an opinion for the newly appointed judges on matters of legal assistance. Later I got more directly involved with the tribunal when I was assigned to Duško Tadić the first defendant to stand trial after his transfer from Germany to the tribunal. The first years of the tribunal were both troublesome and stimulating, because all of us, the judges, the prosecution and the defence, were sailing unchartered waters.

2. The establishment of the ICTY introduced a novelty of supranational criminal law, obliging UN member states to accept the jurisdictional primacy of the tribunal over serious violations of international humanitarian law and to comply without undue delay with any request for assistance or an order issued by the ICTY.

3. These powers raised a number of issues to be sorted out in the first years of the tribunal. Before the start of the very first trial, Germany had to address the constitutional legality under national law of the transfer of a person arrested on its territory to an organisation abroad rather than to a foreign state. At the first trial the power of the Security counsel to establish a judicial body with such far-reaching powers had to be examined.

4. Another novelty was the creation of the Rules of Procedure and Evidence by the judges. These rules introduced an amalgam of various legal systems, though with a dominant accusatorial character, adopted from common law. The judges may have had an idea how these rules would work out in practice, in reality however no one knew. Because of these new procedural rules, and inherently the absence of case law, prosecution and defence had to deal with uncertainties in the application, meaning and consequences of rules.

5. Judges, prosecution and defence were confronted with all kind of questions that were not addressed in the Stature or the Rules. I mention a few before sharing some of my experiences in the Tadić case with you.

6. What would be the elements of the crimes under the jurisdiction of the court? What about witness protection? Would a Trial Chamber have the

power to summon and examine witnesses in the area? What kind of powers would a defence counsel have? What about equality of arms, i.e. would defence counsel have adequate resources to build up an effective defence?

7. Let me finally tell you about my experiences in the Tadić case, the first case tried before the ICTY in the second half of the nineties.