

## ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL IN THE FORMER YUGOSLAVIA (ICTY): DEALING WITH THE “WAR RAGING AT THE HEART OF EUROPE”

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**Abstract\*\*:** *Much has been written on the question of disintegration of the former Yugoslavia and the conflict that followed<sup>1</sup>. A lot of scholarly attention was devoted to the analysis of the reasons of the Yugoslav war, political, military, psychological and other aspects of the conflict and ways of conflict resolution. International community responses to the conflict have also been much discussed<sup>2</sup>. Post-conflict reconstruction, relations of the Balkan states with the EU, compliance with the EU accession criteria have been extensively covered as well<sup>3</sup>. Less attention, however, was given to the process of creation of the International Criminal Tribunal in the former Yugoslavia (ICTY), an institution established to try individuals responsible for international crimes committed during the conflict, cooperation with which is currently one of the most important EU accession criteria for the Balkan states. The ICTY was primarily discussed by legal scholars, who attempted to analyze the impact the Tribunal made on the development of international criminal justice<sup>4</sup>. This article attempts to show how historical analogies were used in the process of creating the ICTY. The rhetoric of “war raging at the heart of Europe”, threatening to undermine developments in the “new Europe” was frequently employed by politicians in the discussions leading to the creation of the Tribunal.*

**Keywords:** *International Criminal Tribunal for the former Yugoslavia, historical analogies, international criminal justice.*

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<sup>1</sup> See, for example, V.P. Gagnon, Jr., (winter 1994/95). ‘Ethnic Nationalism and International Conflict: The Case of Serbia,’ *International Security*, Vol. 19, No. 3, pp. 130-166; Duffy, Gavan and Nicole Lindstrom (2002) ‘Conflicting Identities: Solidarity Incentives in the Serbo-Croatian War’, *Journal of Peace Research*, Vol. 39, no. 1, pp. 69-90; Cohen, Lenard (1993). *Broken Bonds: The Disintegration of Yugoslavia*, Boulder, Colo.: Westview; Gow, James (1992). *Legitimacy and the Military: The Yugoslav Crisis*, New York: St. Martin’s Press.

<sup>2</sup> Dover, Robert (2005). ‘The EU and the Bosnian Civil War 1992-95: The Capabilities-Expectations Gap at the Heart of EU Foreign Policy’. *European Security*, Vol. 14, No. 3, 297-318; Gow, James (1997). *Triumph of the Lack of Will: International Diplomacy and the Yugoslav War*, New York: Columbia University Press.

<sup>3</sup> See, for instance, Batt, Judy (ed.) (2004) ‘The Western Balkans: Moving on’. *Chaillot Papers*, No. 70. October 2004. Institute for Security Studies; Dimitrijevic, Nenad (2008). ‘Serbia After the Criminal Past: What Went Wrong and What Should be Done’, *The International Journal of Transitional Justice*, Vol. 2, pp. 5–22; White, Stephen, Judy Batt and Paul G. Lewis. (2007). *Development in Central and East European Politics*. New York: Palgrave Macmillan, pp. 72-89.

<sup>4</sup> See, for instance, Bassiouni, M. Cherif, and Peter Manikas. (1996). *The Law of International Criminal Tribunal for the Former Yugoslavia*. New York: Transnational Publishers; Beigbeder, Yves. (2002). *Judging Criminal Leaders : the Slow Erosion of Impunity*. Mass.: Martinus Nijhoff Publishers; Meron, Theodor. (1998). *War Crimes Law Comes of Age*. Oxford: Clarendon Press; Mettraux, Guenael (2005). *International Crimes and the ad hoc Tribunals*. Oxford University Press.

## Background

According to different estimates, the death toll in the Bosnian and Croatian conflict was enormous: from 100.000 to 200.000 people; two million became refugees in the period of 1992-1995. One of the worst massacres took place in Srebrenica, when 7,500 Muslim men were killed by Bosnian Serb forces. Conflict in Kosovo generated 1.5 million refugees and 11,000 deaths<sup>5</sup>. The conflict was marked by atrocities committed by all sides to the conflict. The decision to establish an international ad hoc tribunal for the former Yugoslavia, however, was slow to come. States feared that prosecuting persons responsible for atrocities would undermine negotiations process; the non-governmental actors were divided over the issue. Women's rights networks were prominent in the process of creating the ICTY. They made frequent calls to punish those responsible for rape and sexual violence. However, in the beginning of the 1990s there was little agreement among these groups on what actually constituted rape and sexual violence, since these issues had not been on the agenda of international criminal tribunals before (Nuremberg and Tokyo trials held after WWII did not deal with this type of crimes, with an exception of the *Yamashita* trial)<sup>6</sup>. It was not until 1993 that the General Assembly Declaration on the Elimination of Violence against Women brought the concept of

violence against women (as bodily harm) as an issue of international concern beyond the arguments of cultural relativism<sup>7</sup>.

Attention of the international community was gradually drawn to the atrocities committed in the conflict. Initially, there was only very superficial investigation of war crimes. The International Red Cross and the UNHCR (United Nations High Commissioner for Refugees) were overburdened and attempted to be neutral, the United Nations reported that all sides were responsible and “takes a few of the less drastic cases from the abundance of crimes committed on the Serbian side and names them in one breath with the crimes committed on the Muslim and Croatian side”<sup>8</sup>.

It was only at the international conferences held in 1992 in London and Geneva that the idea of an international tribunal began to circulate. An important point of the discussions was the moral responsibility of the international community to put an end to atrocities comparable to those committed during WWII.

## The use of historical analogies in foreign policy

There is nothing unusual about the use of historical analogies in foreign policy decision-making. Michael Desch looks at the Holocaust analogy to show that “it has become one of the central historical analogies

<sup>5</sup> Roper, Steven D., and Lilian A. Barria (2006). *Designing Criminal Tribunals*. Aldershot: Ashgate, p. 20.

<sup>6</sup> For more, see Askin, Kelly D (1997). *War Crimes Against Women. Prosecution in International War Crimes Tribunals*. The Hague: Martinus Nijhoff Publishers. See also, Enloe, Cynthia (1994). “Have the Bosnian Rapes Opened a New Era of Feminist Consciousness?” In Stiglmeier, Alexandra (ed.). *Mass Rape. The War against Women in Bosnia-Herzegovina*, Lincoln and London: University of Nebraska Press, pp. 222-224.

<sup>7</sup> Numerous reports and recommendations by NGOs and governmental organizations emerged, showing an increasing interest in women's rights. See, for example, Women's Human Rights Resources, University of Toronto, <http://www.law-lib.utoronto.ca/Diana>, last accessed February 1, 2005.

<sup>8</sup> Stiglmeier, Alexandra (1994). *Mass Rape. The War Against Women in Bosnia-Herzegovina*. University of Nebraska Press, p. 25.

for thinking about U.S. foreign policy in the post-Cold War world<sup>9</sup>. As Desch remarks, “The received wisdom about the Holocaust among most Americans is that the United States and the rest of the civilized world turned away Jews seeking to escape Nazi Germany before World War II, and then sat idly by while the Third Reich murdered nearly 6 million of them during the course of the war. In light of this reprehensible indifference, the United States shares some responsibility for the Holocaust and it must “never again” allow large numbers of people to be slaughtered because of their race, ethnicity, or religion”<sup>10</sup>.

Similar views were shared not only by politicians, but also by researchers. Samantha Power, for instance, criticizes the United States for its reluctance to stop genocide committed in Cambodia, Bosnia and Rwanda. She gives an impressive account of the U.S. involvement in Cambodia and its unwillingness to stop the genocide committed by the Khmer Rouge<sup>11</sup>. U.S. reluctance to intervene was mostly caused by its failures in Vietnam, fears of upsetting China and a determination to do anything to oppose Soviet influence in the region. Mostly for these reasons, the Vietnamese intervention, which brought an end to the Khmer Rouge massacres, was condemned as aggression and interference in the affairs of a sovereign state. The Khmer Rouge continued to represent Kampuchea in the United Nations until the beginning of the 1990s. Power believes that the country which claims

that it will “never again” let genocide happen, must use all political and practical means in order to stop crimes against civilians<sup>12</sup>.

As Desch shows, the use of historical analogies is also quite frequent in the case of humanitarian interventions and in US support for Israel. However, he thinks that the use of historical analogies in foreign policy decision-making is problematic, since it is not always based on neutral interpretation of historical events and actions taken are not always in the best interests of the state. “Not only do they routinely shape state behaviour, they usually do so for the worse <...> The widely accepted Holocaust analogy illustrates, in my view, both how analogies are frequently based on a faulty reading of history and that policies based on them have not always served U.S. interests”<sup>13</sup>.

There are several reasons why historical analogies are used in foreign policy: first of all, they help to shape public opinion. Secondly, “there is <...> a good reason to believe that historical analogies also play an independent role in shaping decision makers’ perceptions of the costs and benefits of various courses of action <...> Analogies, like other analytic shortcuts, are central to how any decision maker copes with complex reality”<sup>14</sup>.

I believe the use of historical analogies is a more complex phenomenon: historical analogies not only help politicians to justify particular actions and understand complex reality, they also serve as an important instrument often resorted to by the media, NGOs and activist networks in their attempts

<sup>9</sup> Desch, Michael C. (January-March 2006). ‘The Myth of Abandonment: The Use and Abuse of the Holocaust Analogy’. *Security Studies*, Vol. 15, no. 1, p. 106.

<sup>10</sup> *Ibid.*

<sup>11</sup> Power, Samantha (2002). *A Problem from Hell. America and the Age of Genocide*. A New Republic Book, Basic Books.

<sup>12</sup> *Ibid.*, p. xxi.

<sup>13</sup> Desch, p. 106

<sup>14</sup> Desch, p. 109.

to put pressure on decision-makers (the so-called "symbolic politics"<sup>15</sup>). Looking at the establishment of the ICTY shows that the use of historical analogies is a multi-faceted process. Frequent references to WWII events made by European or American politicians (comparing camps in Bosnia to Nazi concentration camps, attacks on civilians to Holocaust) are not independent acts but rather the result of the public pressure (even if at a later stage historical analogies were used to demonstrate that certain actions, such as the establishment of the ICTY, have been taken to deal with the problem while in reality the states attempted to avoid military intervention in the conflict by all means)<sup>16</sup>.

### Historical analogies in the establishment of the ICTY

The first calls for a Tribunal came from Mirko Klarin, a journalist from Belgrade, in May 1991. In an article published in a newspaper *Borba* on 16 May, 1991, he called for trying Yugoslav war criminals

even before the outbreak of hostilities. Klarin wrote, "Not *when* 'this all is over', but *instead* of whatever might soon befall us. Precisely because of what has already happened and what is happening now, all of which can quite easily be shown to be punishable under the terms of Nuremberg judgment and other legal documents just as valid here at home as in the rest of the world"<sup>17</sup>.

In August 1992 *Newsday* published an article by an American journalist Roy Gutman who for the first time mentioned mass rapes of Bosnian women by Serbian soldiers. Soon after a number of reports of human rights violations in the former Yugoslavia emerged, published by scholars and non-governmental organizations, among which were the reports by Amnesty International, Human Rights Watch, International Human Rights Law Group and Centre for Reproductive Law and Policy. Events taking place during the Yugoslav war were compared to crimes committed by Nazi Germany<sup>18</sup>. This was the beginning of a campaign that united many non-governmental organizations, both

<sup>15</sup> According to American scholars Margaret Keck and Kathryn Sikkink, in order to change human rights practices, activists resort to several tactics, namely, "information politics": the ability to quickly and credibly generate politically usable information and move it to where it will have most impact; "symbolic politics": the ability to call upon symbols/actions/stories that make sense of a situation for an audience that is frequently far away; "leverage politics": the ability to call upon powerful actors to affect a situation where members of a network are unlikely to make a difference; "accountability politics": the effort to hold powerful actors to their previously stated policies/principles. Keck, Margaret, and Kathryn Sikkink (1998). *Activists Beyond Borders. Advocacy Networks in International Politics*. Ithaca and London: Cornell University Press.

<sup>16</sup> Hazan, Pierre (2004). *Justice in the Time of War: the True Story Behind the International Criminal Tribunal for the Former Yugoslavia*. College Station: Texas A&M University Press.

<sup>17</sup> Mirko Klarin, "Nuremberg Now!", *Borba*, 16 May 1991, translation from Serbo-Croatian, in Cassese, Antonio. 1996. *The Path to the Hague. Selected Documents on the Origins of the ICTY*. The Hague, ICTY. Document 7: 35-36.

<sup>18</sup> See, for example, 'War Crimes in Bosnia-Herzegovina', Human Rights Watch (July 1993); Siegman, Henry (1993). 'The Holocaust Analogy is Too True: A Muslim People Are Targeted for Extinction, and the West Turns Away,' *Los Angeles Times*, 11 July 1993; Macintyre, Ben (1999). 'Hawkish Albright Driven by Family History', *The Times*, 6 April 1999; Bodley, Anne (1999). 'Weakening the Principle of Sovereignty in International Law: the International Tribunal for the Former Yugoslavia', *New York University Journal of International Law and Politics*, Vol. 31, pp. 418-472 ; Brownmiller, Susan (1994). "Making Female Bodies the Battlefield." In Stiglmeier, Alexandra. (ed.) *Mass Rape. The War against Women in Bosnia-Herzegovina*, Lincoln and London: University of Nebraska Press; Stiglmeier, Alexandra (1994). *Mass Rape. The War Against Women in Bosnia-Herzegovina*. University of Nebraska Press; Allen, Beverley (1996). *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia*. Minneapolis: University of Minnesota Press.

national and international<sup>19</sup>. In August 1992 a Special Rapporteur was appointed by the UN Commission on Human Rights whose task was to investigate human rights abuses in the former Yugoslavia. Tadeusz Mazowiecki, the Special Rapporteur, in particular, highlighted in his report (UN Doc. A/48/92-S/25341) that rape was “both an attack on the individual victim and...a method of “ethnic cleansing”<sup>20</sup> intended to humiliate, shame, degrade and terrify the entire group”<sup>21</sup>.

In spring 1992 Robert Badinter (Justice Minister of France in Mitterrand government and President of the Arbitration Commission for the Former Yugoslavia) was one of the first politicians to openly raise the issue of creating an international tribunal. At a Constitutional Council meeting Badinter remarked that it was unacceptable that at the end of the XX century, fifty years after the end of the WWII, genocide was being committed “in front of our eyes”<sup>22</sup>.

Badinter addressed Lord Peter Carrington and Mr. Cyrus Vance (the mediators for the former Yugoslavia), as well as Francois Mitterrand, the latter stating that he was prepared “to suggest the Security Council that it establish such an international criminal tribunal.”<sup>23</sup> Neither Carrington and Vance,

nor Mitterrand were enthusiastic about creating the tribunal. They believed that a tribunal might impede negotiations with the warring parties. However, Badinter referred again to WWII by saying that he was not willing to look like an accomplice in crimes committed in the Bosnian conflict after the world would get to know about death camps, a situation which took place after WWII<sup>24</sup>.

On 16 August 1992, a conference on Former Yugoslavia was held in London, and the German Foreign Minister Klaus Kinkel, jointly with the French Foreign Minister, Roland Dumas, proposed creating a Tribunal<sup>25</sup>.

Both Kinkel and Dumas expressed their outrage because of the war going on in “the heart of Europe”, “For more than twelve months now, a terrible war of destruction and expulsion has been raging in the heart of Europe. Each day, on which innocent civilians continue to be bombarded with heavy artillery and driven out of their native regions, each day, on which prisoners of war are made to suffer, undermines the credibility of the new beginning we have embarked upon together in Europe”<sup>26</sup>. Dumas echoed Kinkel by stating that, “For more than a year, in the heart of Europe, two hours from here,

<sup>19</sup> Stiglmeier, Alexandra. (1994). *Mass Rape. The War Against Women in Bosnia-Herzegovina*. University of Nebraska Press, p. 26.

<sup>20</sup> The term “ethnic cleansing” is not without controversy. As such, it appeared only in the context of the Yugoslav war and is not a crime that belongs to customary international law.

<sup>21</sup> Meron, Theodor (1998). *War Crimes Law Comes of Age*. Oxford: Clarendon Press, p. 205.

<sup>22</sup> Quoted in Hazan, p. 14.

<sup>23</sup> Letter of Mr. Robert Badinter to Mr. Antonio Cassese (translation from French), 24 May 1996, in Cassese, Document 16 : 71.

<sup>24</sup> Quoted in Hazan, p. 15.

<sup>25</sup> Pierre Hazan describes this conference as an example of hypocrisy: “Backed against the wall by the press and public opinion, the Western governments’ use [...] strong words to mask their own disarray. They find themselves entangled in a network of contradictions: On the one hand, they cannot tolerate the nature and magnitude of the crimes committed without denying their own fundamental morality and policy; on the other, they do not want to intervene militarily. They hope to judge the executioners, but they dread postponing or sabotaging a negotiated settlement. They are hard-pressed to separate the ideology of human rights from the *raison d’etat* that forces them to deal with any interlocutor” [Hazan : 19].

<sup>26</sup> Speech of the German Minister of Foreign Affairs, Dr. Kinkel, at the London Conference, translation from German, General Debate : 26 August 1992, in Cassese, Document 8 : 39-41.

a lethal and destructive conflict has been raging"<sup>27</sup>.

Kinkel came back to this idea on September 23, 1992, in an address to the United Nations General Assembly<sup>28</sup>. Elie Wisel, a Holocaust survivor and Nobel prize winner, addressed Lawrence Eagleburger (US Secretary of State) and Eagleburger in his "naming names speech" at the Geneva Conference (December 16, 1992), mentioned that violations of United Nations Security Council Resolutions and London agreements by the Serb authorities "<...> is not only producing an intolerable and deteriorating situation outside the former Yugoslavia, it is also beginning to threaten the framework of stability in the new Europe"<sup>29</sup>. Eagleburger named candidates for prosecution; these included Slobodan Milosevic, Radovan Karadzic and Ratko Mladic.

Very soon after a Commission of Experts was established, charged with the investigation of human rights abuses committed during Yugoslav conflict. Despite the fact that the Commission faced a number of difficulties, such as insufficient financing, lack of qualified experts<sup>30</sup>, Commission's reports and the information it was able to collect (exhumation of mass graves, interviewing the victims) played an important role in the process of creating the Tribunal and in preparing first indictments.

On May 3 1993 UN Secretary-General presented a report on the question of creating an international tribunal to try those most responsible for violating international humanitarian law on the territory of the former Yugoslavia<sup>31</sup>. The report contained a draft Statute for the tribunal, prepared by a UN Office of Legal Affairs working group (which collected states' suggestions, as well as proposals from the NGOs). The draft statute was presented to the UN Security Council and adopted unanimously.

Resolution 827 adopted by Security Council on May 25, 1993 lay the foundation for the establishment of the Tribunal. The Security Council expressed its "grave alarm at continuing reports of widespread and flagrant violation of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory"<sup>32</sup>.

Even if the Tribunal had a slow start and was frequently criticized in the mid-1990s for its inability to prevent further atrocities or bring to justice those most responsible<sup>33</sup>, establishing the tribunal was an important event in world politics (bearing in mind that it was the first international tribunal after

<sup>27</sup> Speech of the Foreign Minister of Foreign Affairs, Mr. Dumas, at the London Conference, Translation from French,

<sup>28</sup> General Debate, 26 August 1992, in Cassese, Document 9: 43-47.

See, U.N. Doc. A/47/PV.8. p. 61.

<sup>29</sup> Statement of Mr. Eagleburger, US Secretary of State, "The need to respond to war crimes in the former Yugoslavia", December 16, 1992, in Cassese, Document 12 : 55-57.

<sup>30</sup> Bassiouni, M. Cherif, and Peter Manikas (1996). *The Law of International Criminal Tribunal for the Former Yugoslavia*. New York: Transnational Publishers; Bassiouni, M. Cherif. 2000. "Searching for Justice in the World of Realpolitik." 7 Pace International Law Review, Vol. 7, No. 2, pp. 213-231.

<sup>31</sup> Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), S/25704 3 May 1993.

<sup>32</sup> Preamble, S.C.Res.827, U.N. Doc. S/RES./827 (1993).

<sup>33</sup> See, for instance, First Annual Report (1994) of the ICTY, A/49/342 - S/1994/1007, para. 148, available at <http://www.icty.org/sid/31>, last accessed 22 April, 2010.

Nuremberg). It was already in 1995 that the Chief Prosecutor called for apprehension of the indictees and for cooperation of the former Yugoslav states with the ICTY<sup>34</sup>. Currently, cooperation with the ICTY is one of the most important accession criteria for the Balkan states willing to join the EU.

There is no doubt that crimes committed during WWII should be researched and brought to light. However, frequent references to WWII by the politicians, the media and the activists in their analysis of the Yugoslav conflict showed that the conflict was perceived as extremely brutal, and some crimes, in particular sexual assaults—as something that was unprecedented in history. “Western bias”<sup>35</sup> in covering events committed in the former Yugoslavia led to the international outrage about, for instance, about existence of camps “in the heart of

Europe”<sup>36</sup>. Such crimes were unacceptable in the “new Europe” half a century after WWII<sup>37</sup>.

Such statements, though dramatic and attractive to the general public, downplayed the seriousness of crimes committed against civilians in other conflicts in the world. As Patricia Sellers, gender advisor at the ICTY and the ICTR, noted, “If you read Western newspapers on any given day, you will see more interest in Yugoslavia and western countries in general. Although there’s been a war in Angola for the past twenty years, it doesn’t make the papers on a daily basis like Northern Ireland. Somewhere in the back of many western minds, there is the idea that wars and genocide always happen in Africa and that is not news. When you look at Yugoslavia, people were shocked that the war took place on European soil, where it wasn’t supposed to occur”<sup>38</sup>.

<sup>34</sup> Fifth Annual Report of the ICTY (1998), A/53/219 - S/1998/737, paras. 112-114, available at <http://www.icty.org/sid/31>, last accessed 22 April 2010.

<sup>35</sup> Gardam, Judith G. and Michelle J. Jarvis (2001). *Women, Armed Conflict and International Law*. The Hague/London/Boston: Kluwer Law International, p. 30.

<sup>36</sup> Statement by Foreign Minister K. Kinkel at London conference, 26 August 1992. Quoted in Cassese, p. 43.

<sup>37</sup> Statement by US Secretary of State L. Eagleburger, 16 December 1992. Quoted in Cassese, p. 55.

<sup>38</sup> Interview with Patricia Sellers, in Sharatt, Sara, and Ellyn Kaschak (eds.) (1999). *Assault on the Soul: Women in the former Yugoslavia*. The Haworth Press, Inc., p. 75.

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