

THE SCHOLARS' INITIATIVE

Research Group 10:

The International Criminal Tribunal for the former Yugoslavia (ICTY)

Executive Summary

The *Prospectus* of the Scholars' Initiative (SI) summarises the remit of our group in three questions.

“To what extent is the ICTY a political body? To what extent is it impartial?
.... anti-Serb?”

Although they appear to be straightforward questions, which ought to be amenable to equally straightforward answers, this is far from being the case. In the course of our research we have moved away from the attempt to answer them either in simple negative or affirmative terms, believing that it is more useful to investigate *the sense in which it might be said* that the Tribunal is “political”, and *the gap between intention and effect* with respect to its “impartiality”. More significantly, in relation to the overall aims of the SI, we believe that it is important to challenge the explicit framing of “partiality” or “impartiality” in terms of the specific position of Serbs.

The conclusion to which our Group has come is that there is no evidence of systematic bias—certainly not of deliberate bias—on the part of the ICTY against any of the ethnic groups in the former Yugoslavia. We have confirmed, nevertheless, that the *perception* of bias is both persistent and widespread (although diminishing over time, to be replaced in some cases by cynicism and indifference) and we believe that this perception needs to be taken seriously. In the course of that investigation several things have become clear which help to make intelligible that apparent contradiction.

First of all, the Tribunal was created primarily in response to the needs of the major international actors for “peace and stability” in the Balkans. It was designed to implement a body of international law, and by means of procedures which were chosen because they matched the requirements of the Trial Chambers. These requirements were principally for internationally recognisable professional standards, and mutually acceptable compromises between different judicial traditions. None of these factors took account centrally of the perceptions of, and needs for, justice held by people in the ex-Yugoslav states.

Although major international actors from time to time have sought to influence the work of the Tribunal in one respect or another, this has been inconsistent in direction and intensity—even on the part of the governments of particular states. The most significant and consistent element of external pressure has been the attempt to persuade all states of the region to cooperate seriously with the work of the Office of the Prosecutor, rather than any effort to bias the Tribunal against any specific regional state or ethnic group. It has made its way in a changing political environment, in which resort to the Tribunal became available as a sanction which could be deployed in order to further ends other than that of justice. In fact, to its original purposes has been added an ever-growing range of expectations, which no court of justice could ever be expected to meet.

Despite the fact that those of the team (and others) who have had direct contact with the ICTY have paid tribute to the hard work, dedication and professionalism of its staff, the constraints under which they have been recruited as well as the conditions under which they work do reveal differences in their degree of competence. Errors of judgement, however, do not equate to deliberate bias, even if they might contribute to perceptions of unfairness. These critical remarks certainly do not identify the ICTY as a failure, nor seriously challenge its legitimacy. It has constituted an important development in the field of international justice, and one that has probably made a significant general contribution to transitional justice, as well as its original purpose of furthering peace and stability in the region. Nevertheless, the orientation which it has adopted towards global actors, and global criteria of its success, have resulted in it turning, to some extent, a blank façade towards the very region which might have been presumed to be its most important constituency—the peoples of the former Yugoslavia. In retrospect perhaps it can even be said to have been seriously negligent in its failure to address this audience.

On this condition of blankness, and relative unintelligibility, it has been possible to project a variety of different interpretations of its character and purposes, so that perceptions of bias within the Yugoslav space have been widespread. In large measure these can be explained as the unintended and often unrecognised consequences of the manner in which the Tribunal was created and has operated, and policies which have not been deliberately partial to any group or state.

These perceptions have varied between the states emergent in the “Yugoslav space”. In Croatia, although the ICTY was at first experienced as a direct threat to Croatia’s newly-realised independent statehood, the growing security of its situation worked together with the sustained pressure of international agents to promote a fairly general acceptance of the importance of the work of the Tribunal—especially among its political elite. In Serbia, on the other hand, the

manner in which political and military elites became enmeshed with a culture of violence and criminality worked together with aspects of the country's economic deprivation and its historical culture to deepen the widespread conviction that the ICTY was only one component of an international environment which was hostile to Serbs and Serbia. Public opinion studies show that the modification of these antagonistic perceptions of the Tribunal there has been slower and more incomplete. In Bosnia and Hercegovina the structure of "ethnic oligarchies" created by war has been sustained by the action of international agents, with which the ICTY is grouped in public perceptions. Here attitudes towards The Hague are inseparable from the general sense of alienation which pervades other aspects of Bosnian political culture.

The hope that the ICTY might promote reconciliation between the peoples of the region does not appear to have been realised. Reconciliation, if it is to be achieved, is an immense task which will clearly require more than judicial intervention, and will extend well beyond the lifetime of the Tribunal. The demand that it should furnish a reckoning of the moral responsibility for the war has been deliberately set aside. It is not because the ICTY has been a bad court of law that it has failed to deliver a sense of realised justice in these areas—it is precisely because it is a court of law, and for that very reason is unable to address these questions.

Given the relative incomprehensibility of the Tribunal and the lack of commensurability between its achievements and expectations within the region, the local peoples have often tended to the conclusion that the Tribunal favours other interests than their own. In these circumstances, it has been possible for politicians to "fish in troubled waters", and seek to use criticism of the Tribunal (some of it, but by no means all, well-founded) to further their own ends.

Caution should be exercised in the extent to which criticism of the ICTY should be reduced to the status of the "proprietary myths" of nationalist politicians, and thereby dismissed. In North America, and in a Europe intent upon expansion of the Union, there is a tendency to disparage all concerns over national identity as irredeemably non-modern. Such negativity is frequently implicit in the judgement of "nationalism". The search for national identities, and an understanding of their significance, is an understandable element of cultural development throughout the Balkan region (as elsewhere). It is not always easy to judge which aspects of this process might be malevolent, and to what extent.

The penetration into the "Yugoslav space" of global judicial institutions (which in any case are of relatively recent creation, and poorly understood anywhere) is naturally and necessarily problematic. If the Scholars' Initiative has a role to play in relation to these events, it must go beyond an aspiration merely to debunk local mythologies, and embrace the task of furthering a more objective general understanding of changes which affect us all.