

# Fair Trial and International Justice: The ICTY as an example with special reference to the Milosevic Case

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*'Het recht moet nooit aan de politiek, de politiek daartegen  
steeds aan het recht worden aangepast'*  
Immanuel Kant

*'The idea of law is nothing else but the idea of virtue  
inserted in the political world.'*  
Tocqueville

## Introduction

As almost ten years have passed since the establishment of the International Tribunal for Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY) in May 1993, it might be rather unpopular to dwell again upon certain issues which seem to have already been answered and well established. But with the extradition of Slobodan Milosevic, the former President of the Federal Republic of Yugoslavia to the ICTY and the beginning of the trial against him, it seems that there is a renewed challenge for discussion.

Milosevic was indicted by the Tribunal on 24 May 1999 (on the basis of Article 7 (1 & 3), of the ICTY Statute, dealing with individual and superior criminal responsibility) for the crimes committed in the territories of Croatia, Bosnia-Herzegovina and Kosovo, while he was President of Yugoslavia respectively Serbia. He is charged with 66 counts of Article 2 of the Statute (Grave breaches of the 1949 Geneva Conventions), Article 3 (Violations of the laws or customs of war), Article 4 (Genocide and complicity in genocide) and Article 5 (Crimes against humanity).<sup>1</sup> Milosevic was arrested by the Serbian special police on 1 April 2001 and on 29 June 2001 he

was transferred to the ICTY prison in The Hague. Even before his arrest Milosevic strongly opposed the legality of the Tribunal by saying: 'I have always considered the international tribunal in The Hague an illegal and immoral institution, invented as reprisal for disobedient representatives and disobedient people – as once there were concentration camps for superfluous peoples and people.'<sup>2</sup> During the Initial Appearance he raised objections with regard to (a) the legitimacy of the Tribunal; (b) his illegal arrest which, as he claimed, took place in violation of all the Yugoslav laws in force as well as of international norms (the issue of habeas corpus); and (c) the lack of the impartiality of the judges and of fair trial.<sup>3</sup> The Trial Chamber ruled and dismissed all the Motions.<sup>4</sup> The trial of Milosevic started on 12 February 2002.

This article intends to discuss some of the aspects of a fair trial concept in the light of the above raised objections. The *Milosevic Case* is but one of the cases pending before the Tribunal. As of October 2002, out of 79 of the public list of indictees, 55 were in proceedings and 24 remained at large.<sup>5</sup> The Trial against Milosevic is getting significant attention by the public and media as he is seen as the main culprit of the Yugoslav tragedy: with his nationalistic policy and intention to create a 'great Serbia' whatever it means, he tore Yugoslavia apart causing killings of hundreds of thousands of people. However, the discussion on fair trial is not about him personally, neither about any of the 44 accused currently in custody at the Detention Unit in The Hague, nor about the 15 of the accused who received their final sentence. It is rather about the Tribunal itself and its contribu-

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1. Kosovo: Initial Indictment of 24 May 1999; First Amended Indictment of 29 June 2001 (Case No. IT-99-37-I); Second Amended Indictment of 29 October 2001 (Case No. IT-99-37-PT); Croatia: Initial Indictment of 8 October 2001 (Case No. IT-01-50-I); First Amended Indictment of 23 October 2002 (Case No. IT-02-54-T);

Bosnia: Initial Indictment of 22 November 2001 (Case No. IT-01-51-I).

2. In: Gary J. Bass, *Viewpoint: Justice the Only Victor*, Institute for War and Peace Reporting, <[http://www.iwpr.net/index.pl?archive/tri/tri\\_234\\_2\\_eng.txt](http://www.iwpr.net/index.pl?archive/tri/tri_234_2_eng.txt)>.

3. Transcript of 3 July 2001, p. 2 (3-6) and 5 (3) and the Transcript of 13 February 2002, p. 217-220. During the first appearance be-

fore the Tribunal, on 3 July 2001, Milosevic raised his objections as to the legality of the Tribunal.

4. Decision of 8 November 2001 on Preliminary Motions, *Prosecutor v. Slobodan Milosevic*.

5. Fact Sheet on ICTY Proceedings of 21 October 2002.

tion to the development of the recent understanding of a fair trial concept in international criminal law.

### The concept of fair trial

It is indeed a well established rule of human rights law that defendants in both civil and criminal procedures should get a fair trial. Over the past forty years this rule whose origins can be traced back in the 1215 Magna Carta<sup>6</sup> and the 1791 USA Bill of Rights, has been embodied in a number of important international human rights documents.<sup>7</sup> In the field of international humanitarian law and the law on individual criminal responsibility fair trial has been inserted in the two major post-Second World War documents, the Nuremberg Charter of the Military Tribunal<sup>8</sup> and the Tokyo Charter of the International Military Tribunal for the Far East<sup>9</sup>, as well as in the four Geneva Conventions of 1949 for the protection of war victims<sup>10</sup>; and the two Additional Protocols of 1977 to the Geneva Conventions of 1949<sup>11</sup>. From the recent documents the right to fair trial is embodied in Article 20 of the ICTY Statute, Article 19 of the 1994 International Criminal Tribunal on Rwanda (ICTR) Statute and Article 64 of the International Criminal Court (ICC) Statute.

A basic function of fair trial provisions is 'to protect individuals from unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and the liberty of the person'.<sup>12</sup> As it serves primarily as a procedural safeguard in providing a due process, fair trial has developed in a rather complex concept consisting of a number of individual safeguards in differ-

ent i.e. pre-trial, trial and post-trial stages. Such are: the prohibition of arbitrary arrest and detention; the right to know the reasons for arrest, the right to legal counsel, equal access to and equality before the courts; the right to a fair hearing; the right to a public hearing, the right to appeal and to compensation for miscarriage of justice, etc.<sup>13</sup> Most of the existing international provisions are so formulated as to embrace in a more or less detailed manner all the elements indispensable in a fair trial procedure.

Semantically the word *fair* means free from bias, dishonesty or injustice, proper under the rules.<sup>14</sup> Synonyms of the term are: unbiased, equitable, just, impartial, disinterested and unprejudiced.<sup>15</sup> *Trial* is the examination of facts and law presided over by a judge (or other magistrate, such as a commissioner) with authority to hear the matter (jurisdiction).<sup>16</sup> *Fair trial*, thus, would mean unbiased, equitable, just, impartial, disinterested and unprejudiced examination of facts and law presided over by a judge with authority (jurisdiction) to hear the matter. It is therefore not by accident and without reason that some of the major international human rights documents such as the International Covenant on Civil and Political Rights, the European Convention for Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights, make reference to a fair and public hearing by a *competent, independent and impartial tribunal previously*<sup>17</sup> *established by law*,<sup>18</sup> discussed in more details further on in this article. Although it is remarkable that during the preparatory stages of Article 14 of the International Covenant on Civil and Political Rights, no

6. Article 39 says: 'No free man shall be arrested or imprisoned or dispossessed or outlawed or in any way victimised [...] except by the lawful judgement of his peers or judgement of the law of the land.'

7. Of legally binding documents mentioning deserve the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; the African Charter on Human and People's Rights; the American Convention on Human Rights; and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, some non-legally binding documents also include fair trial provisions like the Universal Declaration of Human Rights; the American Declaration of the Rights and Duties of Man; the Basic Principles on the Independence of Judiciary; the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, etc.

8. Article 16.

9. Article 9.

10. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Article 49); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Article 50); Convention (III) relative to the Treatment of Prisoners of War (Article 103–106); and, Convention (IV) relative to the Protection of Civilian Persons in Time of War (Article 5 (3)).

11. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Article 4) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Article 2).

12. See, *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, prepared by the

Lawyers Committee for Human Rights.

13. Ibid.

14. Jess Stein (Ed.-in-Ch.), *The Random House Dictionary of the English Language*, New York: Random House 1983, p. 511.

15. Ibid.

16. Real Life Dictionary of the Law, <<http://dictionary.law.com>>.

17. Some international provisions, like the American Convention on Human Rights (Article 8), contain the word *previously*, whereas the others do not include this word thereby excluding any discussion of its exact meaning and implementation in practice.

18. See, Article 14 of the ICCPR (which is the most prominent fair trial provision of the Covenant and it incorporates the content of Articles 10 and 11 (1) of the Universal Declaration of Human Rights, Article 6 of the European Convention on Human Rights and Article 8 of the American Convention.

significant discussion has taken place regarding this particular provision,<sup>19</sup> it is indisputable that the requirement of independence and impartiality, but also of the establishment of a tribunal by law, lie in the very foundation of a fair trial. For example, it is strongly claimed that the concept of fair trial cannot be de-linked from the basic principle of rule of law for which there is no place in the states governed by military rule. Being dictatorial and oppressive, military regimes are opposed to the principles of justice, human rights protection and fairness. For this reason, it has been claimed, in the countries with military rule it is not possible to have fair trials, as well.<sup>20</sup> Similarly, it has also been considered that military courts, special tribunals, or courts which include military officers in panels of judges, undermine the independence of judiciary which is one of the basic premises of fair trial.<sup>21</sup> Therefore, it would be safe to say that the concept of fair trial is much broader and is not limited only to procedural safeguards, mostly dealt with and discussed in the recent publications. Its proper implementation requires the consideration of the basic preconditions which are: a tribunal to be 'established by law', to be independent and to be impartial.

#### The establishment of the ICTY and fair trial

It was, in fact, the manner in which the ICTY was established by the UN Security Council as an *ad hoc* tribunal which gave rise to a broad discussion in academic circles as to its impartiality and independence. In this sense, Milosevic was not the first defendant to object the legality of the Tribunal. He claimed that all international and national documents, and rules and regulations, determine the fact that a court can be there to judge only if it has been established on the basis of law. Therefore, he asserted that the Security Council could not transfer to the Tribunal the right that it itself does not have and so the Tribunal has no competence to try.<sup>22</sup> It was Dusko Tadic who raised the issue of the legality of the Tribunal.<sup>23</sup> He was the first person indicted and taken into the ICTY custody and charged with violations of international humanitarian law, grave breaches of the Fourth Geneva Convention and

crimes against humanity. His objections might be 'subsumed under one general heading: that the action of the Security Council in establishing the International Tribunal and in adopting the statute under which it functions is beyond the power, hence the International Tribunal is not duly established by law and cannot try the accused.'<sup>24</sup> To be duly established by law, the ICTY should have been created either by treaty which is the consensual act of nations, or by amendment of the UN Charter.<sup>25</sup>

The ICTY was established by a UN Security Council resolution 827 (1993) of 25 May 1993 'for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January and a later date to be determined by the Security Council'.<sup>26</sup> It is quite clear that the Security Council, which has a primary responsibility for the maintenance of peace and security,<sup>27</sup> acting under Chapter VII of the UN Charter, established the Tribunal as a security i.e. enforcement measure. As pointed out in resolution 827 (1993), the Council was convinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal as an *ad hoc* measure would contribute to the restoration and maintenance of peace and to ensuring that such violations are halted and effectively redressed.<sup>28</sup> In the words of the former UN Secretary-General, Boutros-Boutros Ghali, 'in asking the Secretary-General to consider [the project of establishing of the Tribunal], the Security Council has given itself an entirely new mandate.'<sup>29</sup> The Security Council was aware that the procedure of establishing the Tribunal was unusual. The UN Secretary General pointed out that in 'the normal course of events' a tribunal would be established by the conclusion of a treaty previously drawn up and approved by an international body, e.g. the General Assembly or by a specially convened conference,<sup>30</sup> like it was done by the adoption of the Rome Statute establishing the ICC later on, in 1998. Such an approach would allow a detailed examination and elaboration of all the issues relevant for the establishment of the international tribunal. At the same time it

19. See, for example, Travaux Préparatoires of Article 14 of the ICCPR for which almost no discussion took place with regard to the particular provision referring to independent and impartial tribunal established by law. In David Weissbrodt, *The Right to a Fair Trial*, Martinus Nijhoff Publishers (2001), p. 51–52.

20. An Asian Seminar on Fair Trial held in Hong Kong on 7–12 November 1999 <[http://cambodia.ahrchk.net/mainfile.php/19\\_991\\_107/](http://cambodia.ahrchk.net/mainfile.php/19_991_107/)>.

21. Note, for example, the comments of

Amnesty International concerning the anti-terrorism law of Pakistan, enacted in August 1997, providing, *inter alia*, for special anti-terrorism courts (AI Index: ASA 33/004/2002).

22. Transcript of 13 February 2002, p. 217 (11–21).

23. *Prosecution v. Dusko Tadic A/K/A 'Dule'*, Case No. IT-94-I-T.

24. *Prosecution v. Dusko Tadic A/K/A 'Dule'*, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 1.

25. *Idem.*, para. 2.

26. UN Security Council Resolution 827 (1993) of 25 May 1993, para. 2.

27. Article 24 (1) of the UN Charter.

28. Preamble of the UN Security Council Resolution 827 (1993) of 25 May 1993.

29. Quoted from Srdja Trifkovic, *The Hague 'Tribunal': Bad Justice, Worse Politics*, Keynote Speech at the S.B.A. Annual Scholarship Ball Union League Club, Chicago, 7 June 1996.

30. Report of the UN Secretary General pursuant to paragraph 2 of the Security Council resolution 808 (1993) presented on 3 May 1993, (UN Doc. S/25 704), para. 19.

would allow the full exercise of the sovereign will of the states in the process of negotiation of the treaty, as well as in the process of their decision-making to become parties to the treaty or not.<sup>31</sup> However, this would require a too time-consuming procedure not allowed by the urgency of the situation existing in the former Yugoslavia at that time.<sup>32</sup> The urgency of the matter did also not allow the General Assembly to deal with the procedure of the adoption of the Statute.<sup>33</sup> Instead, as pointed out above, the Security Council proceeded by the adoption of a resolution based on Chapter VII of the UN Charter. In establishing the Tribunal it relied on its capacity to create a subsidiary body under Article 29 of the UN Charter.<sup>34</sup>

Though a majority of the authors agree that the advantage of a thus established tribunal is in avoiding long treaty negotiations, they do not deny the problems in acknowledging a clear legal ground for its creation. 'It is particularly uncertain from where the Security Council derives the competence to submit acts committed on a state's territory and within its jurisdictional power to an international criminal court without asking this state to accept this submission by way of a formal act of cession or transfer.'<sup>35</sup> Notwithstanding the fact that there is a broad legal framework for the Security Council's measures and activities in the field of peace and security as established by Article 24(2) of the UN Charter, there is no explicit or implicit provision on the particular capacities of the Security Council to establish any kind of a judicial body. However, it has been claimed that Article 39 of the UN Charter by giving the competence to the Security Council to determine whether a situation of an 'internal armed conflict' presents a threat to peace and security, provides the Security Council with further capacities in determining which measures of non-military and military nature can be decided upon in response to such a situation. In this sense, as it was pointed out by the ICTY Appeals Chamber, the establishment of the Tribunal presents a 'measure not involving the use of force'

pursuant to Article 41 of the UN Charter, and does not constitute an improper delegation neither usurpation of judicial powers.<sup>36</sup> The Charter leaves the scope of Article 41 open and thus a relatively broad discretion to the Security Council to decide upon a type of a non-military measure.

It is a matter of fact that, apart from some cases of defence motions challenging the jurisdiction of the ICTY, the issue of the capacity of the Security Council to establish the ICTY (and also ICTR), is only an academic question as there is no established procedure in determining the validity of acts of the United Nations organs. In the past the International Court of Justice refused to avail itself with judicial review or appeal in respect of the decisions taken by the United Nations organs.<sup>37</sup> Similarly, the ICTY Trial Chamber also refused to deal with the issues scrutinizing the actions of the UN organs which would be a task of a constitutional court set up for that purpose.<sup>38</sup> Although, interestingly enough, in the view of the Appeals Chamber the International Tribunal is empowered to pronounce itself upon the plea challenging the legality of its establishment and it did so in the *Tadic Case*.<sup>39</sup> Even more interesting is the fact that the The Hague District Court pronounced its view in the summary civil proceedings in the case *Slobodan Milosevic v. The State of the Netherlands*.<sup>40</sup>

#### **The meaning of the notion 'established by law'**

A strict interpretation of the wording of the existing international legal provisions on fair trial raises the crucial question of whether the adoption of Resolution 827 (1993) can be taken to mean that the Tribunal was 'established by law'. Regarding this, the ICTY Appeals Chamber has extensively elaborated its view in the above-mentioned *Tadic Case*.<sup>41</sup> According to the Appeals Chamber there are three possible interpretations of the term *established by law*: *firstly*, it means established by legislature in a decision-making process under democratic control. This manner ensures that the administration of justice is

31. Ibid.

32. See the Preamble of the Security Council resolution 808 (1993) of 22 February 1993.

33. Idem, para. 21.

34. Interestingly enough, the Security Council did not follow the same 'formula' regarding the establishment of the Special Court for Sierra Leone. Instead, on 16 January 2002, an agreement was concluded between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court, by which the Government of Sierra Leone, exercising its sovereign right, gave its consent and full support to its

creation.

35. Kai Ambos, 'Establishing an International Criminal Court and an International Criminal Code – Observations from an International Criminal Law Viewpoint', Vol. 7 *European Journal of International Law* (1996) No. 4, p. 519–544, at n. 17.

36. *Prosecutor v. Dusko Tadic A/K/A 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 38.

37. See, the Advisory Opinions of the International Court of Justice in *Certain Expenses of the United Nations* (20 July 1962) and in *Legal Consequences for States of the continued*

*Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (21 June 1971).

38. *Prosecutor v. Dusko Tadic A/K/A 'Dule'*, Decision on the Defence Motion on Jurisdiction, of 10 August 1995.

39. *Prosecutor v. Dusko Tadic A/K/A 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

40. Ruling of the District Court of The Hague of 31 August 2001, Case No. KG 01/975.

41. Idem, paras. 41–47.

not a matter of executive discretion, but is regulated by laws made by the legislature. However, this cannot find its application on the international level, since the constitutional structure of the United Nations organs does not exist and cannot be compared with the division of powers in the municipal systems on legislative, executive and judicial functions. *Secondly*, it refers to the establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions, such as the Security Council has under Chapter VII. *Thirdly*, that its establishment must be in accordance with the rule of law. In the case of the ICTY it means that it had to be established in accordance with the proper international standards and it must provide all guarantees of fairness, justice and even-handedness, 'in full conformity with internationally recognized human rights standards'.<sup>42</sup>

In addition, the Appeals Chamber pointed out that

*'in determining whether a tribunal has been 'established by law' is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness.'*<sup>43</sup>

The requirements laid down in Article 14(1) of the International Covenant on Civil and Political Rights, Article 6(1) of the European Convention on Human Rights and Article 8(1) of the American Convention on Human Rights, impose 'an international obligation which only applies to the administration of criminal justice in a municipal setting'.<sup>44</sup> However, the Appeals Chamber stressed, an international court could not be set up at the mere whim of a group of governments, but such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments, in which case it can be said that the court was 'established by law'.<sup>45</sup>

This is rather an interesting view. It is, of course, true that there are substantial differences between national and international systems which only allow a limited comparison. Instead of legislative procedures

typical for national systems, on international level states have developed special procedures in adopting legal rules large part of which consists of negotiation and deliberation in decision-making. One of the main intentions of these procedures is to safeguard the principle of state sovereignty which is the reason why the international legal system is still rather a horizontal than a vertical system of law. Apart from this, the majority of the existing international organizations, including the United Nations, have Assemblies or Parliaments as bodies representative of the interests of the 'governed'. In addition, various international organs not composed of representatives of all member states possess those functions which states have as part of their sovereignty transferred to them. This is how, with some exceptions,<sup>46</sup> the powers of the Security Council have been established. It has been afforded by a real treaty, the UN Charter, a broad discretion to pass autonomous decisions in the field of peace and security which are legally binding on states on the basis of Articles 25<sup>47</sup> and 103<sup>48</sup>. Its powers under Chapter VII are

*'coercive vis-à-vis the culprit state or entity [and ...] are also mandatory vis-à-vis the other UN member states who are under the obligation to cooperate with the Organization [...] and with one another [...] in the implementation of the action or measures decided by the Security Council.'*<sup>49</sup>

For this reason one would be inclined to consider resolutions of the Security Council adopted under Chapter VII rather as 'executive orders' as it was claimed by the Defence in the *Tadic Case*, or in any case, as 'binding measures' adopted for particular situations and providing for actions and procedures intended as a means to an end. This was, by the way, confirmed by the Hague District Court in whose view 'an international organization such as the UN [...] is perfectly entitled to establish a tribunal by way of a *measure*' (curs. aut.).<sup>50</sup> In this sense the term 'measures' as used in Articles 41 and 42 of the UN Charter reflects the *ad hoc* nature of the decisions of the Security Council. It can also help in explaining why the Security Council adopted a resolution on an *ad hoc* tribunal and was not capable of establishing a permanent criminal court. In this light should also be seen the ICTY Statute which is 'neither common

42. *Idem*, paras. 43–45.

43. *Idem*, para. 45.

44. *Idem*, para. 42.

45. *Ibid.*

46. The exception refers to the position of Permanent members of the Security Council which was not negotiable during the conference in San Francisco in 1945, but was merely accepted by original member states.

47. Article 25: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

48. Article 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations

under the present Charter shall prevail.'

49. *Prosecutor v. Dusko Tadic A/K/A 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 31.

50. Ruling of the District Court of The Hague of 31 August 2001, Case No. KG 01/975.

law accusatorial nor civil law inquisitorial, nor even an amalgam of both: it is *sui generis*.<sup>51</sup>

And, of course, nobody claims that the establishment of the Tribunal was anything else but a security i.e. enforcement measure of the Security Council. However, it seems difficult to reconcile the idea and the function of an enforcement measure with the concept of *established by law*. It is really true that, unlike the Covenant of the League of Nations which in Article 16 listed the possible measures not-involving military force taken by the member states which were limited to the breaking of trade and financial relations, the Security Council has on its disposal an open-ended list of measures upon which it can decide. In practice this led to the implementation of a comprehensive set of coercive measures which, in addition to the measures of economic nature and arms embargo, included also freezing of financial assets abroad, prohibition of the participation in sporting and cultural events, etc. As a matter of principle there is no reason why the creation of a tribunal by the Security Council would not be considered as such a possible measure. Probably the most important objection which can be raised in this regard is that by this measure the Security Council proceeded with the establishment of a body which is supposed to be its subsidiary body, thus to carry out certain of *its own* functions afforded to it by the UN Charter. More concretely, in this case the Security Council empowered a subsidiary body, the Tribunal, with judicial functions which it itself does not possess. Some critics point out that

*'it would take a very flexible legal mind indeed, to interpret [Chapter VII of the UN Charter] as carte blanche to investigate people, indict them, try them, find them guilty and keep them in prison.'*<sup>52</sup>

However, the strict meaning of Article 29 ('The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions' (curs. aut.)), does not imply such an understanding. This provision gives a large degree of discretion to the Security Council to establish a body which is in its own view necessary for the performance of its functions, and that is for the maintenance of peace and security. It means that it is up to the Security Council to freely assess whether a measure such as

the establishment of a tribunal would be an adequate response to a certain security situation. The same competence with the same wording is given to the General Assembly in Article 22, and there is also a more general provision in Article 7(2) of the UN Charter, which is of relevance for all principal organs of the United Nations that '[s]uch subsidiary organs as may be found necessary may be established in accordance with the [...] Charter'. Quite certainly the drafters of the UN Charter at the time of drafting the Charter did not envisage the establishment of the Tribunal as a subsidiary organ, but there is an obvious intention reflected in the wording to give such a broad scope to the provisions on subsidiary bodies to be able to accommodate various needs which would come up in the future. However, despite the claim of the Tribunal and of those who participated in its creation, there is also an obvious and embodied contradiction and incompatibility between the notions of *an independent court of law* and of a subsidiary organ established to fulfil certain duties, in this case *for the performance of [the Security Council] functions*. This incompatibility comes from the fact that while carrying out its functions as a judicial body, the Tribunal needs to take into consideration the existing political goals of the Security Council in the fulfilment of its duty as a subsidiary organ. This very fact undermines the principle of judicial independence.<sup>53</sup>

#### Legality v. legitimacy

In the light of serious critics regarding the legal grounds giving the Security Council the capacity to establish the Tribunal(s), one can wonder how it is possible that there is a substantial international support for the decision itself. It seems that the decision draws its strength from the legitimacy afforded to the Security Council rather than from its strict legality: the goal(s) to be achieved justify the means used.<sup>54</sup> The establishment of the ICTY has been seen as legitimate primarily because of the highly moral quest to react to the security situation in the former Yugoslavia. It coincides with the claim that the interpretation or application of a law is always open to the argument that it should be interpreted and applied in a way that is morally defensible and if necessary should be amended in a way that it becomes morally defensible.<sup>55</sup>

51. Patrick L. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', Vol. 11 *European Journal of International Law* No. 3 (2000), p. 569–589, at p. 569.

52. Srdja Trifkovic, *The Hague 'Tribunal': Bad Justice, Worse Politics*, Keynote Speech at the S.B.A. Annual Scholarship Ball Union League Club, Chicago, 7 June 1996.

53. See on the impact of political considera-

tions on judicial independence in: J. Clifford Wallace, 'An Essay on Independence of the Judiciary: Independence from What and Why', Vol. 58 *NYU Annual Survey of American Law* (2001), p. 214–258.

54. The Appeals Chamber pointed out in the *Tadic Case* that the establishment of the Tribunal lies in the wide discretion of the Security Council as to chosen means, and should not be tested by the likelihood of suc-

cess or failure in achieving the Council's goals. *Prosecutor v. Dusko Tadic A/K/A 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 39.

55. Tony Honoré, *The Necessary Connection between Law and Morality*, <[www.users.ox.ac.uk/~alls0079/positivism2.pdf](http://www.users.ox.ac.uk/~alls0079/positivism2.pdf)>.

According to some sources legitimacy is taken to mean: according to law; lawful; in accordance with established rules, principles or standards; in accordance with the laws of reasoning; to make lawful or legal; pronounce or state as lawful. Its synonyms are: legal; licit; sanctioned; valid.<sup>56</sup> However, it cannot be equated with legality. Prominent philosophers such as Max Weber, do not consider legitimacy as a normative concept. In the Weber's view legitimacy is 'empirical belief of a specific populace in the normative legitimacy of a given political order' (curs. aut.).<sup>57</sup> It comes from the combined force of two processes which need to occur together: open deliberation in and around the institution and the effectiveness of the institution in meeting its goals.<sup>58</sup> As part of the process, deliberation is important because it increases the amount of information available in the decision. At the same time, the effectiveness in achieving the goals will increase legitimacy. During the Cold War period the Security Council failed to legitimise itself because it was able to take decisions only infrequently, and often even when it managed to issue substantive resolutions these were ignored by significant states in the international system.<sup>59</sup>

Another approach to the legitimacy comes from law, meaning that the law (or the state) is the ultimate decider of morality and so of legitimacy<sup>60</sup>: the established law should be the starting point in establishing the legitimacy and not the other way around. Accordingly, legitimacy comes only as a strengthening factor of well-based legal decisions. However in practice it might not be the case: while an action or decision can lack legality it can be perceived as legitimate. It is how, for example the NATO military intervention in the Federal Republic of Yugoslavia, i.e. Kosovo, is being seen. In certain compelling cases such as the NATO intervention, the illegality will not threaten the action's legitimacy under the condition that this occurs as an exception to the well established rule of legality. 'For international politics, the Kosovo case (assuming we see it as legitimate) shows that sometimes moral imperative can trump legal rightness in underwriting legitimacy, but with dangers for the future.'<sup>61</sup>

Similarly, the establishment of the ICTY should be seen as result of the legitimacy of the Security Coun-

cil to take action and the moral quest to do so, taken to substitute the weak legal ground. However, whereas this presents only an attempt to find justification(s) and explanations, it is a matter of fact that in the study of international relations little attention has been paid to the issue of how legitimacy affects international organizations and their acceptance by nation-states<sup>62</sup> and, for the purpose of this discussion, also the existing international law. It is only lately that the issue of legitimacy of international organizations and bodies (including the UN Security Council) receives certain attention and is the subject of discussion also. This is certainly the result of the changed conditions and the Security Council's intensified activity and decision-making in the post-Cold War period.

### Independence and impartiality of the ICTY

On two occasions, in both cases unsuccessfully, Milosevic sought legal remedies outside the ICTY claiming, *inter alia*, the lack of independence and impartiality of the Tribunal. In his submissions before the Hague District Court initiating summary civil proceedings, he claimed that the ICTY could not be regarded as independent and impartial Tribunal within the meaning of Article 6 of the European Convention on Human Rights as it maintains close and friendly relations with NATO and is indeed dependent on NATO.<sup>63</sup> The District Court dismissed the contention without entering any substantial argumentation. It made only a brief reference to the numerous regulations, including lengthy and detailed rules for the protection of the rights of the accused which present constraints to the Tribunal's actions. In addition, it noted that according to the Ruling of the European Court of Human Rights in the *Naletilic v. Croatia Case*, the ICTY fulfils all the criteria necessary for the protection of the accused, including those of impartiality and independence.<sup>64</sup>

Similar claim was raised by Milosevic in his application lodged to the European Court of Human Rights now against the decision of the Hague District Court.<sup>65</sup> He complained, *inter alia*, that under Article 6 of the European Convention of Human Rights the ICTY's procedure was not 'fair'. Article 6 (1) was violated by the failure of the ICTY's Prosecutor to prosecute those responsible for the afore-

56. Jess Stein (Ed.-in-Ch.), *The Random House Dictionary of the English Language*, New York: Random House 1983, p. 819.

57. Max Weber, *Wirtschaft und Gesellschaft*, Tübingen (1980/1998), at 122, quoted from Winfried Thaa, *Legitimacy in the Context of Internationalized Decision-Making Through International Organizations*, paper presented at the Conference Democracy and Legitimacy of the European Union and Other International

Organizations, held at the European Parliament, Brussels, 11–12 October 2002.

58. Ian Hurd, *Legitimacy and the United Nations: Deliberation and Effectiveness in the Security Council*, paper presented at the Conference Democracy and Legitimacy of the European Union and Other International Organizations, held at the European Parliament, Brussels, 11–12 October 2002.

59. Idem.

60. Idem.

61. Idem.

62. Idem.

63. *Slobodan Milosevic v. The State of The Netherlands*, Case No. KG 01/975.

64. Idem, para. 3.4.

65. Application No. 77 631/01 by Slobodan Milosevic against The Netherlands.

mentioned military intervention by NATO member states. He also claimed that the ICTY united in a single organ administrative, legislative and judicial functions 'since it had the power to amend its own rules and delegated powers to its Registrar.'<sup>66</sup> '[T]he aggregate of these failings alleged prevented any trial before the ICTY from ever being 'fair'.<sup>67</sup> In addition, the ICTY's Statute provided for 'persons responsible' or 'persons presumed responsible' for specified crimes, which violated Article 6 (2) of the European Convention as it reflected a presumption of guilt even before the start of every trial. Apart from violations of Article 6, Milosevic complained under Article 10 of the European Convention regarding the restrictions imposed on him to have contacts with the press and media; under Article 13 complaining that it was the ICTY which offered the only 'remedy' available against the violations he alleged; and also under Article 14 which is a general provision prohibiting discrimination.<sup>68</sup> However, none of the allegations were actually dealt with by the European Court, as the Application was declared inadmissible on the basis of the non-exhaustion of domestic remedies.<sup>69</sup>

The issue of impartiality and independence of the ICTY is one of the major points of interest which receives significant public attention. Many of those who are proponents of the Tribunal and those who are its opponents carefully follow its work in the courtroom and its activities outside it. Formally speaking there are safeguards embodied in the ICTY Statute. It contains provisions on impartiality and independence of permanent and *ad litem* judges and of the Prosecutor (Articles 12, 13 and 16). The judges of the ICTY should be persons of high moral character, impartiality and integrity. Impartiality in this context includes impartiality with respect to the acts falling within the competence of the Tribunal.<sup>70</sup> At the same time, as a separate organ of the ICTY, the Prosecutor also acts independently without seeking or receiving instructions from any government or from any other source.

In the implementation of the ICTY Statute and the Rules of Procedure and Evidence the Tribunal uses the appropriate interpretative technique which gives the weight to the principles embodied in Article 31 (1) of the Vienna Convention of the Law of Treaties.<sup>71</sup> In certain situations, however, the flexibility

revealed by the Tribunal might invoke questions of procedural fairness. As it is not the purpose of this article to discuss in detail the elements of due process as implemented in the practice of the Tribunal, it suffices to say that there are in this respect some instances of concern. As such can be mentioned the permission of secret testimonies and anonymous witnesses which takes away the possibility for the accused to counter false accusations, or allowing a conviction by a Trial Chamber for a crime not listed in the indictment, which is prejudicial to the defence because it leaves them without opportunity to prepare counter evidence.<sup>72</sup>

However, apart from this, there is still an open question as to the impact which the manner of the establishment of the Tribunal and its position as a subsidiary organ of the Security Council has on the Tribunal's independence and impartiality. This issue stands independently from the political motives of the Security Council in establishing a tribunal only for Yugoslavia (and later on, for Rwanda) and not reacting in the same way in some equally or even more compelling cases which occurred in the past, such as the killing of two million people or one third of Cambodia's population by Pol Pot's Khmer Rouge in the period 1975–1978 or the killing of half a million people by the Indonesian Army in 1965–1966.

In his Report of May 1993 the UN Secretary General pointed out that the Tribunal, as a subsidiary organ of the Security Council of a judicial nature and established under Chapter VII of the UN Charter

*'would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions (rom. aut.).'*<sup>73</sup>

At the same time, the Secretary General added:

*'as an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and the Security Council decisions related thereto (rom. aut.).'*<sup>74</sup>

66. *Idem.*

67. *Idem.*

68. *Idem.*

69. *Idem.*

70. Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25 704 of 3 May 1993, para. 74.

71. Patrick L. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', Vol. 11 *European Journal of International Law* No. 3 (2000), p. 569–589, at p. 569.

72. Sara Stepelton, 'Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of

Derogation', Vol. 31 *International Law and Politics* (1999), p. 535–609; at p. 557–558.

73. Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25 704 of 3 May 1993, para. 28.

74. *Ibid.*

There is a simple logic needed to understand that the Tribunal as such, having a substantial function in the restoration and maintenance of peace and security, contains a structural difficulty in separating political i.e. security aspects from its judicial functions. Various examples illustrate, indeed, that certain activities of the Tribunal were directly linked to the political considerations and that some countries see it as a useful foreign policy tool.<sup>75</sup>

*'The experience with the former Yugoslavia and Rwanda proved that an international indictment and arrest warrant could serve to isolate offending leaders diplomatically, strengthen the hand of domestic rivals, and fortify the international political will to impose economic sanctions and take more aggressive actions if necessary'*<sup>76</sup>

One would expect that, if it was not for political motives, Milosevic would have been indicted much earlier for his alleged involvement in the crimes committed in Croatia and Bosnia and Herzegovina, and would have not been accepted as one of the main signatories of the Dayton Peace Accord in 1995 and a guarantor of its implementation. Similarly, the indictment against him came in a moment determined by political considerations in the midst of the NATO military intervention in Yugoslavia. There is an overall impression that the indictment had a 'political function' which, in some views, sought to 'buttress support in the US and Europe for NATO's war, while whipping into line those NATO countries – such as Germany and Italy – that have resisted the push by Britain and the US for a ground invasion.'<sup>77</sup> There have been also strong voices that for political reasons ICTY has not provided any satisfactory responses to the claims that some of the NATO leaders by ordering the military intervention in Yugoslavia should have been indicted for 'crimes against peace, crimes against humanity and war crimes'.<sup>78</sup> By doing so, the ICTY and its Prosecutor took a risk of being blamed for application of 'selective justice' and the violation of the rules of independence and impartiality.

As the time passes, there is a growing number of international lawyers, and civil and human rights activists and groups, which have raised their concerns at

the ICTY's lack of genuine impartiality and its routine violation of basic standards of jurisprudence.<sup>79</sup> Ordinary people are the strongest proponents of punishing individuals for crimes committed against the innocent. Yet very few of the general public believe that Milosevic will get a fair trial.<sup>80</sup> Too many various elements and events seem to have already affected the Tribunal's impartiality and independence. For example, the media coverage throughout the whole period of the conflict in the former Yugoslavia and the statements of the Western leaders expressing their satisfaction with Milosevic's detention have already influenced public opinion. This makes it very difficult for the Tribunal to ignore the existing public feelings so-created. It brings into question the application of the right of the accused to be presumed innocent until proved guilty (Article 21 of the ICTY Statute). In addition, as pointed out, the indictment itself was not a serious legal document supported by probative evidence and had a strongly biased character as much of the evidence was supplied by two countries, the USA and Great Britain, that were waging war against Serbia at the time of indictment.<sup>81</sup>

The financing of the Tribunal is also seen as an obstacle to achieving of a genuine impartiality and independence. Though according to Article 32 of the ICTY Statute, the expenses of the Tribunal should be borne by the regular budget of the United Nations, some sources indicate that it has been the recipient of corporate patronage and routinely works in tandem with the departments overseeing US foreign policy,<sup>82</sup> though Islamic donors are also prominent. In 1994/1995 the USA provided \$ 700 000 in cash and \$ 2 300 000 worth of equipment to the Tribunal,<sup>83</sup> whereas at the same time the USA share of debt in the United Nations was 55%.<sup>84</sup> This manner of financing of the Tribunal by private donors and 'intermeshing of NATO governments' indicates the influence which some countries might exercise on the ICTY activities and the lack of independent review of the whole system.

## Conclusion

At the end, it should be pointed out that the idea of prosecuting individuals responsible under interna-

75. Michael P. Scharf, 'The Politics Behind U.S. Opposition to the International Criminal Court', Vol. VI *The Brown Journal of World Affairs*, Issue 1 (Winter/Spring 1999), p. 97–104, at p. 99.

76. Ibid.

77. Garry Grey, *The Milosevic Indictment: Legal Document or Political Diatribe?*, of 1 June 1999, <[www.wsws.org/articles/1999/jun1999/milo-j01.shtml](http://www.wsws.org/articles/1999/jun1999/milo-j01.shtml)>.

78. Jianming Shen, 'A Politicized ICTY

Should Come to and End', *The Law Professor's Network*, <<http://jurist.law.pitt.edu/shen.htm>>.

79. Tony Robson, *Milosevic Trial: Hague Tribunal Shows its Partisan Nature*, <<http://www.wsws.org/articles/2001/oct2001/milo-o15.shtml>>.

80. See BBC News on-line debate of July 2001, <[http://news.bbc.co.uk/1/hi/talking\\_point/1419834.stm](http://news.bbc.co.uk/1/hi/talking_point/1419834.stm)>.

81. Garry Grey, *The Milosevic Indictment: Legal*

*Document or Political Diatribe?*, of 1 June 1999, <[www.wsws.org/articles/1999/jun1999/milo-j01.shtml](http://www.wsws.org/articles/1999/jun1999/milo-j01.shtml)>.

82. Tony Robson, *Milosevic Trial: Hague Tribunal Shows its Partisan Nature*, <<http://www.wsws.org/articles/2001/oct2001/milo-o15.shtml>>.

83. Idem.

84. <<http://www.globalpolicy.org/finance/info/usdebt.htm>>.

tional law is a noble idea which gives the hope that no crimes will remain unpunished. The establishment of the *ad hoc* tribunal(s) helped in speeding up the process of adopting the Rome Statute on the permanent International Criminal Court reflecting the voluntary choice of the states to deal with the issues of individual crimes under international law. After all unsuccessful attempts which had been undertaken in the past, the ICC creation can be considered as a big success of the international community. At the same time, the establishment of the ICTY opened an era of different understanding of what the law and fairness are in the current international and national arenas. Although the idea of establishing an international criminal court is relatively old, the assumed legal capacity of the Security Council to proceed with the creation of an *ad hoc* tribunal, is rather recent. In its core it means the application of punitive means on individuals rather than on states (which are the only subject and object of the regulation by the UN Charter) for achievement of political

goals. This, however, involves on its part also the questions of the implementation of basic requirements of human rights protection in general, including the rights of the accused in particular. Whereas the Tribunal can insist on respecting the procedural safeguards of due process as established in both national and international systems, there is an obvious departure from the past view on the meaning of 'established by law' and independence and impartiality of a tribunal which are the very basis of the fair trial concept. This is result of the Tribunal's 'structural shortfalls' coming from the manner in which it had been established, rather than of the shortcomings in the ICTY Statute or the ICTY Rules of Procedure and Evidence. Under these conditions, quite probably the Tribunal will not be able to fulfil its historical task, and that is to bring to justice and to punish *all* the responsible for crimes under international law committed in the territory of the former Yugoslavia.

*Nijmegen, december 2002*