Centre international de formation Européenne

Institut Européen des Hautes Etudes Internationales

Master in Advanced European and International Studies

Trilingual branch

Academic year: 2010/2011

The Relation Between Law and Politics: A Case Study of the International Criminal Tribunal for the Former Yugoslavia

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"*Everywhere justice is the same thing, the advantage of the stronger.*(Plato, The Republic)

Introduction

The relation between law and politics has always been a curious one. These days, people are eager to assert that the world has shifted towards legalism (Shkar, 1964, p. 1).[1] The omnipresence of legalism expresses itself not only in personal behaviour and political ideologies. Legalism has significantly influenced the modus operandus of institutions - from national governments to international organizations - when dealing with political violence. Rather than strictly resolving to interstate bargaining and political negotiations, the international community has increasingly turned to the rule of law in its quest for peace.

While the development of international law through legally binding treaties is testimony to this legalistic approach, the emergence of international criminal tribunals (ICTs), as of the last decade of the 20th century, is equally proof of the legalistic triumph. Although, this triumph seems self-evident today, the role of law and politics has been subject to centuries of political and academic debate. Morgenthau, the father of realism, was doubtful about the Nuremberg trials. His belief that international law is of no relevance in an anarchic world of all against all, led him to assert that Nazi leaders should have been brought before a court martial within 24h of being caught and then shot the next morning (Bass, 2000, p. 10). Other realists, such as Kissinger, claim that the legalistic approach may constitute an impediment rather than a contribution to peace.

The creation of international criminal tribunals and the growing amount of international law are without a doubt evidence of a turn to legalism. However, this does not imply that the role of politics has become obsolete when dealing with war crimes and political violence. Law and politics are generally regarded as complementary rather than

[1] Dr. Shklar defines legalism as the ethical attitude that holds moral conduct to be a matter of rule-following, and moral relationships to consist of duties and rights determined by rules.

competing measures of conflict-management. Moreover, neither the law nor politics function within an operational vacuum; as a consequence both are often prone to cross-pollination. The interlocking of law and politics is particularly visible with regard to war crimes tribunals, and more specifically the International Criminal Tribunal for the Former Yugoslavia (ICTY).

In 1993, the UN Security Council, in light of the humanitarian catastrophe taking place in the former Yugoslavia, established the first war crimes tribunal after Nuremberg by adopting resolution 827. Therefore, the creation of the ICTY is essentially a political act. After all, it must be remembered that when the UN Security Council agrees to invoke its powers, it is taking a political decision; despite the fact that these powers are enshrined in a legal document – the UN Charter. (Kerr, 2004, p. 3) Moreover, not only was the creation of the tribunal the result of international politics; the court was also established as a means for achieving a political objective: the maintenance of peace and security.

Despite the fact that the ICTY was created by a political organ and serves primarily political objectives, the tribunal in itself has a strictly judicial mandate: the establishment of individual criminal responsibility (Kerr, 2004, p. 9). This duty to adjudicate alleged war criminals, entails responsibilities. After all, adjudication must be free from politics. As a consequence, the ICTY will have to ensure that, in the midst of a political environment, politics do not seep through into the adjudication process. In other words, the Tribunal will have to safeguard its judicial mandate from "politicization".[2]

The aim of this dissertation is to analyze to what extent the ICTY has managed to safeguard the adjudication process from politicization. It will be argued that the success of the ICTY to resist politicization will largely depend on the Tribunal's ability to uphold two critical principles: the principle of separation of powers (chapter I) and the principle of due process (chapter II). After having established whether or not the ICTY is politicized, the affect of this absence or presence of politicization upon the Tribunal's legitimacy will be discussed (chapter III).

[2] Bartram S. Brown defines politicization as the dysfunction in which actions or decisions relating to technical or "non-political" matters are influenced by "political" considerations unrelated to the agreed purposes of the organization.

CHAPTER I: The Separation of powers

> *"There is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.* (Montesquieu, The Spirit of the Laws)

As mentioned in the introduction, whether or not the ICTY is politicized will depend on the Tribunal's ability to uphold both the principle of separation of powers and the principle of due process. This first chapter seeks to evaluate the compliance of the ICTY with the doctrine of the separation of powers.

Though the idea of separation of powers is generally associated with Montesquieu, as early as the fourth century B.C., Aristotle distinguished between three governmental institutions: the general assembly, public officials, and the judiciary (Sam J. Irvin, 1970, p. 108). Despite dating back to ancient times, the principle of separation of powers remains one of the cornerstones of modern society.

By distinguishing three distinct public powers (legislative, executive and judicial) and attributing these to three distinct institutions, the principle of separation of powers aims to not only avoid abuse of power but also increase the efficiency in each of these three branches of government (Saunders, 2006, p. 340). More specifically, the requirement that the judicial function be exercised by a judiciary, protects the judicial process against politicization. As specified above, politicization refers to "*the dysfunction in which actions or decisions relating to technical or 'non-political' matters are influenced by 'political' considerations unrelated to the agreed purposes of the organization*" (Brown B. S., 1992, p. 14). While there are many forms of politicization, a judicial decision taken by a political - instead of a judicial - institution constitutes the most explicit. Though the doctrine of separation of powers serves primarily as a state principle, its ability to protect against politicization, is still sustained when the principle is applied in the international arena.

Therefore, if the ICTY is to be free from politicization, it must be a judicial institution. Prima facie this criteria might seems to be met in light of the ICTY being called a '*tribunal*' and the presence of judges. However, it ought to be remembered that judicial proceeding in Hitler's Germany and Stalin's Soviet Union also took place in a court room and in the presence of judges. This did not prevent the "judiciary" from being a political institution - serving as an instrument of terror and propaganda for their totalitarian leaders - rather than a judicial one (Christenson, 1999, p. 16). In order to evaluate whether or not the ICTY is a judicial institution and, thus, respects the doctrine of separation of powers, the theory of legalization will serve as methodology.

1.1 The Theory of Legalization

As mentioned earlier, the world is witnessing a move to law. This legalism has most notably manifested itself through the creation of dispute-resolution mechanisms. These mechanisms have emerged not only in the field of international peace and security (ICTY) but also in the fields of economy (Appellate Body of the WTO), human rights (European Court of Human Rights) and maritime affairs (Law of the Sea Tribunal). These bodies all aim to resolve disputes in a more legalistic manner than through strict interstate bargaining or negotiations. However, it should be noted that not all of these organs of international organizations relinquish politics in favour of the law to the same extent (Goldstein et al., 2002, p. 386).

In "*The Concept of Legalization*" Abbot, Keohane, Moravcsik, Snidal and Slaughter established a theoretical framework, entitled the theory of legalization. This theory allows one to evaluate to what degree international organizations and their subsidiary organs have undergone the legalization process. Therefore, legalization is presented as a variable. More specifically, the extent to which an institution has been legalized is defined through three criteria: obligation, precision and delegation. Each of these three dimensions of legalization can vary from high to low, and each can vary independently from the other (see Table 1).

Table 1: Forms of International Legalization (Abbot et al., 2002, p. 406).

Type	Obligation	Precision	Delegation	Examples
Ideal type HARD LAW				
I	High	High	High	EC; WTO-TRIPs; European Human rights Convention, International Criminal Court
II	High	Low	High	EEC Antitrust, Art. 85-6; WTO-National treatment
III	High	High	Low	US-Soviet arms control treaties
IV	Low	High	High (moderate)	UN Committee on Sustainable Development
V	High	Low	Low	Vienna Ozone Convention
VI	Low	Low	High (moderate)	UN specialized agencies; World Bank
VII	Low	High	Low	Helsinki Final Act; Nonbinding Forest Principles; technical standards
VIII	Low	Low	Low	Spheres of influence; balance of power
Ideal type Anarchy				

1.2. The Legalization of the ICTY

This typology of legalization, as developed by Abbot, Keohane, Moravcsik, Slaughter and Snidal, will serve as the basis for the analysis as to whether the ICTY can be perceived as a judicial institution.

In order to assert that the ICTY is a judicial and not a quasi-judicial or political institution, it must be established that the tribunal is characterized by "hard" legalization. It should be noted that generally "hard" legalization does not necessarily imply that the institution in question is a judicial one. After all, the theory of legalization is applicable to a vast variety of institutional arrangements, ranging from international organizations to treaties. However, when applied to dispute-resolution

mechanisms "hard legalization" entails a judicial institution. In order to assess the degree of legalization of the ICTY, it is necessary to evaluate the degree of obligation, precision and delegation of the Tribunal.

To be considered as a form of "hard" legalization, the ICTY must have one of two constellations: a high degree of obligation, precision and delegation (O, P, D) or a high degree of obligation, a low degree of precision and a high degree of delegation (O, p, D). While high obligation and delegation are, thus, indispensable conditions for "hard" legalization, a high degree of precision is not a prerequisite (Abbot et al., 2002, p. 402).

1.2.1. Obligation

In "*The Concept of Legalization"* the first dimension of legalization (obligation) is defined as the fact that:

> [...] "*states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behaviour there under is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well."* (Ibid., 401)

Taking into consideration the aforementioned definition, it can be said that 'obligation' refers to the legally binding character of rules contained in international legal agreements. A legally binding rule is an indicator of high obligation, whereas a rule that explicitly negates any intent to create legal obligations is synonymous with a low degree of obligation (see Table 2).

TABLE 2. *Indicators of obligation*: "The Concept of Legalization", p. 410.

High
Unconditional obligation; language and other indicia of intent to be legally bound
Political treaty: implicit conditions on obligation
National reservations on specific obligations; escape clauses
Norms adopted without law-making authority; recommendations and guidelines
Explicit negation of intent to be legally bound **Low**

In international law it is generally accepted that declarations, guidelines, principles, and standard rules and procedures have no legally binding effect. However, these instruments are characterized by an "*undeniable moral force and seek to provide practical guidance*" to actors of international law (United Nations Office Of The High Commissioner For Human Rights, 2010, p. 5). An example of a non-legally binding commitment is the "*Declaration on the Elimination of violence against women*". Firstly, the declaration can have no legally binding effect due to the fact that it was created by the UN General Assembly, which has no formal legislative power. However, it should be noted that in time even non-binding declarations can lead to the emergence of customary law (Abbot et al., 2002, p. 412).

The moral rather than legal force of this declaration is also visible through the language used in its document. In contrast to its legally binding sister, "*The Convention on the Elimination of all Forms of Discrimination against Women*", the declaration uses the term "*should consider*" rather than "*shall undertake*" when referring to state measures. Therefore, it can be said that the declaration views these measures more as recommendations, while the convention regards them as duties.

Not only conventions but also covenants, statutes and protocols regard prescribed measures as duties, and are thus by nature legally binding. This binding effect has far-reaching implications (Ibid., 411). The disrespect for rules governed by the principle of *pacta sunt servanda* entail legal procedures and legal remedies. In contrast, in the case of non-legally binding instruments - such as the aforementioned "*declaration on the elimination of violence against women"* - states and other actors can at most resort to political remedies when rules are disregarded.

When evaluating the degree of obligation of the ICTY one could simply state that the tribunal is governed by the "*Updated Statute of the International Criminal Tribunal for the former Yugoslavia*" (ICTY Statute). Statutes are by nature legally binding. Therefore, it can be said that the ICTY has a high level of obligation. A more profound explanation for the high obligation level of the ICTY would consist of asserting that a tribunal implies a legal procedure. As stated earlier, only legally binding rules - which imply a high level of obligation - can entail legal procedures.

There is nothing inherently wrong with the aforementioned explanation. However, its methodology is strictly deductive. A more scientific approach to illustrate the tribunal's high level of obligation requires an actual analysis of the legally binding character of the rules governing the material scope of the ICTY. Instead of deducing the legally binding character of these rules from the premise that legal procedures are only possible when legal rules are at stake, this methodology allows one to directly establish their legalistic character. Before analyzing the legally binding character of the rules governing the ICTY, one must first define the material scope of the ICTY.

The Statute of the ICTY describes the tribunals material scope in article 1 to 6. More specifically, the statute states that the tribunal has the power to prosecute persons committing grave breaches of the Geneva conventions, violating the laws or customs of war or committing genocide or crimes against humanity (ICTY Statute [1993] 2009: Art. 1-6).

Article 2 of the ICTY statute refers directly to the Geneva Conventions. As stated earlier, conventions are by nature legally binding. Therefore, with regard to the first element of its material scope (grave breaches of the Geneva Conventions), it can be said that the ICTY has a high level of obligation. In article 3 of the ICTY statute a non-exhaustive list is given of the violations of laws or customs of war for which the tribunal has a mandate to prosecute. Though article 3 does not - in contrast to article 2 - refer explicitly to a convention, the listed violations are a reproduction of article 23-28 of the Hague Convention of 1907. Thus, the ICTY also has a high degree of obligation with respect to war crimes.

The same rational explains the court's high level of obligation with regard to the third element of its material scope. Article 4 of the ICTY statute applies the same definition of genocide as laid out in article 2 and 3 of the "*Convention on the Prevention and Punishment of the Crime of Genocide".* Therefore, the definition of genocide as set forth in the ICTY statute is nothing more than a literal repetition of an international, legally binding rule under the Genocide convention.

Finally, the last element of the ICTY's material scope pertains to crimes against humanity. Though there is no formally adopted convention against crimes against humanity, these crimes have been formulated similarly to the ICTY Statute's definition in the Nuremberg Charter. Moreover, a vast arraignment of international legally binding

documents such as the "*International Covenant on Civil and Political Rights"* and the "*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"* provide protection against crimes against humanity by formulating the legal obligation to respect the right to live and the right to not be tortured (International Covenant on Civil and Political Rights, 1966, Art. 6-7).

Taking into consideration Abbott, Keohane, Moravcsik, Slaughter, and Snidal's premise that the legally binding character of rules is an indicator of the degree of obligation, we can assert that the ICTY has a high level of '*obligation*'. Not only is the ICTY governed by a statute, but the rules governing the court's material scope can both directly and indirectly be assessed as being legally binding. Therefore, the first criteria for the ICTY to be considered a 'highly legalized' institution - in contrast to a political one - has been met. However, the indispensable criterion of 'high delegation' and the voluntary criterion of 'high precision' have still to be evaluated. Though the latter is less crucial than the former for establishing the legalization level of the ICTY, a logical build-up requires to firstly discuss 'precision'.

1.2.2.Precision

Precision, the second dimension of legalization, is defined as the extent to which a rule " [...] *specifies what is expected of a state or other actor in a particular set of circumstances*." (Abbot et al., 2002, p. 412) Therefore, precision creates a continuum relating to the scope for reasonable interpretation. At one end of the spectrum we find clearly and unambiguously formulated rules which leave little room for interpretation. The other extreme consist of rules so vaguely defined that they make it impossible to assess whether conduct complies with the rule in question.

A set of precise rules must not only be clear and unambiguous. Rules of the set must also be related in a non-contradictory way to one another. Furthermore, relatively precise rules also distinguish themselves from more generally formulated ones – often referred to as standards - through the moment at which a society labels a behaviour as unacceptable (Ibid.). In societies with precise rules, legislative organs label *ex ante* a way of conduct as 'unacceptable', whereas in communities adopting general standards this labelling process occurs *ex post*, often through the hands of the judiciary. The

requirement of precision not only relates to material rules but also to procedural ones. Therefore, an evaluation of the degree of precision of the ICTY compels us to analyse the precision rate of both its substantive and procedural rules. While the former are the subject of the ICTY statute, the latter can be found in the "*Rules of Procedure and Evidence*" (RPE).

The imprecision of the substantive laws of the ICTY are most visible with regard to the rules governing the material scope of the court. Not only the general manner in which article 2 to 6 are formulated, but also the court's contribution to the interpretation of these international legal norms are proof of their ambiguity (ICTY Statute [1993] 2009: Art. 2-6). However, it is important to note that the Security Council does not have the power to create *ex post facto* international criminal law, when establishing an *ad hoc* international tribunals. Therefore, when interpreting its substantive rules, the ICTY will always be limited by conventional and customary international law (Kaszubinski, 2002, p. 470).

In the *Tadic* case, the first case ever brought before the ICTY, the defence filed a preliminary motion of objections challenging amongst other things the subject matter jurisdiction of the court (Kaszubinski, 2002, p. 469). They argued that article 2, 3 and 5 of the statute, named in the indictment, were only applicable to international armed conflict, not to internal ones. While article 5 explicitly states that both crimes against humanity of an internal and international character are punishable, neither article 2 nor 3 (referring respectively to the Geneva conventions and the genocide convention) specify the territorial scope of their applicability. Therefore, the Trial Chamber had to compensate for the imprecision of these articles by 'uncovering' their territorial applicability through means of interpretation. While the Trial Chamber noted that article 2 was not necessarily subject to the requirement of internationality, the Appeals Chamber held differently - arguing that the Geneva conventions were not applicable to internal armed conflict. Finally, the court confirmed that article 3, pertaining to the laws and customs of war, covers all serious offences of international humanitarian law not covered by article 2, 4 or 5 and, thus, applies to both internal and international conflicts (Prosecutor v. Dusko Tadic, 1995).

The substantive laws of the ICTY are not only imprecise due to the fact that they neglect to specify whether they are applicable to internal or international conflicts or both. The tribunal's ability to regard article 3 as applicable to both internal and international conflicts was the direct consequence of the non-exhaustive character of this article. Article 3 states [...] "*violations shall include, but not be limited to* [...]". Prior to the ICTY's decision that article 3 applies to all serious offences of international humanitarian law not covered by article 2, 4 or 5, it was uncertain which conducts could be regarded as an acceptable addition to the non-exhaustive list of violations formulated under article 3. By adopting the definition of genocide as formulated in the genocide convention, the uncertainty as to whether a conduct can be perceived as a violation is less blatant in article 2 than in article 3. The Statute defines genocide as crimes committed "[...] *with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.*" (ICTY Statute [1993] 2009: Art. 2).

However, the definition of genocide only decreases rather than does away with the need for interpretation. The requirement of intent, as incorporated in the genocide definition, is not clear-cut. In August 2001, the Trial Chamber of the ICTY found Radislav Krstic guilty of aiding and abetting genocide, murders, extermination and persecutions (ICTY, 2004). It was the first conviction for genocide rendered by the court and had important implications for the case against Slobodan Milosevic.
In order to convict Krstic of genocide the court would first have to establish his "*intent to destroy*". The ICTY stated that in the event of a joint criminal enterprise, where several protagonists participate in the crime at hand, the "*intent to destroy must be discernible in the criminal act itself, apart from the intent of particular perpetrators* (Prosecutor v. Radislav Krstic, 2001, p. 198).

Therefore, in the Prosecutor vs. Krstic the imprecision of the notion "*intent to destroy*" and the genocide definition on the whole led the ICTY to not only interpret this substantive rule but to set an important precedent, all the while respecting the limitations set forth by existing conventional and customary international law.
Another noteworthy example of the ICTY as an interpretative authority making landmark decisions can be found in the *Celebici case*. In this case, the ICTY characterized the rape of Bosnian Serb women prisoners at the Celebici prison camp as acts of torture. The tribunal found Hazim Delic, a Bosnian Muslim deputy camp

commander, guilty of a grave breach of the Geneva Conventions (torture) and war crimes (torture) for the rapes he committed (Campbell, 2007, p. 415).

With regard to the substantive laws governing the ICTY's jurisdiction, it can be stated that they are characterized by vagueness. Unspecified notions such as "*intention to destroy*" in the genocide convention, "*torture"* in the Geneva and Hague conventions in combination with the lack of clarity to the applicability in internal or international armed conflict make it difficult to assess whether a conduct complies to the substantive rules of the ICTY. This blurriness entails a broad area of discretion for the ICTY. However, it is important to note that when exercising its interpretative authority, the ICTY is always bound by existing conventional and customary international law. According to the typology set forth by Abbott, Keohane, Moravcsik, Slaughter, and Snidal, one could assert that the broad - but not infinite - area of discretion of the ICTY implies that its substantive rules have a rather low level of precision. However, the level of preciseness of the procedural rules of the ICTY remains to be evaluated.

Shortly after the ICTY was set up, the judges of the tribunal created their own binding rules of procedure and evidence. Over the years the judges have amended and interpreted these rules in a myriad of different ways (Boas, 2003, p. 1). This body of rules aimed to provide a credible code for the prosecution of violations of international criminal law. It has proven to be an irreplaceable source of inspiration in the drafting of both the procedural rules governing the International Criminal Tribunal for Rwanda and the International Criminal Court.

By granting the judges the power to adopt the rules of procedure and evidence, article 15 of the ICTY Statute also implicitly gives them the authority to amend these rules (Boas, 2003, p. 4). Therefore, this rule-making and amending authority entrust the judges with a quasi-legislative power. While the doctrine of separation of powers demands that national judges refrain from legislating and must limit themselves to applying existing law, the judges of the ICTY have the possibility to overrule decisions made at trial or even at the appellate level. However, article 6 of the "*Rules of Procedure and Evidence*" (RPE) clearly states that the proposed amendment "[...] *shall be adopted if agreed to by not less than ten judges at a plenary meeting of the Tribunal.*" Therefore, judges acting in their judicial capacity do not have the power to

make and amend the Rules. After the Rules were adopted in 1994, they were amended four times in respectively 1995 and 1996. Furthermore, since then they have been amended twice every year (Ibid., 5). Even article 6 of the Rules, governing the amendment procedure, has been subject to amendment.

In the first instance, this high frequency of amendments implies that the RPE governing the ICTY are characterized by a low level of obligation. Though at first glance these procedural rules may appear to be legally binding, their binding character is subject to the whims of the judges, who on the ground of article 15 ICTY Statute have the right to amend them. Article 15 ICTY Statute represents a *de facto* escape clause for the legally binding procedural rules. Therefore, taking into consideration the aforementioned typology of legalization, it can be said that the Rules have a low degree of obligation. While obligation (referring to the legally binding character of rules) and precision (ability to assert that a conduct complies with the rules) are not inextricably linked, the procedural rules' low level of obligation are likely to entail a low level of precision. There can never be complete certainty as to whether a conduct complies with the RPE, as these rules can infinitely be modified, not only through amendment but also via interpretation. The rules of procedure and evidence are, thus, defined by a low level of precision.

With regard to the second dimension of legalization, it has been illustrated that both the substantive and procedural rules of the ICTY have a low degree of precision. On the one hand, the vagueness of certain terminology and the neglect to specify the applicability to internal or international armed conflict explain the weak level of precision of the substantive rules. On the other hand the judges' broad amendment and interpretative authority reduces the procedural rules to temporary, and therefore uncertain, norms. However, it should be remembered that the typology of legalization presents precision as a voluntary condition. According to the typology only a high degree of obligation and a high degree of delegation are necessary conditions for 'hard' legalization. Taking into consideration that the ICTY has a high level of obligation and a low level of precision, it is now of the essence to determine that the ICTY has a high level of delegation in order to illustrate that the tribunal is a highly legalized - and therefore judicial - institution.

1.2.3. Delegation: independence, access and embeddedness

International courts and tribunals are thriving. These courts and tribunals represent the third dimension of legalization. Delegation is defined as the "*delegation of authority to courts and tribunals designed to resolve international disputes through the application of general legal principles."* (Keohane et al., 2002, p. 458). Therefore, the growing number of international tribunals is testimony to states' fatigue of resolving disputes through institutionalized bargaining. This vast array of international courts and tribunals is characterized by significant discrepancies. As was the case with the two other dimensions of legalization, delegation represents a continuum. A high level of delegation requires a high level of independence, access and embeddedness. On the other hand, a low degree of these three indicators entails a low level of delegation (Ibid., 459). In order to evaluate the degree of delegation of the ICTY, one must therefore measure the three explanatory variables of independence, access and embeddedness with regard to this tribunal.

1.2.3.1 Independence of the ICTY

According to Keohane, Moravicsik and Slaughter the variable 'independence':

> *"measures the extent to which adjudicators for an international authority charged with dispute resolution are able to deliberate and reach legal judgments independently of national governments*."(Keohane et al., 2002, p. 459)

In other words, independence requires that adjudication is rendered impartially with regard to concrete state interests. More specifically, the level of independence will depend on the ability of members of an international tribunal to liberate themselves from three categories of institutional constraints: selection and tenure, legal discretion, and control over material and human resources (Ibid; 460).

Selection and Tenure, the first and most important criterion of independence, requires that the judges of the ICTY are not direct representatives of national governments, taking into consideration state interests when rendering adjudication. An independent selection demands, therefore, an autonomous and impartial process of naming judges.

However, this is not a sufficient guarantee. In order to be truly independent when serving as an adjudicator, a judge must not be dependent on the national government for his subsequent career. A long term of office is likely to lower this risk of future dependence (Ibid., 460).

In the case of the ICTY, the judges have succeeded in freeing themselves from the institutional constraint of selection and tenure. The selection procedure in article 13*bis* of the ICTY Statute ensures that the judges are not inclined to act as direct representatives of national governments. Firstly, all member states of the UN have the right to nominate up to two candidates meeting the required qualifications. Article 13*bis* specifically states that the nominated candidates cannot be of the same nationality. Therefore, not only are member states not obliged to nominate one of their own nationals, but they are actually forbidden to do so when a first, national candidate has already been chosen (ICTY Statute [1993] 2009: Art. 13-13*bis*).
Furthermore, after a pre-selection by the UN Security Council, the remaining candidates are subject to a vote in the UN General Assembly. While the nomination of candidates is a prerogative of national governments, the final election of the judges is entrusted to the general assembly and, thus, realised under the scrutiny of the world community. Finally, also the tenure of the ICTY judges is contributing to their independence. Though, their term of office is limited to a period of four years, article 13*bis* (3) asserts that judges are eligible for re-election. Given that the ICTY judges enjoy a relatively long term of office (four years with possibility of re-election) and that they are selected by a group of states (UN General Assembly), it can be said that the ICTY, with regard to selection and tenure, has a high level of independence (see TABLE 3).

Legal discretion, the second criterion of judicial independence, measures the extent to which a court has the mandate to interpret norms and resolve conflicts between competing norms when adjudicating a particular case (Keohane et al., 2002, p. 461). As illustrated in the section pertaining to precision, the ICTY enjoys a high level of legal discretion. The vagueness with which the substantive rules of the ICTY are formulated and the tribunal's prerogative to amend its procedural rules not only imply but also necessitate a broad interpretative authority, in order to bring clarity as to whether a conduct complies with the rules of the ICTY. Therefore, the high level of legal discretion

of the ICTY is not merely an indicator, but also a direct result, of the low degree of precision characterizing the substantive and procedural rules of the ICTY.

Financial and human resources, the third and final element of judicial independence, refers to the ability of the court to provide swift and effective justice (Keohane et al., 2002, p. 462). It is clear that an independent and substantial budget, together with abundant and well-trained personnel greatly increase the judges' ability to process their caseloads in a successful manner. In order to be able to fulfil its vast array of duties, the ICTY will, therefore, have to be allocated sufficient financial means and be equipped with adequate and competent staff.

Article 32 of the ICTY Statute reveals that the expenses of the international tribunal shall be borne by the regular budget of the United Nations. However, in 1994 and 1995, the UN General Assembly attributed respectively a mere $10,8 million and $24,3 million to the tribunal (ICTY, 2011). The ICTY differentiates itself due to the fact that its three main organs – the Chambers, the Registry, and the Office of the Prosecutor – have duties, such as collecting evidence and protecting witnesses, which in national systems are performed by the legislative and the executive branches of government. Therefore, the limited financial resources in the ICTY's initial years had significant consequences for the court's ability to carry out its vast array of duties. The ICTY's budget has been increased substantially over the years. In 2010 – 2011 the ICTY was attributed a budget of $302 million (Ibid.).

However, bearing in mind the completion strategy –which aims to see all appeals completed for the end of 2014 - the tribunal's financial means still prove to be inadequate. As will be discussed in chapter II, this lack of judicial independence with regard to the ICTY budget could give rise to politicization of the court.

1.2.3.2. Access of the ICTY

Access, the second element of delegation, measures to which extent social and political actors can summon the court to resolve a particular case. Therefore, when evaluating the variable access, one must ask oneself who has the power to set the agenda. Keohane, Moravcsik and Slaughter distinguish between four degrees of access: none, low, moderate and high.

No accessibility refers to the situation in which no social or political actors – not even states - have legal standing to file a complaint. On the contrary, a high degree of access implies that not only states, but also other actors such as individuals and NGO's can call upon the court to resolve a dispute. Between these two extremes, *low accessibility* requires the consent of the two concerned states and is, thus, only applicable in interstate disputes, while *moderate accessibility* signifies that only a state can file a complaint, although the state can do so in response to pressure from social groups (Keohane et al., 2002, p. 462).

When evaluating the degree of accessibility of the ICTY, it is important to take into account the fact that the ICTY is a criminal tribunal. This characteristic of the ICTY has two important consequences. Firstly, criminal courts try natural persons accused of certain criminal offences, they do not prosecute the states on whose behalf these individuals claim to act. Therefore, a criminal court by nature never adjudicates interstate disputes. As a consequence the ICTY cannot be characterized by low accessibility, as this can only occur in interstate dispute resolution. The fact that the ICTY is a criminal tribunal has, however, a second effect. In criminal tribunals, there is the main character of the prosecutor. International criminal tribunals, such as the ICTY and the ICC, usually go to great lengths to guarantee the independence of the prosecutor. The ICTY Statute states: "*The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.*" (ICTY Statute [1993] 2009: Art. 16)

However, the principle of an independent prosecutor only requires that the prosecutor is not used as a mouthpiece for states or other actors. It does not imply that the prosecutor cannot investigate the legitimacy of complaints filed by the aforementioned actors. Article 18 (1) ICTY Statute states that:

> "*The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed*."

The fact that not only states, but also non-state actors can bring a claim to the attention

of the ICTY, signifies that the tribunal is characterized by a high degree of access.

1.2.3.3.Embeddedness of the ICTY

Embeddedness, the third and final criterion of delegation refers to the extent to which state compliance is needed in order to promulgate and implement judgements. Due to the fact that there is no world governance, no world police or army, international tribunals are often dependent on national authorities to implement their judgements. The continuum of embeddedness runs from strong to weak control by individual states over the promulgation and implementation process of international judgements (Keohane et al., 2002, p. 466). An example of strong control can be found in the old GATT system, in which individual litigants could veto the promulgation of judgements *ex post*. On the other hand, the judgements of the ECJ are subjugated to weak state control. The recognition of the supremacy of EU law over national law and the principle of direct effect entail that national courts respect the advisory opinions of the ECJ, even when they are contradictory to precedents set by national courts (Ibid.).

The fact that the ICTY is a criminal court does not only have repercussions for the level of accessibility of the court, but also affects its degree of *embeddedness.* On the ground of the ICTY Statute the trial chamber has the choice to either acquit the accused or find him guilty and sentence him to prison (ICTY Statute [1993] 2009: Art. 27). In the first scenario of acquittal, the implementation of the judgement only requires states to respect the principle of *non-bis-in-idem* under article 10 and, thus, refrain from prosecuting the accused for the same offences before a national court. Also the second scenario, in which the ICTY finds the accused guilty, is characterized by low state control over the implementation of the judgement. The implementation only needs states, who have indicated their willingness to the Security Council to accept convicted persons, to respect their engagement (ICTY Statute [1993] 2009: Art. 27). Therefore, ICTY judgements enjoy a high level of embeddedness, due to the fact that their implementation only requires limited state action.

Although it does not affect the high level of embeddedness of the ICTY - as embeddedness only relates to state control in the post-trial phase, it is important to note that the ICTY is heavily dependent on states in its pre-trial phase. In order to fulfil its duty of bringing perpetrators to justice, the ICTY must first have these perpetrators in its

custody. While a legal obligation under article 29 (2) ICTY Statute, states such as Serbia and Croatia have (in the past) often inexplicitly or explicitly refused to arrest and transfer to The Hague some of their national war criminals, thereby rendering the ICTY powerless. It was only on the 27 May 2011, 17 years after his indictment, that Serbia, following substantial EU pressure, arrested former Serbian military leader Ratko Mladic (Bilefsky & Simons, 2011).

1.3. Conclusion

In this first chapter it has been examined to which extent the ICTY can be considered a judicial institution. The typology of legalization set forth by Abbot, Keohane, Moravcsik, Slaughter and Snidal has served as the basis for the analysis. According to this typology, there are three dimensions of legalization: obligation, precision and delegation. Each of these variables can, independently from one another, be high, moderate or low.

The authors assert that a judicial institution is characterized by "hard" legalization. "Hard" legalization implies that the institution in question has a high level of obligation, a high level of precision, and a high level of delegation (O, P, D) or at the least a high level of obligation and delegation (O, p, D). Therefore, obligation and delegation are indispensable conditions, while precision is not. After having evaluated these three dimension with regard to the ICTY, it can be concluded that the ICTY is a form of hard legalization in the constellation O, p, D.

The high degree of obligation of the ICTY is the result of the legally binding character of the rules governing the Tribunal's material scope. Article 2 to 6 of the ICTY Statute invest the Tribunal with the power to prosecute grave breaches of the Geneva conventions, violations of the laws of war, acts of genocide and crimes against humanity. Therefore, these articles directly or indirectly refer to obligations formulated in international legally binding documents such as conventions and covenants.

While the rules of the ICTY are characterized by a high degree of obligation, their precision rate is rather low. The vagueness and ambiguity with which certain substantive rules are formulated, often make it difficult to assess whether a conduct complies with the rules in question. With regard to the tribunal's procedural rules, their imprecision is the result of the ICTY's broad amendment authority. This low level of precision in both

the substantive and procedural rules of the ICTY, lie at the heart of the court's vast legal discretion. However, the low degree of precision of the ICTY rules does not exclude that the ICTY is a form of "hard" legalization, as high precision is not a *conditio sine qua non*.

So as to assess whether the ICTY has a high degree of delegation, an evaluation of the court's judicial independence, accessibility and embeddedness was necessary. The court's judicial independence is measured according to the ICTY's ability to liberate itself from three categories of institutional constraints: selection and tenure, legal discretion and control over financial and human resources. While the ICTY performs well with regard to the first two categories, its control over financial and human resources leaves room for improvement. However, the ICTY's high level of accessibility and embeddedness permits to overlook this flaw pertaining to the court's judicial independence. While the possibility for a variety of social and political actors to file a complaint secures a high degree of access, the ICTY's elevated level of embeddedness is the consequence of states' limited role in implementing the ICTY's judgements.

With a high degree of obligation, a low degree of precision, and a high level of delegation, the ICTY is a form of 'hard' legalization. As a consequence, it can be asserted that the ICTY is a judicial institution and, thus, that the principle of separation of powers has been respected. However, as will be illustrated in the following chapter, a judicial institution and 'hard' legalization do not necessarily imply that the influence of politics in the judicial process has completely been abolished.

Chapter II: Due Process

As mentioned, the success of the ICTY to resist politicization will largely depend on the Tribunal's ability to uphold two critical principles: the principle of separation of powers and the principle of due process. While in the first chapter it has been illustrated that the ICTY is a judicial institution adhering to the separation of powers, it remains to be assessed whether the ICTY upholds the principle of due process. After all, the fact that the judiciary – in contrast to the legislative or executive branches of government- is entrusted with the judicial process only offers protection against the crudest form of politicization. While upholding the principle of separation of powers is, thus, crucial to preventing politicization, it is not sufficient. It is equally essential that judges, when exercising their judicial mandate, refrain from considering non-legal aspects.

The requirement of due process demands that independent judges adhere to accepted procedures and apply rules and legal reasoning (Blackman, 1995, p. 285). Therefore, the principle of due process requires judges to abstain from adopting political rationales in their decision-making capacity. As a result, the respect for due process safeguards the judicial process from politicization.

The evaluation as to whether the ICTY upholds the principle of due process and, thus, is free from politicization consists of two steps. Firstly, it should be considered which political actors/factors could impinge upon the legal reasoning of the ICTY judges. After all, in order for judges to forsake strictly judicial adjudication there must be political motivations present. Politicization rarely emerges in a vacuum. These factors, which push judges away from the due process requirement and pull them towards politicization, will be referred to as indicators of politicization. However, the presence of indicators is insufficient to conclude that the ICTY does not respect the principle of due process. Therefore, the second part of the second chapter assesses to which extent the judges of the ICTY have not applied, or have misapplied or applied in a discriminatory way legally binding rules when evaluating the alleged war crimes committed by NATO during Operation Allied Force.

2.1. Indicators of Politicization

With regard to the ICTY, there are three noticeable factors that might entice judges to ignore their judicial responsibility to respect the principle of due process: the limited financial resources of the ICTY, the lack of an ICTY police force, and the consideration for peace. In the following, these three indicators of politicization will be discussed.

2.1.1. Limited Financial and Human Resources

A first indicator that the ICTY might be inclined to disregard the principle of due process is the court's dependency on states with regard to acquiring financial resources. As illustrated in chapter I, the ICTY has a limited budget in relation to its duties. The court's dire budgetary situation, led the UN General Assembly to encourage member states to donate cash, services and supplies to the ICTY (Kaszubinski, 2002, p. 467). While in 1993-1997 these contributions were good for $8.6 million, they grew to $32.9 million by 2001. Though these donations play an indispensable role in ensuring the court's efficiency, they often come at a price.

When confronted with a possible investigation as to whether NATO had committed war crimes, NATO spokesperson Jamie Shea reminded the prosecutor's office that you "*don't bite the hand that feeds you*" (Bloxham & Pendas, 2010, p. 629). NATO member states, specifically the US, make large financial contributions to the ICTY. Therefore, leading contributing states may view their generous and desperately needed donations as an endowment to exert political influence over the judicial process. As a result, the judges of the ICTY might be more preoccupied with securing the financial future of the ICTY than the rule of law and, thus, divert from the principle of due process.

Despite this serious flaw, donations have proven to be indispensable. Not only have they financed many of the court's activities but they have also allowed the ICTY to acquire new staff members. In 2000 the Security Council decided to add 27 *ad litem* judges to the ICTY, following an assessment that under present conditions the ICTY's work would not be accomplished until 2016 (Kaszubinski, 2002, p. 468).

2.1.2. Lack of an independent ICTY police force

NATO's aforementioned threat that you "*don't bite the hand that feeds you*" not only refers to the contributions of NATO member states to the ICTY budget, but also to NATO's role in apprehending indicted war criminals. Therefore, it incorporates both a pecuniary and cooperative aspect.

As mentioned in chapter I, the ICTY is highly dependent on state corporation in its pre-trial phase. Although this reliance does not affect the degree of legalization of the ICTY, it does prove problematic in the sense that it can open the door to politicization. States are legally obliged to cooperate with the ICTY (ICTY Statute [1993] 2009: Art. 27). However, the knowledge that the ICTY is highly dependent on states for the apprehension and transfer of war criminals - due to the absence of an ICTY police force- has led these states to acquire a strong bargaining position *vis-a-vis* the ICTY, or to refrain from fulfilling their legal obligation altogether. As early as 1995, then president of the ICTY Antonio Cassese vividly illustrated the difficulty of enforcing international criminal justice in the absence of state cooperation by an analogy. Cassese compared the ICTY to a "*limbless giant*" reliant on the "*artificial limbs*" of the enforcement agencies of the UN member states (Sloan, 2003, p. 319). If states violated their legal obligation to arrest indicted persons, the ICTY would be incapacitated, due to the fact that it cannot conduct a trial in the absence of the accused. The ICTY Statute does not foresee any solution for this functional inconvenience.

However, in December 1995 the Dayton peace agreement proved to be an efficient instrument for overcoming state non-cooperation. The agreement called into existence the Implementation Force for Bosnia and Herzegovina (IFOR), the predecessor of the Stabilisation Force (SFOR). Though the task of these forces consisted of guaranteeing compliance with the military requirements of the Dayton agreement, over the years they have played an increasing role in the apprehension and transfer of indicted war criminals to the Hague. By 2003, over one third of the people who had sat 'in the dock' of the ICTY, had been apprehended by SFOR (Henquet, 2003, p. 113). It is important to note that the parent body of SFOR is NATO. As a consequence the ICTY is equally dependent on SFOR as it is on NATO for the apprehension of war criminals.

Although the Dayton agreement called into existence a remedy for the disastrous effects of state non-cooperation, it also created a new relation of dependency between NATO (member states) and the ICTY. This dependency could lead to a sense of entitlement on the part of NATO (member states) to exert influence over the ICTY's judicial process (Henquet, 2003, p. 114). On the other hand, the ICTY might view such interference as preferable to losing SFOR cooperation and returning to a system of pure state reliance. Many observers view NATO's warning to the ICTY to "*not bite the hand that feeds you*" and the courts subsequent decision not to investigate NATO for alleged war crimes during their 2000 bombing campaign as proof of this rational. Therefore, the fact that SFOR has enabled the ICTY to carry out its judicial duties, has also increased the possibility that the ICTY not adhere to the principle of due process and, thus, becomes politicized.

2.1.3. The consideration for Peace

A third and final indicator that the ICTY might be prone to politicization relates to the impact that possible indictments may have on the peace process. In war-torn societies where conflict is still wavering, the attempt to acquire peace often seems to overshadow the pursuit of justice. States and mediators often argue that the participation of war criminals in peace-negotiations is essential for bringing an end to war (Williams P. R., 2002, p. 116) The conflict in the former Yugoslavia is a striking example of this phenomenon. However, it is also an exception. Generally, mediators claim that there is insufficient proof to justify excluding alleged war criminals from the negotiation process.

However, in the Kosovo crisis it was indisputably evident that some of those participating in the peace negotiations were guilty of war crimes. As early as 2004, many government officials were of the opinion that there was sufficient proof that Milosevic had orchestrated the war crimes and crimes against humanity taking place in Bosnia, and, thus, to indict him accordingly (Williams & Cigar, 1997). Furthermore, prior to the Rambouillet negotiations in February 1999, the Washington Post leaked a secret conversation between Sainovic, Milosovic's senior advisor for Kosovo, and the Serbian military. The conversation proved not only that the Serbian military forces were responsible for the Racak massacre, but also that they - with the help of Sainovic - were plotting to blame the massacre on the Kosovo Liberation Army (Ibid.).

The question remains why the ICTY, despite this overwhelming evidence, abstained from issuing indictments against both Milosevic and Sainovic.[3]

The decision of the ICTY's prosecutor not to directly indict the aforementioned war criminals could have been a 'politicized' decision. As mentioned earlier, states and mediators often view political leaders - even those who have committed inhumane acts- as indispensable for brokering a peace. Despite the fact that the ICTY is supposed to be independent, it is highly probable that state officials and mediators, eager to have political leaders present at the negotiation table, exerted pressure on the ICTY to adopt a procrastinating approach *vis-à-vis* potential indictments. Justice would have to take a back seat while politicians favoured a policy of peace-building through accommodation. Such a manipulation of the judicial process by politics would constitute a clear violation of the principle of due process and amount to politicization of the court.

Aside from the primary concern of the politicization of the ICTY, it is also important to note that dissuading the court from issuing indictments, might jeopardize rather than increase the possibility of peace Not indicting renowned war criminals and including them in peace negotiations, boils down to legitimizing these individuals. Thereby, they are given a chance to further their agendas and, thus, continue rather than bring to a halt their atrocities (Williams P. R., 2002, p. 118).

Not only the absence of an indictment against Milosevic and Sainovic at the moment of the Rambouillet negotiations can be viewed as the result of extra-judicial considerations. The fact that the ICTY prosecutor finally decided to indict the aforementioned individuals in May 1999, can also be viewed as the outcome of a politicized rational (Ibid.). After the failing of the Rambouillet/Paris negotiations, NATO made good on their threat of force and launched "*Operation Allied Force*". This NATO air campaign brought about two important incentives for encouraging ICTY indictments of Milosevic and Sainovic. Firstly, the outcry over the significant amount of civilian casualties gave way to heavy criticism concerning the NATO bombing campaign. NATO believed that if Milosevic and Sainovic, two powerful Serbian leaders, were to be indicted by the ICTY, the world community would be convinced that NATO was pursuing a legitimate cause in the FRY. Secondly, the fact that the

[3] Both Milosevic and Sainovic were only indicted by the ICTY in May 1999. Milosevic died in 2006, while still standing trial. Sainovic was sentenced to 22 years in prison, following a conviction of war crimes and crimes against humanity.

NATO campaign was proving less successful than initially anticipated, led some countries, such as Russia, to claim that the military approach ought to be abandoned in favour of the previous policy of accommodation (Williams P. R., 2002, p. 130). If only for its credibility, NATO could not allow this to happen. As a result, a US state official met with the ICTY chief prosecutor in order to persuade her to rapidly indict Milosevic. Though Arbour is said to have disregarded this request as an infringement upon her impartiality, she issued an indictment against Milosevic shortly after (Ibid.).

In sum, the timing of the ICTY indictments against Milosevic and Sainovic seems to be anything but random. To the contrary, it appears that the ICTY's decision whether and when to move forward with the indictments was largely the result of non-legal considerations and external pressures.

2.2 Politicization

Taking into consideration the budgetary and executorial dependency of the ICTY, and its potential consideration for peace the assumption that politics manipulated the judicial process is easily made. However, to assert that the presence of political motivations automatically leads to politicized decisions is insufficient. Such a rational would come down to a purely realist approach, in which international law is redundant due to the fact that it will always be subject to the whims of the powerful.

The problem with politicization is that it is difficult to prove. With the exception of cases in which bribery has been proven, one can never indisputably establish that a judge ruled politically. The fact that African-Americans who commit murder are more likely to receive the death penalty than their Caucasian counterparts might be true, but it does not automatically imply that a particular African-American who was sentenced to death was necessarily a victim of discriminatory political prejudice. The question then arises as to how we can prove politicization. The best way to verify whether a decision is politicized consists of examining to which extent the decision in question can be justified on legal grounds. In the case of the African-American, the absence of precedents sentencing to death Caucasians for similar crimes increases the likelihood that political prejudice played a role in the African-American's conviction. On the contrary, precedents sealing Caucasian murderers to the same fate as the African-

American boost the legality of the decision. When a decision is legally justified, it decreases the probability that the judicial process was manipulated by politics. Therefore, the best way to examine as to whether politicization is present is to assess to which extent judges apply legal rules and, thus adhere to the principle of due process, when adjudicating a particular case.

In the following, the legal justification for the decision of the prosecutor of the ICTY not to investigate alleged NATO war crimes during Operation Allied Force (OAF) will be analysed. Though the principle of due process primarily concerns judges, it should be noted that it can - to a certain extent - also be regarded as an obligation of the prosecutor. Even in the Anglo-Saxon tradition were prosecutors generally enjoy more freedom with regard to whom gets indicted, selective prosecution is strictly forbidden. In the United States v. Armstrong it was reaffirmed that prosecutors cannot decide to arrest a person for, or charge a person with, a criminal offense based on "*an unjustifiable standard such as race, religion, or other arbitrary classification*" (United States v. Armstrong, 1996). Therefore, if NATO did in fact commit war crimes similar to those committed by Yugoslav forces and the OIP decided to only charge the latter, this would constitute a selective prosecution and, thus, a violation of the due process rule.

After having provided a brief background to OAF, the legality of the decision not to launch a formal investigation into NATO's role in respectively the attack on a civilian passenger train at the Grdelica Gorge and in the bombing of the RTS (Serbian TV and Radio Station) in Belgrade will be evaluated.

2.2.1 NATO: Operation Allied Force

On 24 March 1999 NATO launched its Operation Allied Force (OAF) against the Former Republic of Yugoslavia (FRY). During this operation NATO planes made about 38.000 sorties of which one-third were actual attack missions. Moreover, an estimated 6000 ton of ammunition is said to have been used. At the end of the 78-day bombing campaign an approximated 500 Yugoslav civilians had been killed (Laursen, 2001-2002, p. 489).

Many international organizations and institutions have heavily criticized OAF. Some critics have accused NATO of violating the international legal obligation not to use force against another state *(ius ad bello*). Others, have condemned the way in which the campaign was carried out (*ius in bello*) (Ibid.).

Furthermore, many critics not only voiced their concerns over possible violations of the laws of war, but also initiated legal proceedings. Notably both the ICJ and ICTY were both summoned to adjudicate. The question of illegal use of force - the NATO campaign was launched without prior Security Council authorization - fell under the jurisdiction of the ICJ. In contrast, the ICTY received several request to investigate NATO conduct during OAF. NATO's high-altitude bombing campaign, conducted with a single NATO combat casualty but with significant civilian casualties within the FRY, called into question the appropriate relationship between means and ends in an intervention designed to save lives (Wippman, Kosovo and the Limits of International Law, 2001-2002, p. 129). Due to the limited scope of this work, only the question of *ius in bello* - as invoked before the ICTY - will be discussed.

Confronted with these request to investigate NATO conduct, then chief prosecutor of the ICTY, Louise Arbour decided to establish a committee. This committee would have the task of evaluating the accusations against NATO and advising the chief prosecutor as to whether these allegations merited a formal investigation. In May 2000 the committee published a report known as the OTP Report. The next month, newly appointed chief prosecutor Carla del Ponte announced to the UN Security Council that, following the recommendations of the committee, there would be no formal investigation (Laursen, 2001-2002, p. 771). Many NGO's, such as Human Rights Watch (HRW) and Amnesty International, were outraged. Accusations arose that the committee had succumbed to political pressure.

2.2.2. The Attack on a Civilian Passenger Train at the Grdelica Gorge

On April 12, 1999, a NATO aircraft fired two laser-guided bombs at the railway bridge over the Grdelica Gorge. Both bombs hit a passenger train that was crossing the bridge, resulting in the death of at least 10 people (Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia [here in after OTP Report], 2000). The pilot of the aircraft is said to have spotted movement on the

bridge at the last instant before impact. Due to the fact that he was unable to dump the bomb at that stage the first bomb hit the train, splitting the train into two. However, noticing that the bridge was still intact the pilot flew to the other end of the bridge, which was now clouded by smoke, hoping to achieve his mission by destroying it with a second bomb. Unfortunately, as a result of the impact of the first bomb, one half of the train had slid to the other end of the bridge and, thus, was hit again by the second bomb (Ibid.). After the incident, NATO officials expressed regret. NATO's explanation focused on the fact that the pilot was unable to see the bridge from his position in the aircraft. He could only see the bridge on a five-inch screen. According to NATO his focus on the aim point within that screen meant that he only saw the train appear when he had already locked the target (Voon, 2000-2001, p. 1111) .

The laws and customs of wars, as referred to in article 3 of the ICTY, are governed by two elements: *actus reus* and *mens rea.* Actus reus implies that the military commanders respect the principles of distinction and proportionality. More specifically, they have the obligation to direct their operations against military objectives while ensuring that the loss of civilian lives is not disproportionate to the direct military advantage. Therefore, an attack directed against a civilian objective or an attack against a military one but resulting in disproportionate collateral damage can both constitute the *actus reus* of a war crime (Massa, 2006, p. 623). On the other hand the requirement of *mens rea* is recklessness. The requirement of mens rea demands that military commanders take the necessary precautions to verify that the objectives to be attacked are military objectives, are cautious in their choice of methods of warfare to minimize incidental civilian casualties, and refrain from attacks that may entail a disproportionate loss of civilian lives (International & Operational Law Department U.S. Army, 2005, p. 168).

According to international law, the Office of the Independent Prosecutor (OIP) recognized this mens rea requirement of recklessness in its final report. However, the OIP's use of *mens rea* is problematic for two reasons. Firstly, in previous non-NATO related cases the OIP did not view the lack of mens rea evidence as an impediment to issuing an indictment. Secondly, the OIP systematically misapplied the mens rea standard of recklessness by transposing a more difficult-to-prove standard of

deliberateness (Colangelo, 2002-2003, p. 1402). With regard to the latter, two important questions arise.

The first question is why NATO had no knowledge of the civilian train which was on the bridge at the time of the bombing. In its final report the OIP only states that " *it does not appear that the train was targeted deliberately."* (OTP Report, 2000, para. 59) The report elaborates by quoting statements made by NATO officials in the wake of the accident. Notably, NATO insisted that the train appeared "*at the very last instant"* and that the pilot had insufficient time to dump the bomb. In order to prove the accurateness of this statement NATO provided a videotape which showed the speed with which the attack occurred. On the basis of this videotape, which later was proven to have been speeded-up, the OIP concluded in its final report that the pilot was indeed incapacitated by the speed of events, and thus, decided not to initiate an official investigation of the incident (Colangelo, 2002-2003, p. 1403).

However, the application of a deliberateness standard is insufficient. Even if the pilot did not intentionally hit the civilian passenger train, the question still remains as to why NATO had no knowledge of its presence. Article 57 (2) of Additional Protocol I to the Geneva Conventions clearly states that military planners and commanders are obliged "[...] *to do everything feasible to verify that the targets to be attacked are strictly military objectives*". Therefore, NATO's failure to verify the railway's time schedule and their neglect to send another aircraft to check the area prior to dumping the bomb, can be said to be a clear violation of this international legally binding principle of precaution (Amnesty International, 5 June 2000, p. 23). As stated in chapter I, even when making use of their legal discretion, the ICTY is always bound by international conventional and customary law. The OIP's decision not to investigate the NATO bombing of the civilian passenger train on the basis that it was not deliberately targeted, is not only a misapplication of the principle of recklessness, but also a direct negation of the ICTY's obligation to adjudicate within the limits of established international law.

A second, even clearer, example that the OIP's decision not to investigate NATO for its role in the bombing at Grdelica Gorge is not legally justified pertains to the launching of the second bomb. As stated earlier, after the first bomb had hit the passenger train, the pilot noticed that the bridge was still intact and subsequently flew to the other end of the bridge to launch a second bomb. However, due to the impact of the first bomb one half

of the train had slid to the other end of the bridge, and as a consequence was now also hit by the second bomb.

In its final report the OIP wrongfully concludes that the launch of the second bomb does not merit a formal investigation. Furthermore, the OIP adopts the rational that NATO provided in an attempt to justify the launch of the second bomb. In the wake of the accident NATO general Wesley Clark claimed that the hitting of the train by a second bomb was the unfortunate result of two regrettable and unforeseeable circumstances. The first was the fact that the pilot was under the illusion that he still had to fulfil his mission of blowing up the bridge. The second was the double misfortune of the train having slid forward and the presence of smoke preventing the pilot from witnessing this physical effect (Niven, 2003, p. 21).

Though admitting in its report that the OIP itself was internally divided as to whether there was an element of recklessness in the second bomb attack, the OIP nonetheless decided that the incident was not worthy of a formal investigation. According to the report the criteria for initiating an investigation were not met. On the one hand the information regarding the incident would not be sufficiently credible. On the other hand the unlawful character of the incident would not be adequately established under international humanitarian law (OTP Report, 2000, para. 62). However, specifically the latter assertion seems to be unfounded.

Even if the pilot did not know that a passenger train was crossing the bridge at the moment of the first attack, he was well aware of this fact when he decided to launch the second bomb. Therefore, the pilots behaviour is a clear violation of article 57 of Additional Protocol I to the Geneva Conventions (Amnesty International, 5 June 2000, p. 31). According to this article any attack must "[...] *be cancelled or suspended when it becomes clear that the objective is not a military one...or that the attack may be expected to cause incidental loss of civilian life...which would be excessive in relation to the concrete and direct military advantage anticipated."* Therefore, the conduct of the pilot is - contrary to the assertion of the OIP - a clear violation of a well established international rule and as a consequence should be investigated.

Looking back at the NATO attack on the civilian passenger train at Gdrelica Gorge, the behaviour of the OIP seems peculiar to say the least. Firstly, their insistence that mens

rea is a necessary condition for a violation is in stark contrast to their history of issuing indictments - in the absence of mens rea evidence - against Yugoslav war criminals. Secondly, though their final report acknowledges that the requirement of mens rea is measured through the standard of recklessness, the OIP systematically applies the less strenuous standard of deliberateness when evaluating NATO conduct. By not adhering to the standard of recklessness, which underlines the obligation to take precautionary measures, the OIP is not respecting its legal obligation to uphold international conventional and customary law. Finally, the OIP's denial of NATO conduct (the launch of the second bomb after establishing the presence of civilians) falling under a well established international norm simply does not follow. The OIP's inclination for aleatory application of the law, misapplication of the law and non-application of the law when evaluating the Grdelica Gorge attack greatly undermine the legality of the OIP's decision not to formally investigate this incident.

2.2.3. The Bombing of the Serbian TV and Radio Station (RTS) in Belgrade

On the 23 April 2000 the headquarters of the Serbian TV and Radio Station, located in downtown Belgrade, were attacked by NATO aircraft. Though early in the morning, 120 employees are estimated to have been present in the building at the moment of the incident. As a result of the bombing, 16 civilians died and an additional 16 were wounded. Despite the attack, the network was able to resume its broadcasting activities a mere three hours after the incident had occurred. (Amnesty International, 5 June 2000, p. 40).

The bombing of the RTS by NATO was an extremely controversial event. It led to wide-spread criticisms and accusations of NATO having violated international law. Though asserting in its final report that it may have constituted a violation of respectively article 52, 57 (2) and 51 (5) of the Additional Protocol I, the OIP decided not to initiate a formal investigation of the NATO attack on the RTS (Colangelo, 2002-2003, p. 1411).

2.2.3.1. Legality of the attack under art 52 Additional Protocol

The first legal issue addressed by the OIP, the possible breach of article 52, relates to the question as to whether the RTS was a legitimate military target. Unlike the bombing

of the passenger train at Grdelica Gorge, after which NATO officials proclaimed that the intentional target was the bridge and not the train, NATO never denied that they deliberately bombed the RTS (Colangelo, 2002-2003, p. 1413). According to NATO the RTS was a legitimate military target due to the fact that it served the dual purpose of civilian and military use. The military side of its dual use was justified on the ground that the RTS offered support to the FRY military and special police forces by serving as a radio relay station. Later, subsequent statements issued by NATO also invoked the more controversial justification that the RTS served as a propaganda tool of the FRY and that propaganda constitutes direct support for military action (Mandel, 2001-2002, p. 125).

Prima facie NATO's bombing of this dual use facility is compatible with international law. The International Committee of the Red Cross regards installations of broadcasting and television stations of fundamental military importance as acceptable military targets (Massa, 2006, p. 628). However, dual use facilities, even when recognized as acceptable military targets, are subject to the requirements of '*effective contribution to military action*' and '*definite military advantage'* as set forth in article 52 (2) of the Additional Protocol I. It is doubtful as to whether the NATO attack on the RTS meets these conditions.

With regard to the requirement of '*effective contribution to military action'*, the OIP was of the opinion that the NATO attack had to have a double aim. Firstly, the bombing of the RTS had to have been aimed at disrupting the communications network. Secondly, this attack had to be part of a more general attempt to destroy and dismantle the FRY Command, Control and Communications (C3) network. Only if the aim of bombing the RTS was consistent with these two conditions, would it be legally acceptable. While the OIP relied on NATO statements to conclude that this double aim was present, others have raised concern as to whether the dismantlement of the FRY C3 network was the actual and sole aim of NATO. (OTP Report, 2000, para. 70-75). Though it leaves no doubt that it was one of their objectives, it is likely that the primary goals of NATO in taking out the RTS was to demoralize the civilian population and armed forces, and dismantle the FRY propaganda machinery (Colangelo, 2002-2003, p. 1413).

The fact that the destruction of FRY C3 networks was not the sole purpose of the bomb attack appears evident when reading NATO statements. After the bombing a NATO spokesperson said that apart from destroying the command infrastructure the bombing also had the intention to "*degrade the Federal Republic of Yugoslavia's propaganda apparatus*" (Colangelo, 2002-2003, p. 1413). Even more convincing is the NATO statement of the 8 April 1999. In this statement NATO declared that the RTS would be subject to attack if they did not agree to broadcast western media reports for a minimum of 6 hours a day. Only in doing so, NATO announced, could the TV station be regarded as an acceptable form of public information. Finally, an interview with former UK Prime Minister Tony Blair can be viewed as another indicator that NATO was primarily concerned with suppressing criticism of Operation Allied Force. During the course of the interview, Blair hinted that the RTS' constant media coverage of NATO-caused civilian casualties was one of the reasons why it was bombed (Amnesty International, 5 June 2000, p. 41).

Irrespective of the aforementioned aim of destruction of the FRY's propaganda apparatus, NATO has also been accused of engaging in psychological warfare. It has been suggested that the attack on the RTS was a deliberate ploy to undermine civilian and military morale. If NATO was merely pursuing the destruction of command, control and communication infrastructure why did it not limit itself to destroying transmitters rather than attacking actual television studios? (Ibid.).

The IOP's evaluation of the RTS attack is deeply disturbing. In its final report the IOP recognizes that the RTS must meet the criteria of '*effective contribution to military action*' of article 52 (2) of the Additional Protocol I in order to be a legal military target. Therefore, the NATO bombing of the RTS must have had the sole aim of destroying the FRY C3 network. However, when applying theory to practice the OIP disregards all evidence of alternative NATO aims, even when these have been admitted to by NATO personnel or NATO member state officials (OTP Report, 2000, para. 68).

However, even if one accepts that NATO's sole purpose was the destruction of FRY C3 infrastructure, it is difficult to maintain that the requirement of '*definite military advantage*' was met. As mentioned earlier article 52 (2) of the Additional Protocol I, sets forth two conditions in order for a target to be a legitimate military objective: '*effective contribution to military action*' and '*definite military advantage'*. Under no

circumstances was the latter requirement met. NATO was aware before the attack that the bombing of the RTS would not effectively disable the military communication system. Moreover, broadcasting resumed a mere three hours after the incident had occurred (Fenrick, 2001, p. 495).

2.2.3.2. Legality of the attack under article 51 (5) (b) Additional Protocol I

The lack of '*definite military advantage*' also has severe repercussions on the legality of the RTS bombing under article 51 (5) (b) Additional Protocol I. According to this article attacks which are expected to cause civilian death or injury disproportionate to the expected concrete and direct military advantage are prohibited. As mentioned above, NATO was well aware of the fact that the RTS bombing would only damage to a limited extent the FRY military communication system. Therefore, the high toll of civilian casualties (16 dead and an additional 16 injured) seems - to any logical person- clearly disproportionate to the direct military advantage of the attack. However, in its final report the OIP advises not to initiate a formal investigation on the grounds that the relation between the casualties and the military advantage was not disproportionate (OTP Report, 2000, para.77). The OIP reaches this conclusion by observing that the requirement of proportionality is not applicable to specific cases. According to the committee, the requirement of proportionality has to be evaluated against the backdrop of the entire military undertaking. However, this cumulative approach seems contradictory to the notion " *concrete and direct*" as formulated in Additional Protocol I, which implies that the requirement of proportionality be assessed in relation to an individual attack (Brown B. L., 1976, p. 136). Therefore, the OIP's interpretation is invalid under current international law. Even if one were to accept the OIP's interpretation, many legal scholars, such as Michael Mandel, believe that an overall assessment of the NATO campaign in Yugoslavia would lead to the same conclusion of breach of the proportionality principle. According to Mandel, a bombing campaign that cost between 500 and 1,800 civilian lives of all ethnicities and injured equally as many, resulted in one million refugees and indirectly led to the death of thousands more by proving violent retaliatory measures clearly outweighed the "*concrete and direct military advantage*" of NATO's mission (Mandel, 2001-2002, p. 104). Furthermore, the author emphasizes that Milosevic and other Serb leaders were indicted by the ICTY for

the murder of 385 people, while NATO - causing a death toll of between 500 and 1,800- walked away scot free.

2.2.3.3. Legality of the attack under article 57 (2) of the Additional Protocol I.

Under article 57 (2) "*effective advance warning*" must be given of attacks which may affect the civilian population. With regard to the bombing of the RTS the question as to whether NATO lived up to this international legal obligation is highly disputed (Voon, 2000-2001, p. 1107). On April 8 1999 both NATO Air Commodore Wilby and French armed forces Chief General Kelche declared that they considered the RTS to be a legitimate military object due to its use as an instrument of propaganda. However, the next day at a press conference NATO spokesperson Jamie Shea stated that NATO would not directly target TV transmitters. However, he elaborated by saying that in Yugoslavia, military relay radio stations are often combined with TV transmitters, but that NATO would only attack the military part. Furthermore, in a note to the International Federation of Journalists dated 12 April, Shea underlined one again that only radio and TV towers which were incorporated into military facilities would be targeted (Amnesty International, 5 June 2000, p. 44).

NATO allegedly told Amnesty International that they did not issue any specific warning relating to the attack due to the fact that such a warning might have endangered their pilots. The failure of NATO to have given advanced warning of the attack is likely to have increased the toll of civilian deaths and constitutes a violation of NATO's responsibilities under article 57 (2) of the Additional Protocol I.

On the other hand, NATO is believed to have informed foreign media personnel of the imminence of an attack on Belgrade's RTS. NATO officials are said to have forewarned CNN in early April to evacuate their staff from downtown Belgrade as an attack was under way on the RTS (Ibid.). Apparently, CNN's Eason Jordan managed to persuade NATO to abort the mission merely a half hour before it was due to take place. CNN argued that NATO's last-minute warning left too short a time to successfully evacuate their staff and that the constant presence of RTS employees would inevitably lead to a high toll of civilian casualties. It is believed that after this aborted mission, NATO issued the 8th April statements stating that the RTS was a legitimate military objective in

an attempt to minimize the civilian casualties of the actual attack that would take place on April 23 (Amnesty International, 5 June 2000, p. 45).

In its final report the OIP views the warning of foreign media representatives as evidence that NATO lived up to the requirement of "*effective advanced warning*". However, under article 57 (2) NATO was legally obliged to forewarn the RTS of the attack. According to the OIP the fact that foreign media were informed of the attack is sufficient ground to establish that Yugoslav officials might have expected that the RTS was prone to attack. Therefore, rather than condemning NATO for not respecting its legal obligation under article 57 (2) of the Additional Protocol, the OIP decides to shift the blame for civilian loss of life upon the Yugoslav authorities. NATO spokespersons and heads of states, such as Tony Blair, have argued that Yugoslav officials are likely to have been aware of the imminence of the bombing but deliberately neglected to inform civilians with the means of acquiring sympathy for the Yugoslav cause (OTP Report, 2000, para. 77).

The fact that NATO did not issue a specific warning, but limited itself to issuing general and contradictory statements regarding the RTS potential military character as well as their discriminatory approach of only warning foreign media representatives seriously put into question the "*effectiveness*" of the advanced warning. The OIP's view of "*effective advanced warning*" is highly disturbing and one cannot but question what led the OIP to adopt such a controversial and legally far-fetched interpretation.

Overall, the OIP's evaluation as to whether NATO's bombing of the Belgrade Radio and Television Station constituted a violation of article 52, article 51 (5) (b) or 57 (2) of the Additional Protocol I is legally flawed. In its final report the OIP seems to systematically go out of its way to characterize the bombing as legally justified, even though such a conclusion is difficult to defend on the grounds of established international law.

2.3.Conclusion

This second chapter evaluated whether the ICTY has adhered to the principle of due process and, thus, is safeguarded against politicization. As illustrated in the first chapter the ICTY is a judicial institution. However, the fact that the ICTY respects the principle

of separation of powers only protects the ICTY from the crudest form of politicization (judicial decisions being taken by quasi-judicial or political institutions). It does not mean to say that the ICTY is necessarily free of political manipulations. Only adherence to the requirement of due process, which demands that judges apply legal rules and legal reasoning, can assure this.

In order to assess that the ICTY does not respect the principle of due process, it is insufficient to merely establish that the ICTY is highly dependent on external actors. Such an approach would come down to a purely realist way of thinking. Therefore, the methodology used in this second chapter consisted of evaluating to what extent the ICTY's decisions are legally justified. When a decision is legally justified, it decreases the probability that the judicial process was manipulated by politics. More specifically, this chapter assessed the legality of the Office of the Independent Prosecutor's decision not to initiate a formal investigation for the NATO bombing of a passenger train at Grdelica Gorge and for the NATO bombing of Belgrade's Radio and Television Station.

In both of the aforementioned cases, the decision of the IOP not to further investigate NATO for war crimes is legally flawed. The OIP seems to adopt a 'cherry-picking' approach. Rather than applying the law to the facts, the OIP systematically misinterprets established legal norm to match the facts, or disregards facts that are clearly in violation of international law when evaluating NATO conduct.

With regard to the bombing of the passenger train at Grdelica Gorge the final report of the OIP acknowledges that the mens rea requirement is measured through the standard of recklessness. However, when it comes to putting theory into practice the OIP decides to apply the standard of deliberateness rather than the recklessness standard, even though the former is not established under international law. Furthermore, the OIP does not apply article 57 of the Additional Protocol I (which demands that an attack be suspended when it becomes evident that the object under attack is not a military one or that the attack could lead to a disproportionate loss of civilian life) to the second bomb attack. Under the ICTY Statute the ICTY is obliged to apply international legally binding norms such as article 57 of the Additional Protocol I.

Concerning the NATO bombing of the RTS, the OIP once again opts to misinterpret both the law and the facts. Firstly, when asked if the RTS fulfils the requirements of

"*effective contribution to military action*" and "*direct military advantage*" and, can thus be considered a military target, the OIP resorts to questionable means to answer this question positively. In assessing whether the sole purpose of the NATO attack was the destruction of FRY C3 network and, thus, lived - up to the requirement of "*effective contribution to military action*" under article 57 of the Additional Protocol I, the OIP ignored any evidence of alternative aims, even when taking the form of an official NATO statement. Furthermore, the OIP makes the blatantly unexplainable evaluation that taking out the RTS broadcasting functions for all of three hours constitutes a sufficient " *direct military advantage*". In a similar way, the OIP resorts to legal fiction by assessing that the requirement of proportionality between civilian casualties and military advantage under article 51 (5) (b) is measured with regard to the overall military campaign. This interpretation of the requirement of proportionality goes against the reading and wording of article 51 (5) (b), and is contrary to the established interpretation under international law in which '*proportionality*' is measured against a specific case. The assessment that NATO fulfilled its obligation under article 57 (2) of the Additional Protocol I to provide "*effective advanced warning*" of the attack is further evidence that the OIP's decisions are not legally justified. The fact that by forewarning foreign media representatives and issuing general statements regarding the military character of the RTS, FRY officials may have expected the attack is insufficient to alleviate NATO from its legal obligation. Under article 57 (2) of the Additional Protocol I NATO should have issued a specific warning to the RTS.

The OIP's evaluation of NATO conduct during its 1999 bombing campaign is characterized by a lack of legal professionalism. However, the question inevitably remains as to why such a dubious application of the law arose. Legal realists might automatically assert that the aforementioned phenomenon is proof that the law is always indeterminate. According to this school of thought, a judicial decision might be determined by what the judge had for breakfast. However, in the case in question it seems that the OIP's decision not to further investigate as to whether NATO violated international law was not merely influenced by what the committee had for its first meal of the day. Though the presence of indicators of politicization was insufficient to establish disregard for the principle of due process, they can be viewed as the reason for the ICTY's lack of legal reasoning. When taking into consideration the presence of potential causes for politicization and the lack of legal justifications for the OIP's

decision not to investigate NATO , it can be said that the ICTY – despite its high degree of legalization - is defined by politicization.

Chapter III: The legitimacy of the ICTY

In the first two chapters it has been established that the ICTY has not been able to resist politicization. Despite being a judicial institution, the ICTY has not always adhered to the requirement of due process. This particularly becomes apparent went assessing the legality of the OIP's decision not to initiate a formal investigation into NATO conduct during respectively the train attack at Grdelica Gorge and the bombing of the RTS. However, the question inevitably arises as to how the Tribunal's politicization effects the legitimacy of the ICTY. Surely a judicial institution which does not always live up to the due process standard cannot be regarded as legitimate? Furthermore, why has the international community, considering this legal faux pas, refrained from discrediting the ICTY altogether instead of presenting it as an example for subsequent *ad hoc* tribunals?

The third chapter tries to provide an answer to the aforementioned questions. Specifically, it will be evaluated whether the ICTY - despite being politicized- can still be perceived as legitimate. To this extent the theory of legitimacy as set forth by Ian Hurd and Bruce Cronin will serve as the adopted methodology.[4] Hurd & Cronin distinguish between three forms of legitimacy: procedural, purposive and performance legitimacy, of which purposive legitimacy is considered the most influential (Hurd & Cronin, 2008, p. 6). According to the authors, legitimacy is not a fixed concept, but the volatile result of the interaction between these three forms of legitimacy. While an institution may have a low degree of procedural, purposive or performance legitimacy this does not necessarily imply that the institution in question is illegitimate. Insufficient legitimacy in one area can be compensated by a high degree of legitimacy in the other two. While an institution may enjoy little procedural legitimacy at the moment of its establishment, its objectives and subsequent performance may lead to the acceptance of the institution as being legitimate. Vice versa, disappointing performance legitimacy can be compensated by high procedural and purposive legitimacy.

[4] It should be noted that this is but one of many theories concerning legitimacy. Authors such as Rousseau, Marx, Weber and Habermas have also attempted to define legitimacy. For an overview of the main theories of legitimacy see Morris Zelditch, "Theories of Legitimacy" in John Jost and Brenda Major " The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice and Intergroup Relations", 2001, Cambridge University Press, London.

Therefore, in order to evaluate whether the ICTY can still be perceived as legitimate - in spite of its politicization – the procedural, purposive and performance ability of the Tribunal will have to be assessed.

3.1. Procedural Legitimacy

In order for an institution to enjoy procedural legitimacy it is required that the coming into existence of this institution be in compliance with the established rules and procedures (Tyler, 2003, p. 284). Some observers have expressed concerns as to whether the ICTY can be viewed as a bearer of procedural legitimacy. The main argument supporting the hypothesis of procedural illegitimacy of the ICTY, pertains to the fact that the international tribunal was not established by means of an international treaty but by a binding Security Council resolution under chapter VII of the UN Charter (Cisse, 1997, p. 106).

The creation of the ICTY by the UN Security Council was beyond doubt a novelty. After having witnessed the humanitarian disaster taking place in Yugoslavia, the UN Security Council, in resolution 808, called upon the Secretary General to establish an international tribunal. The Council did not elaborate on how this was to be done (UN Security Council, 1993). Then UN Secretary General, Boutros Boutros-Ghali, observed that under normal circumstances only an international treaty could call into existence such a tribunal. However, the creation of an international tribunal by treaty seemed to be in stark contradiction with the urgency expressed in resolution 808. Treaties, before coming into force, are subject to a ratification process; this often takes a significant amount of time. Furthermore, the chance that the warring states would accept such a tribunal was highly improbable. As a consequence, Boutros Boutros-Ghali decided that the best approach was the establishment of the international tribunal by a Security Council resolution (Schabas, 2006, p. 49).

It did not take long before claims of an illegitimately established court began to surface. In the *Prosecutor v. Tadic*, the defence argued that the ICTY was illegal, due to the fact the UN Charter did not provide the Security Council with the authority to establish international criminal tribunals. Tadic's lawyers said that in the absence of an amendment to the UN Charter, the ICTY could only have been established legitimately by a treaty. Similar allegations were made during both the Milosevic and Karadzic

trials. However, in the Tadic case both the Trail chamber and the Appeals chamber dismissed the plea that the Tribunal was not lawfully established (UN, 1996), and have stuck to this assessment in subsequent decisions.

Firstly, the ICTY had to assess whether it had the authority to examine its own legality. This implied that the ICTY would have to review the Security Council resolution establishing the international tribunal. This is quit problematic. The UN Charter does not provide a hierarchy between its main organs, and, thus it is doubtful as to whether one main organ of the UN can adjudicate over another organ's legality.[5] However, the ICTY Appeals Chamber concluded that the ICTY was authorized to adjudicate over the Security Council's decision to establish an international court. The rational was that this did not amount to a general judicial review, but that it was merely a validation of the legality of the ICTY's own creation (Schabas, 2006, p. 51). According to the Appeals Chamber, the principle that all judicial institutions have the jurisdiction to determine their own jurisdiction, automatically endows all judicial tribunals with the authority to examine the legality of their own establishment.

After having concluded that the ICTY has the power to investigate its own legality, the Appeals Chamber evaluated whether the Security Council had acted within the scope of its authority when creating an International Tribunal. Only if the UN Charter were to foresee a legal ground for the creation of an international tribunal by the Security Council, would the ICTY enjoy procedural legitimacy. The Appeals Chamber concluded that the UN Charter did incorporate such a prerogative. More specifically, the chamber referred to both article 29 and 42 of the UN Charter as proof that the Council had the authority to create the ICTY (Ibid., 52).

According to article 29, the Security Council has the right to establish subsidiary organs when it perceives this to be necessary for fulfilling its duties. However, it is important to note that the actions of the Council must be justified in relation to the provisions of the Charter. It leaves no doubt that this requirement had been met. In resolution 827, the

[5] The Nuremberg Charter had specifically prohibited the defendants from calling into question the military tribunal's legality.

Security Council states that the creation of the ICTY "*would contribute to the maintenance and restoration of peace*" and, thus, that the Council was acting under Chapter VII of the UN Charter (UN, 1993). Keeping in mind the humanitarian catastrophe then taking place in the former Yugoslavia, the "*maintenance and restoration of peace*" can be conceived as a valid concern. While the peace objective is clearly consistent with article 39 of the UN Charter, the measures to enforce this article, listed further down in Chapter VII, do not specifically mention the creation of an international tribunal. However, the creation of the international tribunal matches the description of " *measures not involving the use of force*" defined under article 41 of the UN Charter (Prosecutor v. Dusko Tadic, 1995).

The question as to whether the ICTY was created in accordance with established rules and procedures and, thus, has procedural legitimacy, can be answered positively. Although, international tribunals normally come into being by way of international treaty, the creation of the ICTY by the Council seems to be adequately rooted in articles 29, 39 and 41 of the UN Charter to be endowed with procedural legitimacy.

3.2. Purposive Legitimacy

The second form of legitimacy, purposive legitimacy, refers to the extent to which a domestic or international body or institution pursues general goals that are broadly shared and approved by the institution's constituency (Sandholtz, 2008). Therefore, in order to evaluate whether the ICTY enjoys purposive legitimacy, one must first determine both the goals and the constituency of the court.

With regard to the objectives of the ICTY one can distinguish a vast array of goals:

> "*to restore and maintain international peace and security; to convict and punish individuals who are criminally responsible; to recognise and acknowledge the suffering and loss of victims; to send a message that serious violations of international humanitarian law will not be tolerated by the international community; to deter future atrocities; to end impunity and promote respect for the rule of law globally; to establish the truth; to encourage reconciliation after periods of ethnic conflict; to give expression to retribution*" (Schabas, 2006, p. 68).

However, in academic literature the restoration of peace and security, justice and retribution, and deterrence are the goals most commonly referred to when discussing the ICTY (Swart, Zahar, & Sluiter, 2011, p. 14). It is clear that the aspirations of the court can be generally perceived as admirable when adopting the belief that human beings are good by nature. Even under the contrary assumption that man is evil, this would not necessarily discredit the thesis that he shares and accepts the objectives of the ICTY. If man is evil, it does not necessarily imply that he does not wish to be a better person. Every society is built on the desire of mankind to regulate human behaviour as to ensure peaceful coexistence.

By creating the UN after WW-II, the 51 founding members showed their shared belief in maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. Furthermore, the enlargement of the UN to 192 member states and, thus, the most of the world community, is testimony of the growing belief in the UN objectives. Though they are not identical due to their focus on criminal justice, the objectives of the ICTY can be seen as largely consistent with the general goals of the UN, which are shared by most of the world community.

Therefore, the idea that the goals of the ICTY are shared and accepted is not merely based on their intrinsically admirable nature. International tribunals such as the ICTY enjoy substantial purposive legitimacy because their objectives are consistent with, and supportive of, the human rights culture that developed after World War II (Lombardi, 2002-2003, p. 889). This new epoch was characterized by the adoption of human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Hague Conventions, Geneva Conventions, the Genocide Convention, and the Convention against Torture and Cruel, Inhuman and Degrading Treatment and Punishment.

3.3. Performance legitimacy

Though the establishment of a new international body may be widely perceived as legitimate, from both a procedural and purposive perspective, new institutions do not enjoy automatic legitimacy forever after. After the institution has come into being, the public's focus will gradually shift from the founding to the functioning. At that moment,

the institution will have to reaffirm its legitimacy by adequately realising its goals and , thus, those of the international community. The extent to which the institution successfully fulfils its functions is known as performance legitimacy, and plays a crucial role in the long term perception as to whether an institution is legitimate. Therefore, it is essential that an institution not be perceived as unfair, ineffective or incompetent in order to have legitimacy (Hurd & Cronin, 2008, p. 151).

After assessing that the ICTY enjoys both procedural and purposive legitimacy, it is important to evaluate whether the court has - despite its lack of judicial impartiality- achieved its goals such as maintaining and restoring international peace and security, justice and retribution, and deterrence. It will be proven that overall the ICTY has been rather successful in reaching these objectives.

3.3.1. Deterrence

After being established in 1993 the ICTY got off to a rocky start. While the selection of the court's first chief prosecutor was time consuming to say the least, the judges were left to put together their own rules of procedure. Furthermore, the court, initially, showed much reticence in issuing indictments. Even when it decided to take legal action, the ICTY was often impeded from obtaining evidence and gaining custody of the accused (Jorda, 2004, p. 572). A lack of financial and human resources further aggravated the ICTY's functional problems. However, despite these initial challenges, the ICTY achieved its goals, gained momentum and set an unprecedented example for international criminal justice (Wald, 2003, p. 279).

Presently, the ICTY has indicted 161 accused for serious violations of international humanitarian law in the territory of the former Yugoslavia. (UN & ICTY, 2011). Besides former Yugoslav president Slobodan Milosevic, several other accused have been high ranking military or civic leaders such as Radovan Karadzic, former president of the Republica Serbska and General Radislav Krstic, commander of the Srebrenica massacre. By bringing such perpetrators to justice, the ICTY has sent a message to national leaders across the globe that war crimes and crimes against humanity will be subject to punishment and, thus, may have helped deter future atrocities.

While deterrence can be defined as "[...] *the ability of a legal system to discourage or prevent certain conduct through threats of punishment or other expression of disapproval"* (Akhavan, Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the UN War Crimes Tribunal, 1998, p. 741), most academics make the distinction between two particular forms: general and specific deterrence. If the former refers to the ability to discourage crime in a society at large, specific deterrence refers to the capacity of preventing individual perpetrators from committing additional crimes (Ibid; 746).

With regard to the ICTY, it would be difficult to claim that the Tribunal persuaded former Yugoslav officials to put a stop to their politics of violence and ethnic cleansing. Arbour's indictment of Milosevic did not dissuade him from continuing his atrocities in Kosovo (Alexander, 2009, p. 11). It could be argued that the apparent failure of the ICTY to generate specific deterrence, is the result of the limited number of indictments issued by the Tribunal. Academics, such as Theodor Meron, maintain that there is a causal relation between the frequency of prosecutions and specific deterrence (Wippman, Atrocities, Deterrence, And The Limits Of International Justice, 1999-2000, p. 476).

On the other hand, some critics of the court have argued that rather than contributing to specific deterrence, indictments might have the opposite effect of inciting perpetrators to intensify their gruesome acts. The rationale behind this argument is the economic model of crime. According to this model, crime is the result of a rational cost-benefit calculation. Only when the criminal in question is of the opinion that the expected benefits of the crime outweigh the expected sanction will he commit an offence. (Ku & Jide, Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?, 2006, p. 792). When perpetrators believe that they will surely and severely be punishment for the crimes that they have already committed, they associate a high cost to their criminal behaviour. As a result, they may be encouraged to maximize the 'benefit' side of their criminal behaviour by continuing to engage in present and future atrocities.

While the specific deterrence effect of the ICTY is disputable, it is generally accepted that the ICTY has contributed to general deterrence (Meernik & King, 2002, p. 352). In contrast to the specific deterrence effect of the ICTY, which is measured through the ability of the Tribunal to stop Yugoslav perpetrators from committing further atrocities, its general deterrence effect evaluates the extent to which the ICTY has contributed to dissuading potential war criminals of the world community to violate international humanitarian law.

Academics such as Payam Akhavan assert that the mere fact that prosecutions are taking place, even if only sporadically, are contributing to the deterrence of future atrocities by potential perpetrators. Therefore, general deterrence - in contrast to specific deterrence - is not affected by the low prosecution rate of the ICTY. Prosecutions, regardless of their frequency, help to bring an end to the "*culture of impunity*" that has dominated our society for too long (Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, 2001, p. 8). This transformation, through prosecutions, from a culture of impunity for genocide, war crimes and crimes against humanity to a punitive one, influences the criminals perception of the costs relating to his potential criminal behaviour.

3.3.2. Peace and Security

While the indictment of war criminals by the ICTY has contributed to deterring future atrocities, this prosecutorial approach has also had a significant impact on bringing peace and security to the Balkans. More specifically, the ICTY has paved the way for a lasting peace in the former Yugoslavia in three concrete ways. Firstly, the Tribunal has helped to marginalize nationalist political leaders and ideologies. Secondly, it has endowed victims with a sense of retributive justice and, thus, discouraged vengeance. Thirdly, the ICTY has enabled the warring parties to establish a 'shared truth'. In the following, each of these three, indispensable elements to peace will be discussed.

3.3.2.1.Marginalizing nationalist political leaders and ideologies

In order to understand why the ICTY - by removing political leaders with criminal dispositions - has contributed to the peace process, it is important to consider the role that these demagogues have played in the Yugoslav conflict. The bloodshed that

occurred within the former Yugoslav territory during the last decade of the 20th century, is not proof of an inevitable fate often associated with multiethnic societies. Rather than being a spontaneous outburst of ethnic hatred, the Yugoslav conflict resulted from a ruthless campaign of misinformation and fear, conceived by warlords in an attempt to acquire political power and personal wealth. Therefore, removing the inciters of ethnic hatred meant removing a major impediment to peace (Zimmerman, 1996, p. 209).

By indicting, arresting and prosecuting political nationalist leaders, the ICTY has not only stigmatized these warmongering individuals but also limited their political influence. Though indicted leaders may still enjoy substantial support from their indoctrinated constituents, isolation from the international arena, which goes hand in hand with indictments, is likely to destabilize their ability to exert power. Eventually the consequences of such isolation, for example in terms of prosperity, in conjunction with the pariah status of the political elite, might lead a frustrated and humiliated population to reconsider the benefits of regime change. (Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, 2001, p. 7).

A prominent example of how the ICTY contributed to post-conflict peace building, through discrediting nationalist leaders, can be found in the arrest of Momcilo Krajisnik. Unexpectedly, the arrest of this central figure of the Republika Srpska and accomplice of Karadzic, led to little counter reaction. The underlying reason for this mild response is that associating with ICTY indicted war criminals has developed into a major political liability. In this sense, the ICTY has greatly facilitated the emergence of moderate political parties in Bosnia. While initially former prime minister of Republika Srpska was quick to assert that he was not involved in the arrest of Krajisnik, he later openly suggested that both Karadzic and Mladic should be arrested and transferred to The Hague. In the absence of the ICTY, such statements would have meant political suicide (Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, 2001, p. 15).

Furthermore, after his arrest, members of the Serb Democratic Party (SDS), tried to dissociate themselves from SDS founder, Karadzic, and attempted to reinvent the SDS by adopting more moderate policy lines. The party went as far as to promote the creation of a truth and reconciliation commission and even openly called for the return of both Muslim and Croat refugees (Ibid.).

Finally, the disgrace and politically disastrous effects associated with an ICTY indictment are maybe best illustrated by Milosevic's ruthless attempt not to be subject to one himself. After Krajisnik's arrest, Milosevic hired a group of lawyers to defend indicted Serbs in the Hague. The underlying motivation for this generosity was that Milosevic wanted to make sure that those facing trial did not say anything that could implicate him. Furthermore, the former Yugoslav president threatened to liquidate family members of those willing to testify to Milosevic's part in the Bosnian war. These drastic measures are proof of Milosevic's awareness that an ICTY indictment, even in the absence of trial, could have severe ramifications on his quest for authority (Orentlicher, 2008, p. 69).

Taking into consideration the changes that took place in the civic and political landscape of the former Yugoslavia, one can assert that, by issuing indictments, the ICTY has contributed to bringing peace to post-conflict Yugoslavia. Specifically, these indictments have facilitated the emergence of more moderate political parties, which have proven to be indispensable in promoting reconciliation and, thus, in ringing in a new era of peace.

3.3.2.2. Discouraging vengeance by retributive justice

Peace and security in the Balkan region has not only been achieved by discrediting political nationalist leaders and ideologies. The ICTY's leading role in administrating justice and in bestowing a sense of retribution on victims has equally contributed to retrieved peaceful coexistence.

In "*The Metaphysical Elements of Justice*" Immanuel Kant states that criminals deserve to be punished and, thus, perceives retribution as an imperative (Kant & Ladd, 1965). On the basis of this observation, Hannah Arendt later observed that mass atrocities, due to their evil character, should equally be subject to punishment (Arendt, 1958, p. 241). However, even when assuming that punishment enjoys moral value, the question remains for who and by who punishment is realised. In the case of the ICTY, punishment is primarily a prerogative of the international community. However, punishment serves as both a means of the international community and the victim groups to express their indignation and anger. Though the international community is implicated in the retributive process, the extent to which punishment can contribute to post-conflict peace will largely depend on the perception of the victim groups as to

whether or not retributive justice has been done (Drumbl, 2004-2005, p. 578). If victims believe that their quest for justice has remained unanswered, they could be inclined to take matters into their own hands and seek private justice. Therefore, it is important to establish whether and to which extent the victims of the Yugoslav conflict accept the ICTY as a capable means for retribution and justice to be done.

Firstly, it is essential to evaluate whether the victims of the atrocities in the Balkans view punishment as a prerequisite for justice. According to a 2007 Opinion Poll in which 1250 Kosovars were surveyed, an overwhelming 89% believed that everyone who had committed war crimes deserved to be punished, regardless of their ethnicity (UNDP, 2007, pp. 20). Furthermore, 90% viewed punishment of all perpetrators as essential for justice. In another survey, conducted both in Zagreb and Sarajevo respectively 90% and 80% of the victims of the Yugoslav conflict interviewed shared this view (Ivkovic, 2001, pp. 301).

However, when established that a clear majority of those interviewed favour the punishment of war criminals, the question still remains whether victims perceive the ICTY as a more effective means than other institutions, such as local courts, to assure that justice be done. In both the Zagreb and Sarajevo survey, between 65% and 75% of victims indicated that they regarded the ICTY as the most appropriate body to impose punishment (Ivkovic, 2001, p. 303). Similarly, 65% in the Kosovo poll claimed to be satisfied with the ICTY, a satisfaction rate far higher than those attributed to Kosovo courts and the Belgrade District Court (UNDP, 2007, p. 21). Therefore, one can conclude that the divers victim groups interviewed all adhere to the belief that the ICTY is the most adapted institution to oversee the retributive justice process.

Interestingly, when asked what their reason was for indicating the ICTY as the most appropriate body, a majority in the Zagreb sample mentioned the court's political independence (Ivkovic, 2001, p. 304). Therefore, despite the presence of politicization - as illustrated in chapter II - victims still perceived the ICTY as having a high level of performance legitimacy with regard to retributive justice.

However, it should be noted that not all victims agree that the ICTY is an appropriate means of administering retributive justice. Specifically Serbs have criticized the Tribunal over the years for its alleged disproportionate number of indicted Serbs. The fact that this accusation is unjustified is not the issue at hand. After all, whether the

ICTY is contributing to peace and security through its retributive function is primarily a matter of perception. Therefore, the Serbian belief that the ICTY provides insufficient justice for Serb victims as well as the perception that Serb war criminals are disproportionately targeted by the ICTY may reawaken hostilities towards other ethnicities, and, thus undermine rather than contribute to the peace process (Hoare, 2008, p. 8).

A side from this criticism, some victims of diverse ethnic groups have also voiced other concerns pertaining to the ability of the ICTY to provide them with a sense of justice. Firstly, the inadequate funds of the ICTY prevent the Tribunal from bringing to justice all perpetrators and, thus, fail to provide retribution to all of the victims of the Yugoslav conflict. Similarly, the ICTY is said to concentrate merely on the "big fish", while leaving lower ranking war criminals unpunished (Akhavan, Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the UN War Crimes Tribunal, 1998, pp. 777-781). With regard to the two aforementioned arguments, it can be said that they are but partially true. Though, the ICTY does not punish all war criminals and tends to focus on high ranking perpetrators, this does not mean that these individuals escape punishment by local courts.[6]

A more plausible argument that the ICTY does not always succeed in its goal of retributive justice regards the Tribunal's practice of offering plea bargains. While the ICTY initially refused plea bargains on the grounds that these were incompatible with its mandate, over the years the Tribunal has come to view them as an efficient instrument to manage their ever growing case loads (Scarf, 2004, p. 1070). However, by agreeing to drop charges or by negotiating the reduction of sentences the victims might lose faith in the retributive capacity of the ICTY.

Though the ICTY's disability to prosecute all - and lately specifically low-ranking – perpetrators in conjunction with its practise of plea-bargaining are often viewed as regrettable, many victims generally perceive the ICTY to be both efficient and adapted when it comes to rendering retributive justice. The belief that, through the ICTY, perpetrators have been brought to justice and their acts somewhat avenged, helps to alleviate the victim's pain and frustration. In the long run, this perception and sensation are indispensible for a lasting peace in the former Yugoslavia.

[6] Article 9 of the ICTY Statute attributes to the Tribunal and the national courts concurrent jurisdiction.

3.3.2.3. Establishing a shared truth

Establishing the truth often requires reliving painful memories. Ernest Renan stated that "*the essence of a nation is that all the individuals share a great many things in common and also that they have forgotten some things*" (Ernest Renan, *What is a Nation?* (1881) quoted in Akhavan, Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the UN War Crimes Tribunal, 1998) Therefore, the question arises whether it is not better to merely forget past atrocities and concentrate on the future . However, in the case of the former Yugoslavia, the establishment of the truth by the ICTY seems to have helped - rather than jeopardized - the peace process.

There are three aspects as to why the ICTY, through its peace-telling function, has been able to contribute to peace in the former Yugoslavia. A first aspect pertains to the fact that the ICTY has refrained from the difficult task of establishing a historical record. In its truth-telling capacity the ICTY has decided to focus on memory rather than history. History and memory have two very different objectives. While memory focuses on victimization and seeks to ensure that past atrocities are not forgotten, the objective of history is to discover the causes of past events. Therefore, the ICTY addresses the factual truth rather than the historic truth. This approach has permitted the Tribunal to avoid much controversy (Orentlicher, 2008, p. 20).

A second reason why truth-telling within the context of the ICTY has contributed to peace relates to the fact that the Tribunal constitutes an official and public forum. Though power acquired by deception can be undone by the truth, such an alteration of power realities demands that the truth be established within the public realm (Bjelakovic, 2002, p. 165).

Finally, truth has contributed to peace by discouraging victims to seek vengeance. In first instance the ICTY tends to focus on punishment and the perpetrator. The punishment of war criminals is central to achieving retributive justice. As mentioned in part 3.2.3.2. retributive justice dissuades victims from carrying out acts of retaliation. However, the mere fact that victims get to tell their story before a court of law can - even in the absence of punishment - help heal their wounds and, thus, motivate them to refrain from seeking private justice.

Conclusion

The ICTY is often viewed as proof of the international community's turn to legalism. However, the Tribunal can equally be regarded as an illustration of the complex relation between law and politics. While both can serve as complementary means to conflict-management, the interlocking of law and politics is not always desirable. With regard to the ICTY, the Tribunal's mandate to establish individual criminal responsibility requires that the adjudication process be done in the absence of politics.

This dissertation had the objective of evaluating to which extent the ICTY has been successful in safeguarding its judicial mandate from politicization, and assessing how this absence or presence of politicization affects the legitimacy of the Tribunal. It has been argued that in order for the ICTY to be free from politicization, the Tribunal must adhere to both the principle of separation of powers and the principle of due process. While respect for the former prevents that quasi-judicial or political institutions exercise the judicial mandate, the adherence to the latter ensures that the judges of judicial institutions do not take political considerations into account when adjudicating.

In order to assess the respect of the ICTY for the doctrine of separation of powers, the theory of legalization was applied to the Tribunal. According to this theory, the ICTY must be a form of "hard" legalization in order to be considered a judicial institution. After having evaluated the degree of obligation, precision and delegation – the three dimensions of legalization – of the ICTY, it could be established that the ICTY is a form of "hard" legalization in the constellation O, p, D and, thus, is a judicial institution. As a result, the ICTY respects the separation of powers and protects against the crudest form of politicization.

However, the fact that the judicial mandate of the ICTY is not being exercised by a quasi-judicial or political institution does not mean to say that the Tribunal is necessarily free of other forms of political manipulations. Only adherence to the requirement of due process, which demands that judges apply legal rules and legal reasoning, can assure this.

Though the dependency of the ICTY on states and international organizations for financing and fulfilling its duties, and the general tendency of human kind to consider peace – rather than justice - when dealing with war torn societies can be regarded as indicators that the ICTY is politicized, they are insufficient to conclude that the ICTY does not adhere to the principle of due process. This would amount to a strictly realist approach. In order to prove and not merely presume that the ICTY does not adhere to the principle of due process, and is thus politicized, it had to be established that the decisions of the Tribunal are not always legally justified. Therefore, a case study was done pertaining to respectively the NATO bombing of a passenger train at Grdelica Gorge and the NATO attack on Belgrade's Radio and Television Station during the course of Operation Allied Force. In both cases the Office of the Independent Prosecutor seemed to systematically not apply, or misapply, or apply in a discriminatory way international legal rules.

While the ICTY fulfils the first prerequisite for safeguarding its judicial mandate from politicization (the principle of separation of powers), the same cannot be said with regard to the second (the principle of due process). As a result, one can conclude that the ICTY is indeed politicized. However, the question still remained how this politicization affects the Tribunal's legitimacy.

The theory of legitimacy of Ian Hurd and Bruce Cronin demanded that legitimacy be perceived as the volatile result of the interaction between three forms of legitimacy: procedural, purposive and performance. From this perspective, the politicization of the ICTY seemed to have a limited impact on the perceived legitimacy of the Tribunal. Despite being politicized, the ICTY appears to enjoy high performance legitimacy. Furthermore, the shared objectives of the Tribunal endow it with high purposive legitimacy, which is considered to be the most preponderate of the three forms of legitimacy.

In sum, it can be concluded that the ICTY provides insufficient guarantees to safeguard its judicial process from politicization. The political forces enabling the court's efficient functioning, are the same ones that are undermining it. While this politicization seems to have had little repercussions on the ICTY's legitimacy, the question remains how the ICTY could have better protected itself against political dependencies and influences. Should the ICTY have had its own police force? If so, what would such a police force

concretely have looked like? To which extent did the politicization of the ICTY encourage future criminal courts, such as the ICC, to adopt more profound preventive measures against politicization? Only when having answered these questions can one truly understand the legacy of the ICTY, as both a beacon of hope for victims of ethnic violence around the world and as a blueprint of how concrete international criminal justice ought to be achieved.

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