"The International Criminal Tribunal for Yugoslavia and the Case of Milosevic"

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Abstract

Justice and Politics are inextricable not only as concepts but also in what regards their practical feasibility. This essay presents the establishment of the *ad hoc* International Criminal Tribunal for Yugoslavia (ICTY) and the trial of the then head of State President Slobodan Milosevic, where the inextricability of Justice and Politics or *raison d'état*, was undeniable. The reluctance of the western states to intervene militarily in order to end the massacres and horrors in the Yugoslav Federation in the 1990's had as a result the establishment of the *ad hoc* ICTY which served them both as an alibi for their indifference and as the means to sooth the growing public outrage about the atrocities committed, compared only to those of the Second World War. However the ICTY served also the Law, the protection of Human Rights in conflicts and as a legal instrument pursued the indictment and punishment of those who breached the customs of war, the law against genocide and for crimes against humanity. Due to the efforts and the persistence of the ICTY's prosecutors and other jurists, justice prevailed over politics and for the first time an active head of state is being prosecuted. The trial of the then President Milosevic became a precedent for ending the impunity of the powerful. Unfortunately the death of Milosevic before a verdict and sentence left the Milosevic's legacy of discord and friction unscathed. Albeit ICTY's undisputed political intermingling its existence and function is still a victory of justice over political machinations and immunity of politics, nonetheless, ICTY's effectiveness in what regards its objectives namely to sanction, to deter and to reconcile is still debated. Especially the objective of reconciliation of the populations of the dismantled Yugoslav Federation, whose suffering left deep scars and their expectations of justice did not met with the actual delivered results, for various reasons, was hardly achieved.

Keywords: Justice, Human Rights, Realpolitik, International Criminal Tribunal for Yugoslavia, Slobodan Milosevic.

Introduction

The wars throughout the history of mankind unfortunately have negatively enriched us with images of the suffering of humans in mass scale, all of which have been carved in our memory. For some is a past personal nightmare experience, for others these horrors are staining their memory through the narration of their families and of course for all through the shocking images and documentaries of the First and Second World War. The images of the horrors inflicted to human beings during the World Wars are so strong that every time a documentary or a movie regenerates them even now days, years after the actual events, provokes profound questions about our humanity, our ability to act worst than beasts, and causes crevasses in our trust to humanity and human society. Therefore the concept of human rights as well as the establishment of laws and legal instruments which will protect the fragility and at the same time the dignity of human existence is of paramount importance. In addition the institutionalization in world scale of the respect of life as well as of the well being, even at the minimum level, of humans under conflicts strengthens again our trust in what really means to be a human. International organizations and institutions which are set to punish the violations of human rights and the degradation of human dignity set the level of a high communal consciousness for all humanity and moreover they navigate the entire mankind towards a vision of more humane humans and consequently towards more civilized societies. Notwithstanding the nobility behind such institutions, their function throughout the recent history of conflicts, from the Second World War onwards, are stained from a selective and therefore biased stance against only the vanquished and less powerful states. Strong powerful states were never prosecuted or trialed when they breach the laws of war, or the laws of humanity. The implication of such selectiveness straightforwardly brings out the role of politics, or the mingling of politics into justice.

Can justice and protection of human rights exist irrespective of political interests? Are human right violations, war crimes and genocide commonly respected laws and concepts or can they be undermined when realpolitik has a different agenda? The establishment of Criminal Tribunals which have as an objective the protection of human rights and the prosecution and punishment of those who violate these rights, can they function independently from political pressures and keep the high standards that the concept of Justice demands? The fundamental question which emerges is:

would the states of the world agree to empower an independent institution? Or a powerful independent and global legal institution could turn against those very states when they violate the laws of humanity, and therefore can pose a threat to the states own pursue of political interests?

The atrocities of the Second World War, the shocking images of the victims triggered a worldwide humanitarian reaction so as to "Never Again" witness such barbarities. However after the "Never Again", humanity experienced yet again war crimes and genocide in the recent 1990's conflict which dissolved the Yugoslav Federation. This essay aims in briefly presenting the interplay of justice and politics through the establishment, function and objectives of the International Criminal Tribunal for Yugoslavia (ICTY), as well as in the trial of Milosevic, the then President of the Serbian Republic and instigator of the nationalistic frenzy which led the Balkans to blood bath. As becomes obvious the interdependence of justice and politics also in the case of the ICTY was not avoided. Therefore in the first chapter is presented the embodiment of the ideas and values about the protection of the human's rights into law internationally as well as what that implies for the international relations. According to the liberal line of thought institutions and in this case the international institutionalization of justice could function as an authority which defines the unacceptable in states behavior. Realists on the other hand do not accept ethos or morality in what regards state's effort to survive or achieve its interests in the international unpredictable and anarchic environment. And since state sovereignty remains the legitimate nuclear of human communities, political interests cannot but overpower the international institutionalization of justice. Consequently, in the first chapter the historical overview of the relation between justice and politics is presented. Until the Second World War Justice was sacrificed to politics, since the representatives of sovereignty were granted with impunity and the perpetrators of crimes against humanity where granted amnesty so as political interests could be served. After the Second World War, the International Criminal Justice significantly advanced, albeit evidencing one-sidedness and many flows, living as a heritage a movement towards the moralization of international life with the signing of the Convention of Human Rights, the protection of civilians in wartime and the Convention on Genocide. The proliferation of the transitions of post conflict post authoritarian regimes after the end of the Cold War, in addition, resulted in two

models of transitional justice the retributive and the restorative. As a clearly judicial tool of retributive justice the ICTY is presented in the second chapter. In this chapter, the ICTY's establishment and statutory objectives are presented alongside its efforts to avoid the mistakes of the past, namely the Nuremberg and Tokyo trials as well as the adversity of politics to ICTY's law implementation. The political intrigue becomes apparent since the member states of the United Nations have different views regarding their reactions towards the blood baths in the Balkans in the 1990's. Trying to balance the public outrage about the atrocities committed and their reluctance to intervene militarily they opted for a diplomatic and political negotiation in order to stop the horror and resolve the conflict. As a result of their choice they established initially the Commission of Experts which monitored and collected information about the violation of human rights, and which bore restricted legal power. In this way they tried to show to their national public that they do not stay indifferent to the breach of the laws of human rights under conflict, while continued their political approach negotiating with the leaders of the torn Yugoslav Federation. Later the International Criminal Tribunal for Yugoslavia was *ad hoc* established, bearing more legal power relatively to the Commission of Experts, but in parallel threatened the negotiations. ICTY as a legal weapon could indict the very leaders with whom the western powers were holding the negotiations. As a result the interplay of politics and justice became evident. The third chapter depicts the arrest and indictment of Milosevic as well as his defense strategy in his trial. For the first time an active head of state is being indicted prosecuted and tried for genocide, crimes against humanity and violation of the ethics of war. Once more the involvement of politics to justice procedures is proven to be unavoidable, a fact that provided Milosevic his defense arguments in order to undermine the legitimacy and impartiality of the tribunal. His untimely death before ICTY reaching a judicial verdict left his guilt or innocence without a closure and thus continued Milosevic's legacy of discord and division. Finally in the fourth and last chapter, there is an evaluation of the efficiency and success of the ICTY according to its statutory objectives. The objective of sanctioning the past crimes remains debatable in the literature weather it was successful or not. However the other two, deterring and reconciliation were considered as failed. The reasons are many. Among them are the remoteness of the ICTY in Hague, and the technicalities of legal procedures which resulted in absence of outreach to the population of the Former Yugoslavia. Moreover political manipulation in the region together with the different

expectations of the divided communities prevented ICTY from reconciling the tormented Balkans though judicial tools. Therefore restorative justice that uses policies such as education, truth commissions and reparations might result more efficient for reconciling post conflict societies. In the fourth chapter there is also the definition of the term political justice or politicized justice, which corresponds better to the rule of law applied as a means for international order from the powers of the world of liberal democracy. The essay ends with the conclusions where there is the summary of the above chapters.

1. Human Rights Law and International implications

The idea of law, order and justice always played a central role into the formation of human societies from antiquity to now days. Every society created for itself a framework of principles and a set of commonly accepted rules of permissible and forbidden acts within which this community could develop[1]. The necessity of law and order opposing the chaos, which is inimical to a just and stable existence, was and is the binding element which facilitates societies to live in peace and to pursue commonly, agreed goals. Through the adherence to recognized values and standards, the individuals from one hand have the permission to establish legal relations with rights and duties and on the other hand can be punished upon the infringement of these regulations[2]. These set of rules of accepted and not accepted behaviors mirror the ideas and preoccupations of the society which produce them, as well as the society's collective level of consciousness and civilization[3].

Indicative of a high level of consciousness, the protection of human rights as an international obligation, notwithstanding its impetus during the 20th century has its roots in antiquity[4]. Essential human needs are implicitly referenced in legal written codes from the ancient Babylon, and in Buddhist, Confucian and Hindu texts[5]. However the universality of human rights as an idea has its origins in the western culture, in particular the Natural Law tradition which advocated that certain rights are by nature inherent to human beings. Natural Law, as it evolved from ancient Greek and Roman philosophers, the debates over the 'rights of man' during the Enlightenment, the Magna Carta in 1215, and the development of English Common Law together with the Bill of Rights in 1689, were significant steps of enshrining basic human rights into law[6]. In addition the 'Law of Nations' of Grotious, Rousseau's 'Social Contract', and Locke's 'Popular consent, limits of sovereignty', also contributed to the inscription of human rights into law[7].

[1] Shaw, 2008, p. 1
[2] Bassiouni, 2003, Shaw, 2008, p. 1
[3] Shaw, 2008, p. 1
[4] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, Shaw, 2008
[5] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, p.p. 66-67
[6] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, p.p. 66-67, Shaw, 2008
[7] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, p.p. 66-67, Shaw, 2008

In the 19th century, state sovereignty and domestic jurisdiction reigned supreme and therefore all matters concerning human rights were universally regarded as belonging in the internal national jurisdiction[8]. However, the development of western political culture dictated commonly accepted standards upon which inter-state relations could develop[9]. In particularly, the internationalization of human rights law was introduced with the advocacy of democracy and liberal internationalism[10]. According to the Liberal line of thought the extension of human rights to all peoples was important not only because what is wrong or criminal for the individual is also wrong and immoral for states, but also because states which uphold the rule of law and they respect the human rights of their citizens are less likely to behave aggressively internationally[11]. The task of Liberalism to develop and promote 'morality' of universal consent into international affairs through institutions is an effort to substitute the absence of an international authority or 'Archi' (Αρχή), which can intervene when a state runs to it asking for help when its national interests are threatened[12]. Since however enforceability in the Liberal theory of international relations is problematic, national interests and sovereign state's principle of self-help in order to counterbalance the unpredictable and Anarchic international environment, even today holds states reluctant to outsider's interference in their domestic affairs, even in what regards human rights violations[13]. Realist view of the 'behavior' of states in the Anarchic international arena sees the pursuit of national interest as of major importance and consequently overriding ethical and human considerations[14]. The two opposing stances which the Liberal and Realist theories of international affairs pose: the existence of 'morality' through protective institutions of human rights according to Liberals or the absence of 'morality' in the international arena, when national interests and survival are at stake, according to Realists, simultaneously

[8] Clark, 2008, p. 10, Shaw, 2008, p. 270
[9] Shaw, 2008
[10] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013
[11] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013,p. 67, Shaw, 2008, p. 13
[12] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, Clark, 2008, Koskenniemi, 2002
[13] Bassiouni, 2003, Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, Clark, 2008, Koskenniemi, 2002, Shaw, 2008
[14] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, Clark, 2008, Koskenniemi, 2002, Shaw, 2008

pose a paramount dilemma[15]. From one hand an outside international institution and for this reason more unbiased, is something we would all prefer to be the 'organ' of justice, since the state which breaches the law of human rights is not likely to be at the same time the one which could handle impartially and without prejudice the proceedings and enforcement of law and serve justice. On the other hand who would dare give to an international institution the means and power to override national interests, or policies, even on moral grounds or exactly because it will be on moral grounds, and trust that it will remain impartial and unprejudiced while at the same time so powerful? Whereas in a state there is the power and means of legislating and enforcing the law, given that the parliament legislates, the Courts adjudicate and police or the army enforces the law, while at the same time the division of powers immunizes too much concentration of power in one sector, if applied to an international institution that would create an hegemonic formation of concentrated power of global law[16]. This dilemma is exactly why albeit the growing influence of Liberalism and the increase of the public opinion for the protection of human rights in recent years and notwithstanding the existence of international institutions and organizations monitoring human rights violations as well as the existence of the International Court of Justice in the Hague, the lack of enforceability of international justice remains its weakness[17]. The Security Council of the United Nations for example is constrained by the veto power of its permanent members (USA, Russia, China, France and the United Kingdom), and moreover it is unable to act coercively in posing punishment when humanitarian law is breached because this needs the co-ordination of its member's national interests[18]. Even Liberals are divided over this issue of enforcement of law in compliance with universal standards. The non-interventionists defend state sovereignty while others regard ethical principles as adequate justification for intervention in the internal affairs of other states[19]. As understood law and policy can never be completely separated no matter what theory one opts for and the inextricable bonds of law and politics must be recognized[20]. The best proof of these bonds is provided from the reluctance of criminalization of

[15] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, Clark, 2008, Koskenniemi, 2002, Shaw, 2008
[16] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, Shaw, 2008
[17] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, Shaw, 2008
[18] Shaw, 2008, p. 4
[19] Burchill, Linklater, Devetak, Donnelly, Nardin, Paterson & True, 2013, p. 69
[20] Shaw, 2008, p 11

leadership which actually is a relatively recent phenomenon, as we will see later[21]. The international law albeit existing to resolve problems of conflicts and confrontations serving a social need cannot provide instant solutions[22]. Seeking welfare and justice not only within the state one lives, but also in the international system is of vital importance to individuals but also to states. However if one does not accept the interplay of politics and justice opts for a utopia which when compared with reality will fail[23]. Oppositely the cynical approach of brute power is equally inaccurate, if more depressing[24].

1.1 Politics and Justice in conflicts, a general historical overview and Transitional Justice.

Justice and Politics are two confuting but nevertheless not mutually excluding stands on addressing conflicts and post conflicts conditions, however in earlier historic conflicts justice was sacrificed to political considerations. From 1864 there were international instruments expressing concern for the treatment of the sick and wounded soldiers while states were required to hold certain minimum standards for the treatment of aliens[25]. Moreover certain agreements of welfare nature were beginning to be adopted while the right of humanitarian intervention was accepted but without specific range or extent[26]. With the establishment of the League of Nations in 1919, article 22 of the Covenant of the League a major change is observed[27].

After the First World War, a commission set up by the Allied Powers recommended that the defeated states had violated the laws of war and consequently high officials including the Kaiser Wilhelm II of Germany under the principle of command responsibility, should be prosecuted[28]. In addition there was suggested that an Allied High Tribunal should be established in order to try the violations of the customs of war and the laws of humanity[29]. The Treaty of Versailles 1919 recognized the right of the Allied and Associated Powers to bring to trial before military tribunals

[21] Clark, 2008
[22] Shaw, 2008, p. 12
[23] Shaw, 2008, p. 13
[24] Shaw, 2008, p. 13
[25] Shaw, 2008, p. 270
[26] Shaw, 2008, p. 270
[27] Bassiouni, 2003, Shaw, 2008, p. 270
[28] Bassiouni, 2003, Shaw, 2008, Hazan, 2004
[29] Shaw, 2008

individuals responsible for such crimes, article 228, establishing in this way the individual responsibility of Kaiser, article 227[30]. However, the German Kaiser was not prosecuted, since the Netherlands refused to hand him over, notwithstanding the provision of the Treaty of Versailles that required it[31]. Only few trials were held in Leipzig before German courts with mixed results[32]. The reason was that most European countries could not accept the precedent of holding heads of states and in particularly monarchs as criminally accountable[33]. Especially when the family lineage of that crowned head was linked to their own monarchy[34]. USA and Japan refused the investigation of responsibility for war crimes against humanity in 1919, regarding the prosecution of Turkish officials for the Armenian massacre of 1915[35]. Their prosecution had been specified in the Treaty of Sevres of 1920; however this effort was abandoned when the European allies evaluated Turkey as an essential bulwark against the new Bolshevik government of Russia[36]. Therefore the Treaty of Sevres was never ratified, instead it was replaced in 1923 by the Treaty of Lausanne which contained an unpublished protocol guaranteeing amnesty to the very people who were to be prosecuted[37] As a result of these political machinations there was no international prosecution for war crimes which demonstrates how seriously justice was compromised, either based on the "taboo" of prosecuting head of states and monarchs who represented the sovereignty of nation states, or based on political and international political interests.

The nest stage of post conflict justice was after the horrors of the Second World War, where the need for an adequate international system which would maintain international peace and protect human rights became apparent to all[38]. Consequently the International Criminal Justice was significantly advanced, albeit evidencing one sidedness and many flaws[39]. The International Military Tribunal at Nuremberg (1945-1949) composed of four judges from the USA, the UK, the USSR and France, and four alternates as well as the International Military Tribunal for the Far East in Tokyo

[30] Shaw, 2008, p 399
[31] Bassiouni, 2003, p. 93, Hazan, 2004, p. ix. , Shaw, 2008, p. 399
[32] Shaw, 2008, p. 399
[33] Bassiouni, 2003, p. 93, Hazan, 2004, p. ix.
[34] Bassiouni, 2003, p. 193.
[35] Bassiouni, 2003, p.p. 93, 94, Hazan, 2004, p. ix.
[36] Bassiouni, 2003, p.p. 93, 94, Hazan, 2004, p. ix.
[37] Bassiouni, 2003, p. 94.
[38] Shaw, 2008, p. 271
[39] Hazan, 2004, p. x.

(1946-1948), established to deal with the Japanese war crimes, composed of judges from eleven states, reveal that no member of the victorious Allied forces was prosecuted for war crimes against humanity, for example regarding the dropping of the atomic bombs in Hiroshima and Nagasaki[40]. Although there was no doubt about the responsibilities of those under trial in the Nuremberg and Tokyo trials, the evidencing of one-sidedness and many procedural flaws resulted in calling the justice applied as 'victor's justice'[41]. Among the arguments was that first only the vanquished were called to account for the violations of humanitarian law, while USA for example was equally guilty for the dropping of the atomic bombs targeting civilian population. Secondly the German and Japanese officers were judged and punished for crimes defined for the first time by the victors at the conclusion of the war, irrespective of the *ex post facto* principle known by the Latin phrase *"nullem crimen sine lege"* meaning that there is no crime without being already defined or described in the law and thirdly that the Nuremberg Tribunal functioned on the basis of limited procedural rules and therefore inadequately protecting the rights of the accused[42].

The heritage of the Nuremberg Tribunals was the new restriction on the intolerable, which is Crimes against Humanity. Notwithstanding the 'victor's justice' applied, the Nuremberg and Tokyo trials became the true beginning of the International criminal Law[43]. From then on liabilities and duties were to be imposed upon individuals responsible for crimes against peace, war crimes and crimes against humanity, irrespective of rank or governmental status, as well as upon states for crimes against international law[44]. The provisions of the Nuremberg Charter became part of the international law since the General Assembly in 1946 affirmed the principles of the Charter, while in addition criminalized genocide stating that genocide bears individual responsibility[45]. The emergence of globalization gave international civil society greater influence over governments' *realpolitik* practices and increased its opposition to violent *raison d'état* [46]. Western countries undertook a

[40] Hazan, 2004, p. x, Scharf, 2001, p. 391. , Shaw, 2008, p. 399
[41] Hazan, 2004, p. x, Scharf, 2001, p. 394.
[42] Scharf, 2001, p.p. 391, 392, 393
[43] Shaw, 2008
[44] Shaw, 2008
[45] Shaw, 2008, p.p. 400, 401
[46] Hazan, 2004, p.p. x, xi.

movement towards the moralization of international life drafting treaty after treaty[47]. In 1948 the Universal Declaration of Human Rights and the United Nations Convention on Genocide are adopted, in 1949 the Geneva Conventions are completed to protect civilians in wartime and in 1950 the European Convention on Human Rights is signed[48].

As a result we have the definition of the most serious crime the genocide which whether committed in time of war or peace is a crime under international law, as well as the war crimes and crimes against humanity[49]. According to the definition the crime of genocide includes any of the following acts which intent to destroy completely or in part a grouping of people, with the exception of political groups, under specific national, ethnical, racial or religious labels: Killing members of the group, bodily tortures to members of the group, inflicting life conditions to the group which could lead to their physical destruction, imposing measures preventing birth within the group, and the transfer by force of children of the given group to another[50]. Here is worth mentioning that the concept of cultural genocide is not included and that, albeit the obligation to prevent genocide, there is no provision of means in order to implement the prevention of genocide[51]. Moreover, many clarifications over the crime of genocide as well as case-law development have occurred due to the International Criminal Tribunals regarding the wars in the Former Yugoslavia and Rwanda[52]. For example conspiracy, direct and public incitement, attempt and complicity in committing genocide have been added as punishable acts[53]. War crimes are violations of the rules of customary and treaty law, known also as the breach of the law governing armed conflicts[54]. These violations include among others: willful killing, torture and biological experiments, destruction and appropriation of property not justified by military necessity and carried unlawfully, compelling prisoners of war or civilians to serve in the force of hostile power, taking civilians as hostages, unjustified by military necessity destruction of cities, towns or villages, attacking or

[47] Hazan, 2004, p. 21.
[48] Hazan, 2004, p. 21.
[49] Shaw, 2008, p. 282, http://www.ohchr.org/Documnets/Publications/HR_in_armed_conflict.pdf.
[50] Shaw, 2008, p. 282, https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf
[51] Shaw, 2008, p. 283
[52] Shaw, 2008, p.p. 283, 431
[53] Shaw, 2008, p. 430
[54] Shaw, 2008, p. 205, http://www.ohchr.org/Documnets/Publications/HR_in_armed_conflict.pdf.

bombarding undefended towns, villages, dwellings or buildings, seizure or destruction of institutions dedicated to religion, charity, education as well as historic monuments[55]. The definition of crimes against humanity include: murder, extermination, enslavement, deportation and other inhuman acts against any civilian population before or during war, as well as persecution on political, racial, or religious grounds[56]. In concluding, the war crimes law constitutes a part of the humanitarian law, but is applied primarily to individuals whereas the international humanitarian law to states[57].

1.2.….and Transitional Justice

In the following decades with the consolidation of the international human rights regime, the end of the Cold War, the proliferation of transitions to democracy and the resolution of internal conflicts the role of justice acquired a new impetus[58]. As a result new ideas and perspectives in public policy emerged having as objective the post conflict societies to move from a divided past to a shared future. The concept of the process of reconciliation in post conflict and post authoritarian regimes is the transitional justice[59]. Transitional Justice as a strategy of post-conflict reconciliation was initiated from Western governments, inter-governmental bodies and nongovernmental organizations and was defined from the United Nations as "*the full range of processes and mechanisms associated with society's attempts to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation*"[60]. It emerged from studying the case of Argentina where after the toppling down of an autocratic regime the transitional authorities to democracy initiated numerous trials on human rights abuses of the previous regime higher middle and lower officials, which caused a series of military rebellions jeopardizing the political stability[61].

As a result many debates took place in the 1980's and 1990's about whether punishing human rights perpetrators in a strict legal sense really help and enforce

[55] Shaw, 2008, p.p. 205, 206, http://www.ohchr.org/Documnets/Publications/HR_in_armed_conflict.pdf.
[56] Shaw, 2008, p. 215
[57] Shaw, 2008, p. 434
[58] Armakolas & Vossou, 2008, p. 23.
[59] Armakolas & Vossou, 2008, p. 23.
[60] Ostojic, 2014, p. 6
[61] Ostojic, 2014, p. 13

stability and democracy and respect of human rights in the future or whether the prosecutions of perpetrators destabilizes the countries in transition and leads to further violations of human rights[62]. As many scholars argued, based on the cases of Argentina and Chile, transitional governments have the obligation not only to redress past violations of human rights but also to secure political stability and transition to democracy and sustainability of peace, balancing between moral justice and political feasibility[63].

As a result of these debates transitional justice having as a goal the transition from war to peace, the process of reconciliation of a divided society towards a shared and peaceful future comprised two distinct models, the retributive and the restorative justice[64]. The retributive justice is the most common type of transitional justice; it concentrates its efforts in punishing past crimes and perpetrators and deals with the past. It attains reconciliation through the reinstatement of the rule of law and the moral order using purely judicial tools[65]. It follows the logic of appropriateness meaning the penalization of past crimes prioritizing judicial solutions and punitive measures appropriate with regards to human rights violations that need to be penalized[66]. The policy making based on retributive justice corresponds to a more idealistic persuasion of international relations since it is believed that by punishing the perpetrators prevents or reduces the collective guilt and victimization and subsequently contributes to the construction of a new social order[67]. In addition retributive justice constitutes a method of deterrence because the judicial resolution prevents acts of revenge and finally because the public prosecution legitimizes and establishes the rule of law which was violated[68].

On the other hand, restorative justice seeks reconciliation and restoration of the broken communal identities by the conflict through truth commissions, reparations and education[69]. It claims that is more effective relatively to the short-term gains of the retributive justice following the logic of consequences and therefore it will not

[62] Ostojic, 2014
[63] Ostojic, 2014
[64] Armakolas & Vossou, 2008, p.p. 23, 25. Ostojic, 2014
[65] Armakolas & Vossou, 2008, p. 25.
[66] Armakolas & Vossou, 2008, p. 27. , Ostojic, 2014
[67] Armakolas & Vossou, 2008, p.p. 26, 27, 30. Wippman, 1999.
[68] Armakolas & Vossou, 2008, p.p. 26, 27, 30. Wippman, 1999.
[69] Armakolas & Vossou, 2008, p. 25.

rush into punitive measures if there is a risk of destabilizing the transitory regime or the communal peace, which by itself bears a more realistic persuasion[70]. According to this line of thought it is better to apply transitional justice after the consolidation of democracy and peace when the development of the judicial and policing system becomes transparent and legitimate, '*delaying' justice without denying it*[71].

However, in this essay the focus is on the International Criminal Tribunal for Yugoslavia (ICTY) for the war crimes against humanity committed during the war that torn the Yugoslav Federation in the 1990's, which is strictly a judicial tool and therefore belongs to the retributive model of justice.

[70] Armakolas & Vossou, 2008, p. 27.
[71] Ostojic, 2014, p. 16

2. The International Criminal Tribunal for the Former Yugoslavia (ICTY).

The International Criminal Tribunal for Yugoslavia is an *ad hoc* tribunal established specifically to address the crimes committed during the nationalistic wars of 1990's which torn the Yugoslav federation apart[72]. Under the authority of the United Nations Security Council, in particular under Chapter VII of its Charter instead of an international conference as in the case with the International Criminal Court, the Council adopted binding decisions upon all its member states in order for the ICTY to become operational as quickly as possible as well as to ensure that the parties closely involved with the war crimes to be bound independently of their consent[73]. After many preceding steps the ICTY was established under the adoption of the Security Council's resolution 808 in 1993, in order to prosecute persons responsible of violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991[74].

According to its Statute the Tribunal and national courts have concurrent jurisdiction, but the ICTY has primacy over national courts and consequently the national court if asked can defer its competence[75]. As a result a person cannot be tried by a national court if he or she is already tried by the International Tribunal, but can be tried from the Tribunal for relevant criminal acts after trial by a national court, if the crime committed was characterized by the national court as an ordinary crime or if the national court proceedings were biased and not independent[76]. The investigations into alleged offences are initiated by the Prosecutor either *ex officio* or based on information obtained from any source, including governments, organs of the UN and non-governmental organizations[77]. The Prosecutor then decides whether there is enough evidence in order to proceed and may question suspects, victims, witnesses while collecting evidence and conducting on-site investigations[78]. If a *prima facie* case is determined to exist the Prosecutor prepares an indictment comprising the crime or crimes with which the accused is charged[79]. In addition according to the

[72] Hazan, 2004, Shaw, 2008
[73] Shaw, 2008
[74] Bassiouni, 2003, Hazan, 2004, Shaw, 2008, p. 403
[75] Shaw, 2008, p. 405, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
[76] Shaw, 2008, p. 405, http://www.haguejusticeportal.net/Docs/ICTY/rule_procedure_ICTY.pdf
[77] Shaw, 2008, p. 405
[78] Shaw, 2008, p. 405, http://www.haguejusticeportal.net/Docs/ICTY/rule_procedure_ICTY.pdf
[79] Shaw, 2008, p. 406, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

Statute, states are obliged to cooperate with the Tribunal in the investigation, and prosecution of the accused persons[80]. This includes compliance without undue delay with any request for assistance or order of the Tribunal in identifying, locating, taking testimony, arresting and transferring the accused to the ICTY[81]. The Trial Chambers seek to ensure that the trial is fair and expeditious with respect to the rules of the proceedings and evidence as well as with respect to the rights of the accused while protecting the victims and witnesses[82]. The punishment that can be delivered from the Tribunal is limited to imprisonment upon conviction[83]. The articles 2 to 5 of the Stature of the ICTY lay down the crimes upon which the Tribunal can exercise jurisdiction and are: grave breaches of the Geneva Convention of 1949, violations of the customs of war, genocide and crimes against humanity[84]. Article 7 establishes that persons who instigated planned, ordered, committed or aided the execution of the crimes listed in the above articles (article 2 to 5) will be held individually responsible for the crime[85]. Furthermore, this article provides that persons committing these crimes will be held responsible and will be punished irrespective of their official position; moreover their responsibility will stand even if a crime was committed by a subordinate and the superior knew or suspected and did not take any measures preventing or punishing the subordinate who was about to commit the crime[86]. The article 7 also required that even if a person committed a crime under the order of a government or of a superior that would not relieve him from criminal responsibility, although this may constitute a mitigating factor[87]. The ICTY focused on the prosecution and trial of the most senior leaders while intermediate and lower ranked accused where referred to national courts[88]. Notwithstanding ICTY's undeniable abiding with the law and legality as proceedings and Stature the political intrigue behind its 'genesis' is equally undeniable.

[80] Shaw, 2008, p. 405, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
[81] Shaw, 2008, p. 405, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
[82] Shaw, 2008, p. 406, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
[83] Shaw, 2008, p. 406, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
[84] Shaw, 2008, p. 404
[85] Shaw, 2008, p. 404, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, http://www.haguejusticeportal.net/Docs/ICTY/rule_procedure_ICTY.pdf
[86] Shaw, 2008, p. 404, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
[87] Shaw, 2008, p. 404, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
[88] Shaw, 2008, p. 407, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

2.1.The Political intrigue behind ICTY

The war of the former Yugoslav Federation broke into a globalized world. Through the international press and the television networks atrocities are watched by the societies outside Yugoslavia and evoke the horrors of the Second World War (WWII)[89]. Ethnic cleansing, summary execution, deportation, detention, killing of civilians, rapes, based on nationality or religion had as a result the international public opinion and civil society to remember again the moral demand of the post-war (WWII) of "Never Again", resulting in putting pressure to their governments to act and end the massacre[90]. In July 1992, the international press reveals the truth about the Bosnian Serb camps and in August 1992 there is an article published by the New York daily Newsday with the title 'Bosnia's Camps of Death' where Roy Gutman interviews two survivors who were held in these concentration camps in which civilians were executed or starved to death[91] . Roy Gutman also publishes the same day "A Witness' Tale of Death and Torture', where a traffic engineer describes the humiliations inflicted to Muslims from their Serb captors, while the British television network ITN broadcasts images of starved and terrorized people held in the Omarska camp[92]. But the broadcasts in the television and the news are not the only factor that disseminated the truth about the horrors in the Former Yugoslavia outside the Balkans. War and ethnic cleansing forced thousands of whom the majority were Muslim to seek refuge elsewhere[93]. By July 1992, 2.3 million people were displaced due to war, 200.000 have found refuge in Germany, 60.000 in Hungary, 50.000 in Austria, 44.000 in Sweden and 12.000 in Switzerland[94]. Furthermore the principal U.S. organization of human rights the 'Human Rights Watch' published a report with the title 'War Crimes in Bosnia-Herzegovina' where it supports based on testimonies and documents that ethnic cleansing and genocide is committed[95]. The report also cites by name ten culpable Serb and Bosnian Serb military officials as well as politicians, among them the President Slobodan Milosevic of the Serb Republic, Radovan Karadzic the Serbian President of Bosnia, Ratko Mladic the commander of

[89] Bassiouni, 2003, Hazan, 2004.
[90] Barria & Roper, 2005, Bassiouni, 2003, p. 200, Hazan, 2004.
[91] Hazan, 2004, p. 12
[92] Hazan, 2004, p. 12
[93] Bassiouni, 2003, Hazan, 2004
[94] Bassiouni, 2003, Hazan, 2004, p. 12
[95] Hazan, 2004

the Bosnian Serb forces, Zeljko Raznatovic the leader of the Bosnian Serb paramilitary Tigers and the tchetnik Serb paramilitary leader Vojislav Seselj[96]. This report also blamed as guilty Croat and Muslim armies who harassed and mistreated Serb civilians in the territories which they controlled[97]. Thus the idea for an international tribunal which would investigate, pursuit, judge and punish those responsible for war crimes in the Former Yugoslavia comes as a demand from bellow, from the civil society and is also comprised in the report of the Human Rights Watch, at the end of July1992[98].

This demand for an international tribunal or any act in order to end the horrors of the Yugoslav war, from one hand pressed the UN which without a mandate to act would be reduced in an organization of mere statisticians and humanitarian accomplices to mass crimes and from the other pressed its member states and in particular the western governments to alter their wait-and see policy[99]. Initially USA 'had no dog in that fight' according to President George Bush's public statement describing in a nut shell USA's reluctance to intervene[100]. Europe on the other hand was divided. Europe is lacking a common foreign and defense policy; as a result Germany wanted to follow the hard line of intervention however the atrocities committed by the Nazis in the Second World War precluded them from a military intervention in the area, while the French and the British who were the main providers of the UN Blue Helmets peacekeepers, opted for nonmilitary intervention wanting to avoid aggressive retaliations against their troops[101]. Basically the western governments opted for providing humanitarian aid and political negotiations and solutions to the Yugoslav problem using as a 'stick' economic sanctions[102]. Nevertheless the ethnic cleansing continued. Americans launched the idea of war crime commissions underlying their change in tactics without however changing their objective which at that time remained the political solution and not intervention[103]. Indeed on October 6, 1992, instead of a tribunal the Security Council of the UN adopts Resolution 780 establishing in this way a Commission of Experts on war

[96] Hazan, 2004, p. 13
[97] Hazan, 2004, p. 13
[98] Bassiouni, 2003, Hazan, 2004, p. 14
[99] Hazan, 2004, p.p. 12, 14
[100] Bassiouni, 2003, Hazan, 2004, p. 52
[101] Hazan, 2004, p. 18
[102] Bassiouni, 2003, p. 200, Hazan, 2004.
[103] Hazan, 2004, p. 23

crimes[104]. This commission would examine and analyze information evidencing grave breaches of the Geneva Conventions and other violations of Humanitarian Law[105]. In early 1993 the Commission produced a report confirming violations of international humanitarian law, such as ethnic cleansing, mass killings, torture, rape pillage and destruction of civilian, cultural and religious property[106]. As a formation the Commission of Experts served the needs of the western governments who seek the high moral ground in order to sooth their respective public opinion while at the same time to not provoke or threaten the Serbian Leaders with whom they negotiate a political solution[107]. Thus the Commission of Experts bears credibility, but it is not as strong or dangerous as an autonomous tribunal, since it is controllable and easily dismantled in contrast to a tribunal, whose indictments once launched cannot be annulled[108]. Furthermore, the tight control under which the Commission of Experts operates shows the contradictory objectives of the UN which while searches for violation of human rights, pursues to diplomatically reach peace and send humanitarian aid, which implies the cooperation with exactly those who accuses and hunts down as war criminals[109].

Notwithstanding the continuation of this absurdity, the ongoing barbarities in the Former Yugoslavia and the change in US's administration under the Presidency of Clinton brought a favorable shift in the previously dismissed idea of a tribunal which led in the creation of an *ad hoc* tribunal for the Former Yugoslavia[110]. The draft of the ICTY's resolution was prepared attentively by the French, and screened by the British, Russians, Americans and Chinese[111]. Politically conceived the ICTY is prone to pressures from all sides due to its potential power, since it has the ability to indict even head of states[112]. The Americans see the ICTY both as a means of pressure against the belligerent leaders of ex Yugoslavia, and as a way to 'save face' and reinforce their moral position without having to send soldiers in the area[113]. The French want to appease the public opinion above all, while the British are afraid that

[104] Bassiouni, 2003, Hazan, 2004, p. 23, Shaw, 2008, p. 403
[105] Shaw, 2008, p. 403
[106] Shaw, 2008, p. 403
[107] Hazan, 2004, p. 23
[108] Bassiouni, 2003, Hazan, 2004, p.p. 23, 24
[109] Bassiouni, 2003, Hazan, 2004
[110] Hazan, 2004
[111] Hazan, 2004, p. 36
[112] Hazan, 2004
[113] Hazan, 2004, p. 45

the tribunal will threaten the so desired political solution for ending the war. As for the Russians and Chinese, they fear the precedent posed by a supranational tribunal created and dominated from the West[114]. Nevertheless to the appeasement of this bottom-up pressure the ICTY was established in 1993 by the United Nations Security Council through Resolution 827[115]. The ICTY as a purely judicial tool aimed to reconcile by rendering retributive justice with three statutory objectives addressing different periods of time[116]. To sanction, to bring before justice and punish the war criminals aiming at the chastisement of the past, to deter, to end the violation of the humanitarian law, addressing the present and to reconcile, to restore and maintain peace in the future[117]. As Hazan comments: *'Perfect from e theoretical point of view, but has only one fault: it ignores reality'* (Pierre Hazan, 2004, p. 39).

And the reality remains surreal. Radovan Karadzic, the Bosnian Serb leader and President Milosevic attend international Conferences on the Former Yugoslavia in Geneva, and they are, among other leaders of the torn Yugoslav Federation, the indispensable negotiators with whom the western diplomats and politicians discus a political solution while at the same time are accused as war criminals and are under the threat of being incarcerated[118].Thus the morality and legitimacy from one hand and the threat to the negotiations posed by the ICTY from the other, speaks volumes about the contradiction within which the western governments dueled, justice or real politics? Therefore, it became evident in ICTY's early years that no resources would be allocated to it, and hence no enforceability. On November 17, 1993 in the Palace of Peace in The Hague, the seat of the International Court of Justice, the highest UN judicial body opens its first plenary session of the International Criminal Tribunal for the Former Yugoslavia[119]. A day before on the 16 of November the eleven judges meet only to realize that they have no offices, no statute, no prison, no accused, no logistics and more importantly no prosecutor[120]. To make things more disheartening the judges believed that the UNPROFOR peacekeepers would be the 'police' force of the tribunal, since the ICTY was created under Article VII of the Security Council

[114] Hazan, 2004, p. 45
[115] Hazan, 2004, p. 38.
[116] Hazan, 2004, p. 39.
[117] Hazan, 2004, p. 39.
[118] Bassiouni, 2003, Hazan, 2004
[119] Hazan, 2004, p. 43
[120] Hazan, 2004, p. 44

Charter which provides the authorization of the use of force, however the Security Council does not allow it[121]. The Judges are perplexed; does the Security Council manipulate them? Doesn't it want an effective and independent tribunal? Was justice to be nearly stillborn and why? The establishment of the ICTY formed an alibi for the western allies to not intervene militarily, while not showing indifference[122]. The judges elect as their first act a president. Presidency functions as the voice of the ICTY in the political arena, while keeping intact its judicial impartiality[123]. At the position is elected Antonio Cassese, Known for his habit of confronting politicians, Cassese regards law as a tool of social transformation, a weapon to improve the world[124]. He also understands the opportunity that the ICTY offers. If it fails that would mean the end of the fight against the impunity of the humanitarian law criminals all over the world. If it succeeds that could open the way for creating a truly international court, away from the manipulations of the UN Secretariat which treated the tribunal as a mere subsidiary organ instead of an independent court[125]. In January 1994 the judges begin to write the statutes of the ICTY, establishing the rules of procedures since without a prosecutor that is the only thing they can do[126]. Here it's worth mentioning that the judges were pre-selected from a list proposed by the Security Council, then confirmed by the U.N. General Assembly after being scrutinized for ten rounds[127]. All the judges with religious or cultural sympathy or affinity to either side are excluded. There are no jurists of Muslim origin despite the fact that four judges are coming from Islamic countries. But the Egyptian is a Coptic Christian, the Pakistani Zoroastrian, the Malaysian Buddhist and the Nigerian Christian[128]. It is the first international penal code ever established so it has to be written on paper given that there is no precedent. Furthermore, albeit the remarkable technical work of the judges, since they do not know how the new code will be applied beyond the tribunal, they limit their focus on the fairness of the rules[129].

[121] Hazan, 2004, p. 44
[122] Bassiouni, 2003, Hazan, 2004.
[123] Hazan, 2004, p. 47
[124] Hazan, 2004, p. 48
[125] Hazan, 2004, p. 50
[126] Hazan, 2004, p. 50
[127] Hazan, 2004, p. 46
[128] Hazan, 2004, p. 46
[129] Hazan, 2004, p. 51, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

Consequently the Article 21 and 22 of the ICTY Statute provide among other that: all persons shall be equal before the international tribunal; the accused shall be entitled to a fair and public hearing, the accused shall be presumed innocent until proven guilty[130]. In addition the accused must be informed promptly and in detail about the charges against him, to have enough time and facilities to prepare his defense, to be tried expeditiously and in his presence, and to defend himself in person through legal assistance of his own choice[131]. In case he does not have legal assistance or he does not have the means to pay for it, then a legal assistance will be assigned to him for free, as well as an interpreter in case he does not understand the language used in the International Tribunal, finally the accused will not be compelled to testify against himself or to confess guilt[132]. From the above provisions two issues were of paramount importance to the judges of the Tribunal. First while in a time of peace the accused can remain free until his trial, in the case of the accused war criminals that would constitute impunity and therefore an affront to the victims, as a result they allowed only accused persons who were ill to remain free[133]. Secondly, the concept of 'contumacy', namely trials in absentia, from one hand would allow them to stigmatize the criminals internationally; destroying their status as respectable interlocutors in negotiations for a political settlement but on the other hand could easily result in a legal 'circus' and 'show trials'[134]. They choose not to try in absentia, based on the fear that a tribunal without a defendant would result in mere words without a real effective power and punishment[135]. Notwithstanding the adverse of real-politics to justice and the rule of law, the ICTY made efforts for scrupulously fair trials in order to avoid the mistakes of the Nuremberg trials and to reach higher legitimization[136]. The Nuremberg trials were accused as "victor's justice" first because only the vanquished were under trial, secondly because they were punished for crimes expressly defined for the first time, ex post facto law principle, and third because of the limited procedural rules that inadequately protected the rights of the accused[137]. The improvements of the ICTY over Nuremberg consisted in the previous existence of

[130] Shaw, 2008, p. 440, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
[131] Boas, 2007, Shaw, 2008, p. 440, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
[132] Shaw, 2008, p.p. 440, 441
[133] Hazan, 2004, p. 51
[134] Hazan, 2004, p. 51, Koskenniemi, 2002.
[135] Hazan, 2004, p.p. 51-52
[136] Scharf, 2001, p.p. 391-393.
[137] Scharf, 2001, p. 391.

explicitly defined war crimes from the Geneva Convention and the Genocide Convention therefore secured its legitimacy relatively to "*nullem crimen sine lege"* principle, prohibited trials in *absentia* which are inherently unfair and are likely to be seen as an empty gesture, and finally where the defense attorneys at Nuremberg were prevented from full access to the evidentiary archives, the ICTY provided detailed rules for procedures and evidence and full access of the defense attorneys prior to trial to all evidence in the possession of the Prosecutor[138]. Albeit the improvements of the ICTY in a strict legal sense, the exerted influence of politics on it, as argued, is that the Tribunal was heavily dependent for its function on hundreds of millions of dollars contributed to it by the USA and its western allies, the staff for the Prosecutors office was on loan from NATO countries and that NATO also provided military support[139]. Moreover the judges impartiality is the least questioned since their incredibly prestigious, 200.000 $ per year jobs would not otherwise exist[140]. Last but not least is the argument against the neutrality of the ICTY based on the fact that after the initial political pressures against the indictment of leaders, tones of top secret material and information followed to help the Prosecutor against Milosevic from Britain and the US, thus evidencing the inseparability of justice and political interests[141]. As a result the image of an independent neutral International Tribunal is irreversibly stained[142].

Another issue deriving from the reticence with which the western governments and the U.N. handle the Tribunal is the absence of a Prosecutor for fifteen months[143]. To this central role, which defines the objectives, and the penal strategy and holds the power of indicting and prosecuting, was positioned Richard Goldstone a South African, the chairman of the Commission on Violence committed by the police under apartheid[144]. He satisfied the requirements of all fifteen members of the U.N. and assumes the Prosecutor's office in the summer of 1994[145]. Immediately he issues indictments on two secondary figures, Dragan Nikolic the Serb commander of the

[138] Scharf, 2001, p. 393.
[139] Hazan, 2004, Scharf, 2001, p.p. 394, 395.
[140] Hazan, 2004, Scharf, 2001, p.p. 393, 394.
[141] Scharf, 2001,
[142] Hazan,2004, p. 54
[143] Hazan, 2004, p. 54
[144] Hazan, 2004, p. 55
[145] Hazan, 2004, p. 56

Susica concentration camp and Dusko Tadic the Omarska torturer[146]. However he avoids indicting 'big fishes', obeying the rational of the western governments who pursuit a political solution and peace above all, even above justice[147]. Therefore, notwithstanding Antonio Cassese's and the judges briefing regarding the 'command responsibility' as the best strategy to indict those responsible for ethnic cleansing, Goldstone refuses to indict the Serb president Milosevic and his henchmen[148]. Thus the indecisiveness of the west to let the Tribunal function independently leads to the impunity of the perpetrators who feel invulnerable. Their feeling of impunity culminates in the tragedy of Srebrenica in July 1995. The extend of the horrors and atrocities, shocked the judges as well as Goldstone, who interpret the massacre of Srebrenica, the largest massacre since the World War II in Europe, as the proof of the ineffectiveness of the Tribunal[149]. In front of the immensity of the crimes Goldstone decided to change his strategy, and indicted Karadzic and Mladic who then became the 'accused' for crimes committed even before Srebrenica, going back as far as 1992[150]. The western governments nevertheless, in the wake of the Dayton Peace Agreement still pursuit peace above all, even peace without justice[151]. Slobodan Milosevic not only is not indicted but there is a rumor that he is being guaranteed immunity from the American negotiator Richard Holbrooke, in return for his contribution to the peace accord[152]. In fact after the signing of the Dayton Peace Agreement Milosevic is metamorphosed into a peacemaker, and in effect enjoys international legitimacy and impunity[153].

The ICTY's role after the Dayton becomes redundant or unnecessary? The accused, Karadzic and Mladic are still free and arresting them seems unfeasible. In these conditions of disorganization and disappointment Goldstone pushed by Cassese, adopts 'Rule 61' a pseudo contumacy provision[154]. Rule 61 is not a trial in absentia, which was repudiated in the name of the right to defense of the accused, but a public acknowledgment and condemnation of the crimes committed in the Former

[146] Hazan, 2004, p. 57
[147] Bassiouni, 2003, Hazan, 2004
[148] Hazan, 2004
[149] Hazan, 2004
[150] Hazan, 2004, p. 66
[151] Bassiouni, 2003, Hazan, 2004, p. 67
[152] Bassiouni, 2003, Hazan, 2004, p. 67
[153] Hazan, 2004, p. 69
[154] Hazan, 2004, p.p. 73, 74

Yugoslavia. It includes public reading of the indictments, presentation of evidence and the deposition of witnesses and since it is not a trial the defense attorneys may be absent[155]. The mere recitation and pronouncement of the crimes, without the presence of either lawyers or defendants and without a real punishment at stake, reduces the Tribunal to a 'Tribunal of the Word'[156]. This show trial however sheds light to the responsibility of the international community, with the testimonies of the French Jean-Rene Ruez, assigned to the Tribunal's investigations, and several peacekeepers as well as the deposition of two witnesses an executioner and a victim[157]. As a result the truth spoken out loud on June 1996, about the horrors of Srebrenica provides substance to the role of the ICTY[158]. This pantomime of a trial produces unexpected results. The evocations of the mass atrocities lead the judges to draft an indictment on July 11 1996, not only of Karadzic and Mladic but of Milosevic as well[159]. The press affirms the 'plan RAM' of Milosevic to set up through violence a new Serbian state with the aid of the highest Serbian political and military personnel[160].This infuriates the negotiators and diplomats of the western governments and the judges withdraw the Milosevic name from the final version leaving only the indictments of Karadzic and Mladic[161].

By the end of 1995 Louise Arbour succeeded Richard Goldstone in the position of the Prosecutor[162]. She realizes that the ICTY is in a path towards failure. The Tribunal is dismissed by the NATO countries that do not want to proceed with arrests, and therefore the Scheveningen prison near the Dutch capital remains empty, with the exception of seven detainees out of the seventy-four indicted, while Yugoslavia and the Republika Srpska do not recognize the authority and jurisdiction of the ICTY[163]. Furthermore according to Louse Arbour the 'tribunal of the word' is not up to the standards of a real tribunal and reduces the function of the ICTY in a simple voice of morality without punishing the 'butchers'[164]. The inability to arrest and consequently the lack of enforceability of the Tribunal has its roots in the refusal of the west to have

[155] Hazan, 2004, p. 74
[156] Hazan, 2004, p. 76
[157] Hazan, 2004, p. 76
[158] Hazan, 2004, p. 76
[159] Hazan, 2004, p. 85
[160] Hazan, 2004, p. 85, Le Bor, 2004, p. 143
[161] Hazan, 2004, p. 85
[162] Hazan, 2004, p. 90
[163] Barria & Roper, 2005, Bassiouni, 2003, Hazan, 2004, p.p. 90, 91
[164] Hazan, 2004, p. 91

an independent legal weapon namely the ICTY. Albeit the pressures from Cassese the western powers refuse to give to the Tribunal a 'judiciary police' from the IFOR NATO forces[165]. The absence of enforceability underlines the asymmetry between politics and the Law. No government with soldiers on the ground of Former Yugoslavia wants its troops to be responsible for the capture of the accused[166]. Politicians pass the responsibility to the military which regards the arrests as far too dangerous, while the military passes the blame to the political leadership which refused to give them the order to do so[167]. The Americans limit themselves in putting up posters of Karadzic and Mladic and offering rewards on information which would lead to their capture, just as in the good old West[168].

Consequently the facts and reports remain pessimistic for the Tribunal. The Tribunal cannot free itself from the political pressures posed from the western states that in theory are submitted to the ICTY but in reality are empowered to dissolve the Tribunal[169]. During the war the Tribunal is ineffective, after the Dayton Peace Agreement, albeit its provision for collaboration with the ICTY, Republika Srpska and Yugoslavia refuse to recognize its jurisdiction and forbid it to open an office in Belgrade[170]. According to 1997 reports, several indicted persons still hold official positions. Zeljko Meakic, who is indicted for genocide, Mladen Radic, Nedeljko Timarac and Miloslav Kvocka are all working as police officers in Rrijedor in the Republika Srpska[171]. The global powers in the early years of the Balkan war, namely the U.S and Europe were reluctant and unwilling to use military force and pursued a political approach to end the conflict[172]. Meanwhile, the very existence of the ICTY threatened the diplomacy since active head of states from the former Yugoslavia, with whom the negotiations were held, risked to be indicted for war crimes[173]. Consequently, in the early years, real-politics secured the impunity of the perpetrators so as a political solution could be reached while finding evidence of their crimes as

[165] Hazan, 2004, p. 92
[166] Bassiouni, 2003, p. 200, Hazan, 2004, p. 94
[167] Hazan, 2004, p. 94
[168] Hazan, 2004, p. 94
[169] Hazan, 2004, p. 92
[170] Hazan, 2004, p. 108
[171] Hazan, 2004, p. 109
[172] Barria & Roper, 2005, Bassiouni, 2003, Hazan, 2004.
[173] Hazan, 2004.

well as witnesses was rendered almost unattainable[174]. In fact Milosevic was arrested in 2001, Karadzic in 2008 and Mladic in 2011.

[174] Bassiouni, 2003, Hazan, 2004.

3. A Head of State under Trial

Slobodan Milosevic as mentioned above was arrested in 2001; he was the President of the Socialist Republic of Serbia from 1989 to 1997 and President of the Federal Republic of Yugoslavia from 1997 until 2000[175]. He was born in 20 April 1941 in Pozarevac Serbia and was raised during the Axis occupation of the Kingdom of Yugoslavia[176]. His roots were from Montenegro- his father a Serbian Orthodox priest and his mother a school teacher and an active member of the communist party. He studied law in the Belgrade University and he was positioned as the head of ideology committee of the Yugoslav communist leagues-student branch, while a student[177]. His political interests thus started and as mentioned above he became the President of the Serbian Republic. Through this position he not only supported but he instigated the rise beyond control of the Serbian nationalism which in its own turn triggered a nationalistic frenzy from all the other Republics of the Yugoslav Federation. The horrors and breaches of human rights revoked the unthinkable predicament of 'humanity' of the Second World War. Milosevic thus was characterized as the 'butcher of the Balkans' in the western media, therefore before getting into the details of his arrest and trial by the ICTY it is worth describing the context within which this massacre manifested in the 1990's.

3.1. Milosevic Igniting Nationalism

Yugoslavia was more a 'state of nations' rather than a nation-state; however during Tito's leadership nationalistic tendencies were smoothened under his policy of 'Brotherhood and Unity'[178]. In 1970's Tito was weakened by old age and gradually isolated as well as out of touch of the current political situation[179]. From every concession offered to the republics constituting the Federation, the republics augmented their power in the expense of the Federation itself[180]. The weaker the Federation became the more demanding the republics became[181]. Moreover the constitution of 1974 provided more autonomy to the individual republics as well as

[175] Le Bor, 2004, https://trialinternational.org/latest-post/slobodan-milosevic/
[176] Le Bor, 2004, https://trialinternational.org/latest-post/slobodan-milosevic/
[177] Le Bor, 2004, https://trialinternational.org/latest-post/slobodan-milosevic/
[178] Barria & Roper, 2005, p. 350, Le Bor, 2004, p. 53
[179] Barria & Roper, 2005, p. 350, Le Bor, 2004, p. 53
[180] Barria & Roper, 2005, p. 350, Le Bor, 2004, p. 53
[181] Barria & Roper, 2005, p. 350, Le Bor, 2004, p. 53

awarding an autonomous status to the provinces of Kosovo with a large ethnic Albanian population and of Vojvodina[182]. In addition to the changing political environment of the Federation the economic factor also contributed to a more obvious turbulent instability. Yugoslavia's increasing reliance to foreign aid for its material comfort was mounting and by 1981 its debt was $19.2 billion and the inflation was over 25%[183]. And even if Tito's personality and political legitimization would still play the role of a political 'glue' to the Federation of 'state of nations' that proved impossible after his death in May 1980[184].

In that destabilizing Yugoslav Federation Milosevic acquires true political position and power. In 1984 through 'cadre rotation' Ivan Stambolic, became president of the Serbian Communist Party helping Milosevic to be elected as the president of the Belgrade Communist Party[185]. By 1986 Milosevic became the new head of the biggest and more powerful Communist Party of the Yugoslav Federation the Serbian Communist party[186]. Unfortunately the triggering event which led to the massacres of 1990's after the horrors of the Second World War, was Milosevic's mission to Kosovo Polje where he was send by Ivan Stambolic in order to defuse nationalist tension between Serbs and Albanians[187]. Now, the Kosovo Polje is considered the Serbian historic cradle, known as the 'Field of Blackbirds', which was built in 1389 where Prince Lazar had been defeated by Sultan Murad's I Ottoman army in a historic battle, which resulted in 500 years of Ottoman rule[188]. In that impoverished province Serbs were increasingly feeling isolated due to the previous political concessions made to Kosovo's Albanian majority, which led to nationalist tensions threatening the stability of the Yugoslav Federation[189]. There to the demonstrating Serbian crowd Milosevic followed the standard party line of Brotherhood and Unity, according to which nationalism and national hatreds could never be progressive[190]. However when a Serbian from the crowd shouted that the communist party has never helped them, Milosevic replied that the Central Committee

[182] Barria & Roper, 2005, p. 350, Le Bor, 2004
[183] Le Bor, 2004, p. 53
[184] Le Bor, 2004, https://trialinternational.org/latest-post/slobodan-milosevic/
[185] Le Bor, 2004, p. 58
[186] Le Bor, 2004, p.p. 71, 72
[187] Le Bor, 2004, p. 78
[188] Hazan, 2004, Le Bor, 2004, p. 78
[189] Barria & Roper, 2005, Le Bor, 2004, p.p.76, 78
[190] Le Bor, 2004, p. 78

of Serbia was aware of this and that they could do more, in addition he agreed to return four days later to discuss about what that 'more' could be[191]. Milosevic being a Serb and knowing the importance of the Kosovo myth as the cradle of the Serbian civilization sees the opportunity offered for his own political career[192]. He consulted his advisors back in Belgrade and of course his wife Mira regarding how to handle the crisis in Kosovo[193]. In the meanwhile back in Kosovo a Serbian local leader Miroslav Solevic was preparing riots which albeit instigated by the Serbs had as a goal to further polarize ethnic divisions and manifest Belgrade's failure to protect the local Serbs[194]. Fifteen thousand angry Serbs waited for Milosevic, who arrived with the local Albanian Communist leader Azem Vllasi and both entered the local House of Culture while the police of Albanian majority, was holding the agitated crowed[195]. Whether there was cooperation between Milosevic and Solevic about the planned riot or not, Milosevic was nervous and almost shaking from the ferocity of the demonstrating Serbian crowd[196]. Solevic in a lengthy and aggressive speech underlined the fact that Serbs were abandoning the area, although their wish was to remain there in Kosovo, and therefore something had to be done in order to protect the rights of the Serbian population[197]. Outside the angry mob was howling and Solevic went to Milosevic saying that the police was beating the Serbian people who protested not only against the Albanians but also against the Communist state which according to their opinion betrayed them[198]. As Milosevic went out of the hall facing the crowd he heard an old man shouting that they were being beaten up from the Albanians[199]. Milosevic's response was one of those that remained in history as the trigger of the Europe's blood bath of the 1990's. He declared: '*No one should dare to beat you again!*'[200]. In the meeting with a delegation that followed and lasted twelve hours, Milosevic told his audience: '*This is your land, your fields, your gardens, your memories are here. Surely you will not leave your land because it is difficult here and*

[191] Le Bor, 2004, p. 79
[192] Le Bor, 2004, p. 79
[193] Le Bor, 2004, p. 79
[194] Le Bor, 2004, p. 79
[195] Le Bor, 2004, p. 79
[196] Le Bor, 2004, p 80
[197] Le Bor, 2004, p. 80
[198] Le Bor, 2004, p.p. 80, 82
[199] Le Bor, 2004, p. 82, http://news.bbc.co.uk/hi/english/static/in_depth/europe/2000/milosevic_yugoslavia/rise.stm
[200] Le Bor, 2004, p. 82, http://news.bbc.co.uk/hi/english/static/in_depth/europe/2000/milosevic_yugoslavia/rise.stm

you are oppressed . . . You should also stay here because of your ancestors and because of your descendants. Otherwise you would disgrace your ancestors, and disappoint your descendants. I do not propose, comrades, that in staying you should suffer and tolerate a situation in which you are not satisfied. On the contrary you should change it'[201]. According to Le Bor, from this experience Milosevic acquired not only the knowledge of the power of nationalism but of mob dynamics as well[202]. Through simple and repetitive language voicing the Serbian grievances could manipulate the masses towards the achievements of his goals[203]. Milosevic's acquaintance with mob dynamics especially in a time of transition when the old regime was losing its firm control of power, aided him to imagine a different future for Yugoslavia[204]. He did not want to dissolve Tito's Yugoslavia; he rather wanted to incorporate the existing power structures of state, party and army into a Serbian state[205]. His plan as mentioned in a previous chapter, known as RAM was a detailed geographical outline of the future Greater Serbia that would include large parts of Croatia and Bosnia inhabited by Serbs[206]. RAM was not a modern plan it was based on a previous outline of the Serb nationalist theoretician Ilija Garassanin in the mid-nineteenth century[207]. Milosevic not only adopted the plan but also followed the methods of Garassanin and send spies to the coveted areas and Serb agents to infiltrate and organize parallel military and police forces[208]. Serbian secret service, armaments and military equipment was located in strategic areas of Croatia and Bosnia while local Serbs were trained as paramilitary forces setting thus the prerequisites for the ethnic cleansing and the horrors which followed[209].

In concluding, with Tito's death in 1980, nationalist tendencies rose in the Federation of the Yugoslav Republic (FRY). Milosevic emerged in Yugoslav/Serbian Politics after declaring support to the Serbs in Kosovo who claimed that they were mistreated from the ethnic Albanian majority[210]. In April 24 1987 animosity and riots between Serbs and Albanians broke in Kosovo while Milosevic addressed the

[201] Le Bor, 2004, p. 82
[202] Le Bor, 2004, p. 85
[203] Le Bor, 2004, p. 85
[204] Le Bor, 2004, p. 85
[205] Le Bor, 2004, p. 85
[206] Le Bor, 2004, p. 143
[207] Hazan, 2004, Le Bor, 2004, p. 143
[208] Le Bor, 2004, p. 143
[209] Le Bor, 2004, p. 143
[210] http://news.bbc.co.uk/hi/english/static/in_depth/europe/2000/milosevic_yugoslavia/rise.stm

leadership inside the local cultural hall. Milosevic spoke to the angry Serbian crowd, and his phrase: *"no one should dare to beat you again"*, became the rallying cry for Serbs in all parts of Yugoslavia and unleashed nationalism all over Yugoslavia[211]. Either nationalist or opportunist, Slobodan Milosevic led Yugoslavia to dissolution and immersed it to blood bath provoking memories of the World War II. Stop the "Butcher of the Balkans" appears as New York Times article in 1992[212].

3.2. The Trial of Milosevic

Albeit the western media and the public opinion who characterized Milosevic as the 'Butcher of the Balkans' already in 1992, his indictment came from the ICTY only on 24 May 1999[213]. At that time he was the President of the Federal Republic of Yugoslavia (FRY), and he was indicted for crimes against humanity and for violations of the laws and customs of war[214]. Milosevic's indictment received instantaneous media coverage worldwide since it was the first time that an active head of state was prosecuted for crimes against humanity[215]. The text of the indictment was posted in dozens of internet sites, and made the headlines of the world press with the exception of Serbia[216]. The headlines of the world press were generally positive but expressed also their preoccupation regarding the political effects[217]. The headlines were: *Liberation*: "Milosevic the Pariah", The *Financial Times*: "Russia Pursues Peace Deal Despite War Crimes Charges", *Le Figaro* commented that "despite the indictment Washington does not challenge Milosevic", and *Le Monde* states that "the decision of the prosecutor caught the Western leaders unawares, who, while encouraging the investigation of the Tribunal, did not expect that it would succeed so rapidly"[218]. His indictment had a range and symbolism far beyond the Balkans[219]. The indictment of Milosevic, escaping the power of real politic marked the entry and connection of justice to international relations[220]. More importantly from the ICTY on, which

[211] http://news.bbc.co.uk/hi/english/static/in_depth/europe/2000/milosevic_yugoslavia/rise.stm
[212] http://news.bbc.co.uk/2/hi/europe/4797564.stm
[213] Hazan, 2004, https://trialinternational.org/latest-post/slobodan-milosevic/, http://www.haguejusticeportal.net/index.php?id=6122
[214] Magliveras, 2002, p. 662.
[215] Hazan, 2004, p. 112
[216] Hazan, 2004, p. 145
[217] Hazan, 2004, p. 145
[218] Hazan, 2004, p. 145
[219] Hazzan, 2004, p. 112
[220] Hazan, 2004, p. 112

constitutes a paramount legal advancement, national sovereignty and consequently heads of states will no longer be unaccountable and absolute when crimes against humanity are committed[221].

His indictment took place after March 10 of 1998 when the ICTY extended its jurisdiction over Kosovo[222]. Initially the indictment regarded the atrocities committed in Kosovo, where Milosevic abolished Kosovo's political autonomy and in 1998 his special troops backed by tanks and helicopters attacked Kosovo, which was a bastion of ethnic Albanian population[223]. The then Yugoslav President Slobodan Milosevic was accused for having '*planned, instigated, ordered, committed or otherwise aided and abetted a campaign of terror and violence directed at Albanian civilians living in Kosovo*', from January 1 1999 on[224]. The strategy of the prosecutor Louise Arbour determined that the indictment of the Yugoslav President must be made on the most serious grounds and although she wanted to concentrate on the massacres she found it extremely hard to reveal the chain of orders up to superior officers and finally up to Milosevic[225]. And while the prosecutor and four or five layers were investigating the still missing connection to the chain of command leading to Milosevic, Milosevic was following a very precautious strategy[226]. During the war in Croatia and later in Bosnia-Herzegovina, he 'camouflaged' his responsibility behind the fact that he at that time was the president of Serbia which was not officially implicated in the war since the Federal Yugoslav army was engaged in the war and not the Serb police[227]. And vice versa when the war occurred in Kosovo in March 1998, Milosevic had become the President of Yugoslavia and thus, the Serbian paramilitary and police forces were responsible not the Yugoslav army[228]. Nevertheless the lawyers determined that the Yugoslav president was the one who had de facto control over the Serb forces in Kosovo[229]. In addition to the prosecutor's efforts at the end of 1999 eleven huge boxes arrived at the Tribunal offices, covered with a poster of Slobodan

[221] Hazan, 2004, p. 141
[222] Barria & Roper, 2005, p. 356, Hazan, 2004, p. 113
[223] Hazan, 2004
[224] Hazan, 2004, p. 143, http://www.haguejusticeportal.net/index.php?id=6122
[225] Hazan, 2004, p 116
[226] Hazan, 2004, p. 140
[227] Hazan, 2004, p. 140
[228] Hazan, 2004, p. 140
[229] Hazan, 2004, p. 140

Milosevic and with the subtitle 'We must arrest this man'[230]. These boxes contained more than 100.000 signatures of ordinary citizens as well as Nobel Prize winners who supported the indictment of Milosevic[231]. The next step was the indictment of Milosevic for crimes committed earlier in Bosnia-Herzegovina[232]. Based on Milosevic's de facto control of the federal government and the Serbian republic, as well as the fact that he was the person with whom the international community negotiated and signed numerous agreements related to these wars, on October 8, 2001 Milosevic was indicted for crimes against humanity committed in Croatia and on November 22, 2001, for genocide, war crimes and crimes against humanity in Bosnia-Herzegovina[233].

After seven years of maneuvers of Justice and politics, Milosevic was arrested on 1 April 2001 not by virtue of the ICTY's charges against him, but for corruption and abuse of power to be judged from the federal courts of Yugoslavia[234]. Notwithstanding the provisions of the Constitution of the FYR and of the Republic of Serbia, according to which extradition of its nationals is prohibited, and therefore Milosevic should be judged from the federal courts of Yugoslavia or fall within the Serbian Republic competence, the Prime Minister of the Republic of Serbia Djindjic, instructed the Serb police to secretly take Milosevic in an American air base in Tuzla, Bosnia[235]. From there he was transferred by military jet to Hague and was arrested on July 28, 2001[236]. The *"difficult but morally correct"* decision that Djindjic had to take that is to extradite Milosevic to Hague can be explained by the 1.28 billion $ of aid from US and EU in return for the surrender of Milosevic and moreover the offering of membership to all western Balkan countries in the EU bosom, were the cooperation with the ICTY was and still is a precondition[237].

In 24 May 1999 the ICTY indicted Milosevic with 3 indictments: for crimes against humanity and war crimes in Kosovo in 1999, in Croatia between 1991-1992 and for Genocide, crimes against humanity and war crimes in Bosnia between 1992

[230] Hazan, 2004, p. 126
[231] Hazan, 2004, p. 126
[232] Hazan, 2004, p. 146
[233] Hazan, 2004, p. 146, http://www.haguejusticeportal.net/index.php?id=4281
[234] Magliveras, 2002, p.p. 662, 663.
[235] Magliveras, 2002, Scharf, 2001.
[236] Scharf, 2001.
[237] Gordon, 2009. Pippan, 2004, Scharf, 2001, p. 396.

and 1995[238]. According the decision of the then Prosecutor Carla Del Ponte all three indictments would be dealt with at a single trial which started on 12 February 2002[239]. In total he was accused on 66 counts of crimes against humanity, violation of the laws and customs of war and Genocide which is the gravest crime known to the international law, as well as grave breaches of the Geneva Conventions[240]. Moreover there were encompassed more than 7.000 allegations of wrongdoing over the eight years of war in Yugoslavia[241].The judges of the ICTY already by 1995 acknowledged the unwillingness to indict head of states as well as the difficulty of finding evidence therefore they briefed the prosecutor that the best legal strategy to indict those responsible is the doctrine of "Command responsibility"[242]. Although at best a strained precedent, the Yamashita case offered to the prosecutor the legal base so as to proceed with the indictments to curb the policies of murders and to limit the atrocities in war[243]. Yamashita was a general of the Japanese forces in Philippines in 1944; his troops massacred Manila although there was no proof that he gave such an order, in fact he was actually cut off from his troops. However he accepted responsibility for the actions of the soldiers under his command and he was convicted and sentenced to death by virtue of the command responsibility[244].

Milosevic's trial strategy was to discredit the legitimacy and impartiality of the ICTY[245]. He claimed that he was kidnapped and therefore he should be let free, according to the European Court of Human Rights which held that luring or abduction in violation of the established extradition procedures is human rights violation for which dismissal is the appropriate remedy[246]. He accused the Tribunal for victor's justice and "puppet" tribunal and attempted to force the Tribunal to face the *tu quoque*

[238] http://news.bbc.co.uk/2/hi/europe/1403054.stm, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art06.shtml.
[239] http://news.bbc.co.uk/2/hi/europe/1403054.stm, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art06.shtml
[240] Boas, 2007, p. 1, https://trialinternational.org/latest-post/slobodan-milosevic/, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art06.shtml.
[241] Boas, 2007, p. 1
[242] Hazan, 2004, p. 58.
[243] Hazan, 2004, p. 58. , http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art06.shtml.
[244] Hazan, 2004, p. 222.
[245] Scharf, 2001., http://news.bbc.co.uk/2/hi/europe/1403054.stm,
[246] Scharf, 2001, p. 396, https://trialinternational.org/latest-post/slobodan-milosevic/

(you too) argument[247]. The *tu quoque* argument referred to the war crimes committed from NATO during the 1999 intervention[248]. Indeed, the operation 'Allied Forces' under the order of the secretary-general of NATO, Javier Solana began air strikes against Yugoslavia. NATO bombed Belgrade but accidentally also bombed a residential area in Aleksinac, resulting in the deaths of dozens innocent civilians, the Chinese embassy in Belgrade killing three people, a passenger's train south of Belgrade and a convoy of civilian vehicles by mistake in southwestern Kosovo[249]. That provoked a negative public opinion while at the same time provided the base according to which Louise Arbour the then prosecutor of the ICTY decided to hold the countries of the Atlantic Alliance responsible for crimes committed because of the bombings[250]. Her decision however changed and she determined that NATO had not committed war crimes despite the deaths of civilians from the bombing[251]. Moreover albeit the illegality of the NATO campaign, since the UN Charter forbids the resource to military force against a sovereign state in the absence of a Security Council resolution, as the Swiss jurist Nicolas Levrat put it: '*The regime in Belgrade has rendered itself beforehand capable of 'deliberate behavior, substantially and massively illegal' in violating the Convention against Genocide, as well as the international pact relating to civil and political rights and the prohibition against the resource to armed force in the UN Charter, that being against Bosnia-Herzegovina, Croatia and Slovenia'* [252]. Even Carla Del Ponte the successor of Arbour in the prosecutor's position of the ICTY declared that there was no open investigation of the Tribunal against NATO[253]. Furthermore Milosevic argued that USA's opposition to a permanent international court undermined its moral right to participate in any way in his trial[254].

Milosevic during his trial did not follow the former Gestapo officer Klaus Barbie's style and role of a defeated and absentee man or the role of a modest

[247] Scharf, 2001, p. 397, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art06.shtml.
[248] Scharf, 2001, p. 397.
[249] Hazan, 2004, p. 128
[250] Hazan, 2004
[251] Hazan, 2004
[252] Hazan, 2004, p. 127
[253] Hazan, 2004, p. 133
[254] Scharf, 2001, p. 397

bureaucrat as Eichmann did[255]. He was not silent or modest; rather he maintained his pomposity and taste for theatrics while being dismissive towards the jury[256]. At the judge-president Richard May who asked him whether he would like to have the indictment read out or not, Milosevic answered: '*That's your problem*'[257]. And when Richard May asked Milosevic if he pleaded guilty Milosevic answered '*I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the U.N. General Assembly, so I have no need to appoint counsel to an illegal organ*'[258]. The president of the court cut of Milosevic microphone and entered a plea of not guilty on Milosevic's behalf[259]. This style and tone followed through the entire trial of Milosevic whose strategy was to shift the trial towards a political trial against the 'masters of NATO'[260]. The Tribunal according to Milosevic was not appropriate to judge him, only the judgment of the Serb people and of history counted in his eyes[261]. Dismissive of the tribunal he tried to free himself from its rules; he refused to wear earphones and the judges who feared the accusation of unfair trial installed a loud speaker only for Milosevic[262]. He claimed that he was being tried because he was a Serb standing against American 'neocolonialism'. The whole world should be alarmed because the whole world was the target of American 'neo-colonialism'[263]. Milosevic inversed the accusations against him towards the instigators of the war, namely NATO, the United States and Germany, who by manipulating the media had as a goal to destroy the Serb people[264]. Furthermore he had an answer to everything. About the camps of horror in Bosnia he was told nothing about them, the Bosnian Serb chiefs Radovan Karadzic and Momcilo Krajisnik informed him that there were no such camps[265]. About the massacres in Srebrenica, on which he was accused for genocide, he claimed he knew nothing about it; it was

[255] Hazan, 2004, p. 159, https://trialinternational.org/latest-post/slobodan-milosevic/
[256] Hazan, 2004, p. 159
[257] Hazan, 2004, p. 159, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art06.shtml.
[258] Hazan, 2004, p. 159, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art06.shtml.
[259] Hazan, 2004, p. 159
[260] Hazan, 2004, p. 159, http://www.icty.org/x/cases/slobodan_milosevic/tjug/en/bulatovic.pdf
[261] Hazan, 2004, p 160
[262] Hazan, 2004, p. 161, https://www.youtube.com/watch?v=_QGoh2ffgNs
[263] Hazan, 2004, p. 161
[264] Hazan, 2004, p. 161
[265] Hazan, 2004, p. 161

the European negotiator Carl Bildt who informed him of them[266]. As for the other crimes in Croatia and Bosnia he attributed them to some agitators, who could be found in all states without the responsibility for their actions to fall on the President of the country[267]. The attack in the village of Racak that triggered the NATO air strike was a manipulation of the UCK in order to provoke the intervention of the West, as for the hundreds of thousands of Albanians chased away from Kosovo in 1999 according to Milosevic were leaving in order to survive from the NATO bombing not from the Serb forces[268]. Milosevic promoted thus his view of himself as the mere victim of the conspiracy of the 'Masters of the World' who were driven by vengeance against him on the ground of his policy of independence of Yugoslavia[269]. Serbs according to Milosevic were always fighting for their independence against the fascist 'ustasha' Croat regimes, the Kosovar Nazi collaborators, the Third Reich and now the West who allied with the Albanian terrorists[270]. For this reason and in order to shift the trial into a political trial he tried to force the appearance of the western political leaders, namely Bill Clinton, and former secretary of state Madeleine Albright of the United States, President Jacques Chirac of France, Prime Minister Tony Blair of Great Britain, Chancellor Gerhard Schroeder of Germany as well as his predecessor Helmut Kohl and of course the head of the U.N. Kofi Annan, as responsible for the 'NATO aggression' against Serbia[271]. In addition he denounced the 'puppet' government of Belgrade in order to still maintain influence over a part of the Serb population, accusing the Belgrade government that due to their fear of destruction by NATO "*they had actually abolished democracy*"[272].

Moreover, Milosevic faithful to his dismissive stance regarding the Tribunal, he denied a defense attorney and therefore not only he saved more speaking time in order to inverse the roles from the accused to the prosecutor but he also would be the cross-examiner of the witnesses, since the defense retains this right and Milosevic was his own defense attorney[273]. This had as a result the intimidation and even the

[266] Hazan, 2004, p. 161
[267] Hazan, 2004, p 162
[268] Hazan, 2004, p 162
[269] Hazan, 2004, p. 162
[270] Hazan, 2004, p. 163
[271] Hazan, 2004, p. 164
[272] Hazan, 2004, p. 162
[273] Hazan, 2004, p. 165, https://trialinternational.org/latest-post/slobodan-milosevic/

threatening of the witnesses from Milosevic[274]. Modest, illiterate or semi-illiterate Albanians from Kosovo appeared to the Tribunal thinking that they will be able to testify and reveal the barbarities committed against themselves and their families only to find out that they would be cross-examined by the very person who they consider to be evil incarnate[275]. Their witness testimony was summarized by the deputy prosecutor in three minutes and then they were delivered to the cross-examination by Milosevic for forty-five contemptuous minutes[276]. Milosevic's threats also deteriorated the situation for the witnesses since he had the capacity to indirectly reveal the identity of the 'protected witnesses'. In fact as the three *amici curiae* (friends of the Court) and the two legal counselors, which the judges accorded to Milosevic confessed, they were making dozens of telephone calls. According to *Le Monde* and affirmed by the Serb press these calls were made to activate an effective network, supporting Milosevic with information by the secret services, the army and the police, so as he could prepare his cross-examination throwing off balance those who testified against him[277]. An Albanian from Kosovo who recounted his expulsion by Serb forces was asked by Milosevic if he was not the '*cousin of that trafficker intercepted at the Bulgarian border with 200 kg of drugs*'[278]. For another 'protected witness' named 'k25', a former member of the special police, Milosevic made every effort to reveal his identity and affirmed that he was '*a deputy police chief in a large town in Serbia, that he had received a medal for displaying courage in the NATO aggression and had been promoted from corporal, his rank in 1999, to lieutenant and then captain*'[279]. The terrorized protected witness 'K12', after taking the oath to speak the whole truth and nothing but the truth, left without saying a word and to the judge's threat for criminal contempt he responded '*if this is the only solution, throw me in prison, if you want it. I will be more secure there than free if I testify here*'[280]. And when the pacifist Ibrahim Rugova, the Kosovar leader known also as the 'Gandhi of the Balkans', was cross-examined by Milosevic, he was indirectly threatened of retribution by the following words of Milosevic: '*When you and your family were*

[274] Hazan, 2004, p. 165
[275] Hazan, 2004, p. 165
[276] Hazan, 2004, p. 165
[277] Hazan, 2004, p. 167
[278] Hazan, 2004, p. 166
[279] Hazan, 2004, p. 166, http://www.icty.org/x/file/Cases/Weeklyupdate/weeklyupdate2002/weekly_update_228.pdf
[280] Hazan, 2004, p. 168, http://www.icty.org/en/press/icty-weekly-press-briefing-2nd-jun-2005

threatened you fled to Italy. Have you thought about where you would be fleeing now once the occupation of Kosovo comes to an end?'[281]. This attitude towards the witnesses amused a part of the Serb population which talked of 'the Milosevic Show' in The Hague, however astounded the judges[282]. Nevertheless whereas a professional lawyer with the above attitude would be hardly sanctioned or even indicted for contempt of the court, the judges did not even reprimand Milosevic[283]. However regarding his effort to minimize or discredit the legitimacy of the ICTY Milosevic "forgot" that he signed the Dayton Peace Agreement in 1995 which required that the signing parties had to cooperate with the tribunal; moreover he authorized the prosecution of Drazen Erdemovic before the ICTY for the massacres in Srebrenica, consequently he had already legitimized the ICTY[284].

After many delays due to the decision of the chief prosecutor Carla Del Ponte to trial Milosevic's three indictments in a single trial, decision that had as a result the prosecution phase to last over two years, and due to health issues of Slobodan Milosevic, he died in his prison cell in the UN Detention Unit in the Hague, on 11 March 2006 from 'myocardial infarction'[285]. As a consequence the blame fell on the prosecutor's Carla Del Ponte decision to apply for jointer of the three separate indictments into one case, covering eight years of war, which according to her theory these matters were comprised into a single transaction under the umbrella of the creation of a Greater Serbia[286]. Rule 49 of the ICTY provides that two or more crimes may be joined in one indictment if the series of acts committed together from the same transaction- meaning acts or omissions whether occurring as one event or a number of events at the same or different locations and being part of a common scheme, strategy or plan- and the said crimes were committed by the same Accused[287]. The argument of the prosecutor therefore was that the three indictments

[281] http://www.icty.org/en/content/ibrahim-rugova
[282] Hazan, 2004, p. 165
[283] Hazan, 2004, p. 166
[284] Scharf, 2001, p. 394.
[285] Boas, 2007, p. 1, http://news.bbc.co.uk/2/hi/europe/1403054.stm, https://trialinternational.org/latest-post/slobodan-milosevic/, http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/4797696, http://theguardian.com/world/2006/mar/11/warcrimes, http://www.icty.org/en/sid/8781, http://www.haguejusticeportal.net/index.php?id=4281
[286] Boas, 2007, p. 80
[287] Boas, 2007, p. 115

concerned the same transaction of the same accused namely Milosevic[288]. In his attempt to create a 'Greater Serbia' he alleged the forcible removal of non-Serbs from the respective locations committing crimes sanctioned under the ICTY Statute, indicating the paragraph 6 of the Croatia and Bosnia indictments and paragraph 16 of the Kosovo indictment[289]. Moreover Carla Del Ponte argued that the jointer of the indictments would result in a more consolidated trial timetable and a fairer and more expeditious trial for the accused[290]. Milosevic otherwise would have to face a trial while at the same time confronting two other pre-trial phases, in addition more than one trial would require repeated testimony and the evidence or findings probably common to all three, from one trial should be incorporated into the next[291]. The prosecutor also argued that a single trial would promote juridical economy, since the number of the witnesses might be less, not having to testify three times and the provision of exculpatory evidence would be better facilitated[292]. The trauma of the victims would be lessened if they had to only testify once and the security concerns would also be lessened since the witnesses would have to travel to The Hague and testify once. Furthermore, the single trial would ensure that the judgments were not conflicting because the same Chamber would decide and evaluate the evidence, and would obviate concern about the appeal of one while the second and third trial was still proceeding[293]. As a result on 15 January 2002 the Appeals Chamber ordered that the three indictments would be tried together as one trial[294]. As rational as the prosecutor's arguments were, the one single trial of Milosevic resulted into a gargantuan and unmanageable trial[295]. The trial lasted over four years and despite the prosecutor's statement that its end was only weeks away, as Boas argues in reality it was some months away from its conclusion and yet many more from rendering a judgment[296]. Not only the decision of a single trial but also issues relating to self-representation of Milosevic and his ill health which caused many interruptions to the

[288] Boas, 2007, p. 115
[289] Boas, 2007, p. 116
[290] Boas, 2007, p. 116
[291] Boas, 2007, p. 116
[292] Boas, 2007, p 116
[293] Boas, 2007, p. 116
[294] Boas, 2007, p. 118
[295] Boas, 2007, p. 118, Hazan, 2004
[296] Boas, 2007, p. 1

trial and required reduced sitting schedule, were also reasons for the trial lasting for so long[297].

To this interminable trial the death of Milosevic from 'myocardial infarction' added a blemish which damaged the ICTY as emblem of opposition to the impunity of tyrannical head of states who until then considered themselves immune to justice to accountability and to punishment[298]. It also was a heavy blow to the consolidation of international criminal justice, "Escaping judgment" near the end of his trial was the worst outcome for the tribunal of the "butcher of the Balkans"[299]. The death of Milosevic, the first head of state to be indicted for crimes against humanity, will diminish the legacy of the most important court since the end of the World War II[300]. There will never be a judgment from outside the region which Former Yugoslavia could one day be able to look to as impartial[301]. Therefore even nowadays Slobodan Milosevic's name in the ICTY's site is under the 'deceased after transfer to the Tribunal' cases and not under 'sentenced', or 'under ongoing proceedings'[302]. The absence of a verdict and a closure "empowers" the legacy of division and discord in the tormented Balkans. Milosevic's legacy of division continues after his death to divide the public opinion in the region. To some is a political martyr, claiming that even dying without being convicted Milosevic had managed to defend national and state interests, to others remains as "the butcher of the Balkans" who led the country to blood bath, poverty and isolation, and to some others particularly the younger the figure of Milosevic is indifferent, they want to forget him and go on with their lives[303]. Indeed, for some Serbs the international community did not treat Serbia fairly, to others Milosevic harmed their image in the whole world and they recognize that it will take a long time to repair it. A male interviewee in Novi Sad commented: '*I will remember Milosevic as the most negative guy in our history. Really, I know Serbian history very well and no one in our history turned the whole world against*

[297] Boas, 2007, p. 1
[298] Boas, 2007, p 1, http://www.icty.org/en/sid/8781
[299] Boas, 2007, http://news.bbc.co.uk/2/hi/europe/4797564, http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/4797696.
[300] http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/4797696.
[301] http://news.bbc.co.uk/2/hi/europe/4797564.stm
[302] http://www.icty.org/en/cases/key-figures-cases
[303] Clark, 2008, http://news.bbc.co.uk/2/hi/europe/4797564.stm, http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/4821424.stm

Serbia. No one'[304]. Some also prefer to forget Milosevic and their preference, as it is suggested, is understood not as a simple desire but as a need, as a coping mechanism in order to deal with their traumatic past, or as some others argue forgetting Milosevic is a form of collective denial[305].

As for the absence of a real closure to Milosevic's trial due to his death, to some Serbs means also a blurry future for Serbia. According to a female interviewee in Belgrade: '*…now everything remains unfinished…There will always be some space for controversies and school textbooks will change according to who is in power…I don't know if it's politically correct to say "established truth", but there will never be something that everybody agrees upon. Never*', this also suggests that the reconciliation process will be affected due to the lack of a shared acceptance of the past[306]. Moreover, the dominant reaction to Milosevic death, which is anger and /or disappointment for escaping punishment, according to Serbian interviewees underlines another possible hindrance to reconciliation[307]. However some interviewees have expressed an enormous relief that Milosevic died when he did and 'escaped justice'. A male interviewee in Belgrade said: '*It's hard to say, but dying was probably the best thing that Milosevic could have done for Serbia in that moment, because it would have been more tragic if he had been sentenced and found guilty of genocide. It would have been a great burden for us as a nation if we were proclaimed as a genocidal nation, which probably would have happened if he had been sentenced by the Hague tribunal*' [308].

[304] Clark, 2008, p. 69
[305] Clark, 2008, p. 77
[306] Clark, 2008, p. 78
[307] Clark, 2008, p. 78
[308] Clark, 2008, p. 79

4. Efficiency of the ICTY and Political Justice

The efficiency and success of the ICTY in fulfilling its statutory objectives is highly debated. Relatively to the objective of sanction the ICTY according to Cherif Bassiouni, the first *rapporteur* and elected president of the Commission of Experts and a law professor, was successful in a strict legal sense, since it provided justice to the victims, notwithstanding the difficulties due to timing and political interference[309]. The second objective of deterrence, meaning the discouragement of individual criminal behavior or the prevention of crimes committed by the society at large, which is one of the most important reasons for establishing international criminal tribunals, has failed[310]. The continuation and the persistence of atrocities at high levels, and especially the Srebrenica's safe area shelling and the following massacres even after the work of the ICTY began, demonstrated the ineffectiveness in what regards deterrence[311]. As for the third objective of reconciliation it also failed for various reasons.

First, the remoteness of the location of the Tribunal in Hague resulted in the absence of ownership and awareness of the tribunal's role from the population. This lack of outreach to the people of the region had as a consequence the manipulation of the ICTY's role from the local political power and the media[312]. Second, the proceedings of such trials in the interest of fairness are complex and technical resulting long and boring and have as consequence few people to acquire a broad understanding of the cases[313]. Moreover, politicians and other interested parties could easily distort the facts presented[314]. Third, reconciliation also failed, because individual culpability and prevention of collective stigmatization of groups were not delivered from the ICTY since its decisions were interpreted through national lenses from the respective communities[315].

[309] Bassiouni, 2003, Hazan, 2004, p. 27
[310] Barria & Roper, 2005, Wippman, 1999, p. 476.
[311] Wippman, 1999, p. 475.
[312] Armakolas & Vossou, 2008, p. 43.
[313] Armakolas & Vossou, 2008, p. 43.
[314]Armakolas & Vossou, 2008, p. 43.
[315] Armakolas & Vossou, 2008, p. 45.

Criticism against the Hague Tribunal was not confined only to the Serbian population[316]. The Muslim community regarded their nation as the victim of genocide perpetrated by Serb and Croat forces[317]. Although ICTY was perceived as a beacon of hope they could not understand the indictments against the Muslim perpetrators nor the relevance of ICTY's judgments to their actual experiences of violence[318]. The Bosnian Muslims have accused ICTY for playing politics, angry and resentful that the tribunal until 2005 had not captured and brought Mladic and Karadzic to justice[319]. The prosecutor Carla Del Ponte also acknowledged this and on 13 June 2005 observed: '*Despite all the progress made, it is obvious that the great expectations placed by the victims in the international community and the ICTY have not been met and will not be realized until Karadzic and Mladic are in The Hague*'[320]

The Croatian community, especially during the Tudjman regime was hostile to the ICTY because some of the indicted Croatians were regarded as national heroes while at the same time these indictments equated the quilt of Croats and Serbs which for them was unacceptable[321]. The tribunal was frequently criticized as biased and anti-Croat. For example, Dr. Zvonimir Separovic had described Graham Blewitt, the former deputy prosecutor as '*one of the Croat eaters in The Hague*' and the former vice-president of the Croatian Democratic Party, Maja Freundllich underlined: '*In The Hague court everyone is guilty, if they are Croatian*'[322]

Finally the Serb community also perceived itself as a victim of its enemies, namely the Muslims and the Croats. Nationalism is still vibrant and its manipulation from the political elites, explain the strong hostility against ICTY's exported justice. Furthermore, in Serbia ICTY's justice was viewed as partial and unfair targeting exclusively Serbs. A male interviewee from Cacak claimed that: '*The Hague is an ad hoc tribunal, created only for judging the nations of the former Yugoslavia and above all the Serbs. Somebody must be blamed for everything and the Serbs are guilty because they lost the wars*' and according to a female interviewee in Kikinda, all the other sides were favored with the exception of Serbs, while the biggest part of the

[316] Clark, 2008, p. 109
[317] Saxon, 2005.
[318] Saxon, 2005.
[319] Clark, 2008, p. 109
[320] Clark, 2008, p 109
[321] Clark, 2008, p. 109, Saxon, 2005.
[322] Clark, 2008, p. 105

guilt should be shared between Milosevic, Tudjman and Izetbegovic[323]. The belief among Serbs that the ICTY was biased against Serbs also stemmed from the fact that the majority of the indicted were Serbs while for example for the 200.000 Serbs, who fled Croatia during the operation Storm in 1995, only Ante Gotovina the Croat operational commander was in the Hague for this crime[324].Consequential to these widespread Serbian views according to the Belgrade Center for Human Rights more than two thirds of the population consistently believed that the ICTY was partial and unfair while a similar research by the Strategic Marketing and Media Research Institute in 2003, 2004 and 2005, proved that only 10% of the respondents trusted the judgments of the tribunal for the Serbs nationals and 69% did not trust that the ICTY had the ability to judge the Serbs nationals without bias[325]. Finally for what has to do with the lessening or even the removal of the collective guilt, which is one of the paramount attributes of justice, the ICTY was proved unsuccessful. Especially during the Kosovo war in 1999, the idea of Serbian collective guilt began to entrap the Serbian population[326]. Milosevic more and more was compared and linked to Adolf Hitler from the international public opinion, and the Serbs connected to the 'archetypal guilty' nation the Germans[327]. According to the controversial American author Daniel Jonah Goldhagen, '*Serbia should be occupied on the grounds that any people that committed such horrific deeds in open defiance of the international law and the fervent condemnation of almost the entire international community certainly consists of individuals with damaged faculties of moral judgment who have sunk into a moral abyss from which it is unlikely, any time soon, to emerge without aid*'[328]. As generic, objectionable and flawed and therefore rejected as such arguments should be since according to the political theorist Hannah Arendt's word: '*There is no such thing as collective guilt or collective innocence; guilt and innocence make sense only if applied to individuals*', the Serbian collective guilt was not elevated from the ICTY[329]. Here it is important to mention also that the image of Serbs as collectively guilty of the atrocities during the 1990's for some was interchanged with their view of

[323] Clark, 2008, p. 104
[324] Clark, 2008, p. 104
[325] Clark, 2008, p.p. 104, 105
[326] Clark, 2008, p. 88
[327] Clark, 2008, p.p. 88, 89
[328] Clark, 2008, p. 89
[329] Clark, 2008, p. 89

being victims of Milosevic[330]. In particular the death of Milosevic which 'robed' justice from the Serbian people solidified the image of Serbs as victims. The image of victim as Mark Amstutz argued results potentially problematic since it: '*leads groups to focus solely on their own historical traumas and so disregard the suffering of others. And when groups become totally self-absorbed by their own hurts and injustices, they are likely to lose perspective about the suffering of others*'[331].

Albeit the ICTY's efficiency critic, the tribunal acknowledging its role for the years to come relatively to the population of the region, established in 1999, the Program Outreach[332]. The ICTY legacy, after the arrest of the last two fugitives in 2011 and many of the high-level accused currently standing trial, is reaching its final shape[333]. And since the remaining years will be of paramount importance for the populations in the region the ICTY through the Outreach Program has as objective to work with the communities of the former Yugoslavia, to reflect on the Tribunal's achievements and to carry its legacy forward[334]. With this program the tribunal through extensive and methodical information campaign will reach beyond its juridical mandate of deciding the guilt or innocence of individual accused[335]. The Tribunal's role trough the Outreach could include processes of dealing with the past in the former Yugoslavia, which still remains a challenge for these societies who emerged from conflict[336]. Under the principle of open justice, meaning for justice to be truly done it must be seen to be done, every year thousands of people come into direct contact with the tribunal through a variety of activities. These activities include capacity building for national judiciaries; work with the younger generation, grassroots communities, and the media; visits to the ICTY; and the production of a variety of information materials, multi-media website features and social media outputs[337]. In these activities, Outreach not only informs, but also listens and

[330] Clark, 2008, p.p. 78, 79
[331] Clark, 2008, p. 79
[332] http://www.icty.org/en/outreach/outreach-programme
[333] http://www.icty.org/en/outreach/outreach-programme
[334] http://www.icty.org/en/outreach/outreach-programme
[335] http://www.icty.org/en/outreach/outreach-programme
[336] http://www.icty.org/en/outreach/outreach-programme
[337] http://www.icty.org/en/outreach/outreach-programme

encourages dialogue, leaving the success of the ICTY's legacy as the fight against the impunity to be determined by the local communities themselves[338].

Thus, it becomes apparent that retributive justice must be complemented with the restorative justice which seems a more efficient tool for reconciliation and peace building. Restorative justice looks beyond exclusively legal, retributive justice mechanisms and provides richer possibilities[339]. For the reconciliation and a peaceful future in the Former Yugoslavia therefore, the ICTY played an important role but not an exclusive one[340]. While retributive justice is focused on the crime, seen as the violation of the law, and its primary goal is to punish the perpetrator, form the restorative view point, crime is seen as a violation of people and relationships and for this reason restorative justice does not entail punishment[341]. Rather it '*involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation and reassurance*'[342]. Therefore in the former Yugoslavia in addition to the retributive justice, mechanisms of alternative transitional justice have also been used such as reparations, vetting and lustration and public apologies, albeit in a limited way[343]. Due to the restorative justice mechanisms many NGO's in Serbia but also throughout the former Yugoslavia are involved in vital restorative and reconciliation projects[344]. For example the victimology Society of Serbia led by Vesna Nikolic-Ristanovic launched the project 'From Remembering the Past to a Positive Future', the European Initiative for Democracy and Human Rights, the group 484 and the War Documentation Center. However it is argued that restorative processes will need more investment and effort particularly in the creation of a regional truth and reconciliation commission[345]. Truth seeking initiatives, truth commissions, documentation efforts, media and initiatives regarding missing person's fate, material reparation between or within states, public apologies and memorials require above all

[338] http://www.icty.org/en/outreach/outreach-programme
[339] Clark, 2008, p 99
[340] Clark, 2008, p. 111
[341] Clark, 2008, p. 112
[342] Clark, 2008, p. 112
[343] Clark, 2008, p. 114
[344] Clark, 2008, p. 114
[345] Clark, 2008, p. 114

time but nevertheless provide a more deep process which can prove more successful in reconciling divided post conflict societies[346].

The dilemma about the International Criminal Tribunals and as such, about the ICTY, is beyond the ambiguity of "victor's justice, the most appropriate framework would be the notion of political justice[347]. Political Justice is the use of legal institutions and processes to create sustain and legitimate a particular political order[348]. War crimes trials demonstrate their political nature. Their creation, success and failure always reflect the diplomatic concerns of the time and the struggle of leaders to determine the future order[349]. The war crimes tribunals as means of international order rose with the liberal democracy, most notably British and American to the center of world power, ideologically tied to the rule of law, that have advocated judicial processes for the vanquished[350]. Political justice or according to Clark politicized justice is considered as biased justice[351]. ICTY due to the way and manner it was created cannot escape its political mixture. ICTY as a creation of the U.N. Security Council, an executive body with no actual authority to establish courts, contradicts its attributive as the rule of law. According to Laughland: '*The fact that the ICTY was brought into being in this manner should be a matter of the gravest concern to anyone interested in the rule of law*'[352]. The UN Security Council composed of governments among which US and UK, its two permanent members, who played a crucial role in the NATO bombing of Serbia in 1999, not unjustifiably enforced the belief among Serbs that the ICTY is a political court, dependent on the UN Security member states interests, and based on 'victor's justice'[353]. Vladislav Jovanovic, the former Foreign Minister of Serbia described the tribunal: '*A terrible political instrument to fulfill the policy of the United States*'[354]. This view of the ICTY however is not confined only to the Serbian population; it reflects also the views and concerns of western commentators as well[355] . For example Beloff argues that in the years between the Nuremberg trials and the ICTY some thirty-four civil wars around

[346] Armakolas & Vossou, 2008, p. 26.
[347] http://www.bbc.co.uk./history/recent/milosevic_trial_06.shtml
[348] http://www.bbc.co.uk./history/recent/milosevic_trial_06.shtml
[349] http://www.bbc.co.uk./history/recent/milosevic_trial_06.shtml
[350] http://www.bbc.co.uk./history/recent/milosevic_trial_06.shtml
[351] Clark, 2008, p. 106
[352] Clark, 2008, p. 106
[353] Clark, 2008, p. 106
[354] Clark, 2008, p. 106
[355] Clark, 2008, p. 106

the world occurred, causing far more deaths than the wars in the former Yugoslavia[356]. Nevertheless Washington did not consider it necessary to 'export justice' there, justice was only required in the case of Yugoslavia[357]. In addition Johnstone remarked that the tribunal was heavily dependent on the United States, which not only sponsored its creation but also provided it with personnel, resources and information for formulating indictments[358]. And this only happened when the U.S. decided it was optimum for the implementation of its policy, as seen in a previous chapter[359].

This undisputed dependence of the international tribunals and in this case of the ICTY damages its image and credibility and raises fundamental questions and concerns about what sort of justice and protection of human rights in conflicts it can deliver[360]. Although increased training and logistical assistance for states should be encouraged in order for states to be harmonized and integrated with the international law of human rights, a one human rights body as Shaw argues would be proven problematic[361]. Locating the necessary expertise in one organ and more importantly, in political terms, having such authority concentrated in one body increases its susceptibility to political pressure[362]. Furthermore in order for a judicial body to be effective and practically feasible it must have enforceability. However this kind of sophisticated assistance, as for example intelligence, information and force ability in capturing and arresting criminals, only states can provide[363]. Tribunals are dependent on states and especially on the most technologically advanced countries which again limit their autonomy[364]. The most political indictments depend on the good will of certain states and their cooperation with the tribunals[365]. This is the fluid space in which an international criminal tribunal is pulled between two contradictory imperatives, law and politics[366]. As Bassiouni argues, the tensions between justice and

[356] Clark 2008, p 106
[357] Clark, 2008, p. 106
[358] Clark, 2008, p 106
[359] Hazan, 2004
[360] Clark, 2008, p. 106
[361] Shaw, 2008, p. 337
[362] Shaw, 2008, p. 337
[363] Hazan, 2004, p. 129
[364] Hazan, 2004, p. 129
[365] Hazan, 2004, p. 129
[366] Hazan, 2004, p. 130

politics historically evolve through three interlinked cycles[367]. The first is the circle of ideas and social values emerging from philosophic and religious values, which have the ability to influence the second circle which comprises the evolution of international instruments and the deriving proscriptive and prescriptive norms[368]. Finally the third circle is the circle of enforcement. The proscriptive and prescriptive norms are empty shells without enforceability and administration of justice[369]. However, although enforcement models and tools are developed in a national level there is reluctance in developing enforceable models in an international level[370]. The paramount reason remains the notion of state sovereignty and consequently the leap from the national model to the globalization of justice finds no supporters[371]. Consequently, a supranational model of justice is internationally unacceptable and thus the International Criminal Court (ICC) remains an international and not a supranational instrument of justice depended on the "good" will of sates or to put it more bluntly depended on the national interests of states[372]. Therefore it is naïve to believe in the purity of justice independent from politics. Nevertheless, it represents an effort of the human community to institutionalize an authority "Archi" in an "Anarchic", power driven world with debatable abiding respect to Human Rights.

[367] Bassiouni, 2003, p. 202
[368] Bassiouni, 2003, p. 202
[369] Bassiouni, 2003, p. 202
[370] Bassiouni, 2003, p. 202
[371] Bassiouni, 2003, p. 203
[372] Bassiouni, 2003, p 203

Conclusion

Justice and politics are two intermingled stands of resolving conflicts and post conflicts conditions and although they seem inseparable from one another they are not mutually excluding standpoints. The protection of Human rights as concepts and values which transformed into law and international ethics is indicative of a higher collective consciousness of the mankind and a criterion of a high level of human civilization. With the advocacy of democracy and liberal internationalism in particular, international institutions such as the United Nations and the International Criminal Court were established as an authorized 'Archi' for monitoring and protecting human rights in conflicts. Thus, liberalism set the opposite pole to the realist line of thought which regards the power and interests of a state above any ethos and morality in the unpredictable international arena. But since these international institutions and in our case the International Criminal Tribunals are far from independent global establishments and are lacking enforceability they let space for political pressures and the inextricable realism of *raison d'état*.

Indeed, until the Second World War justice was sacrificed to political considerations. The very notion of holding criminally accountable a head of state or a monarch it was and still is quite a "taboo", since they represent the sovereign nation state. Moreover not only sovereignty but also political interests overpowered justice so as to promote desirable political outcomes. With the end of the Second World War, the International Criminal Justice was significantly advanced. Albeit the evidencing one-sidedness, flows and the "victor's justice" accusation, the Nuremberg and Tokyo trials succeeded in providing justice against the crimes committed during the war and their heritage offered a new meaning and restriction on the intolerable. Human rights, ethics of war and genocide were defined and described in International law, consolidating internationally the human rights regime. In the following decades, the end of the Cold War, the proliferation of transitions to democracy and the resolution of internal conflicts had as a result the role of justice to emerge as transitional justice aiming at the reconciliation of post conflict societies. The transitional justice having as objective the transition from a dividing past to a common peaceful future comprises the retributive and the restorative justice models. The retributive is the common justice through judicial tools and the restorative a more broadly policy oriented model.

The ICTY as a purely judicial tool aimed at rendering justice through the retribution of perpetrators of war crimes during the war in the Former Yugoslav Republic. ICTY's statutory objectives aimed in sanctioning past crimes, in deterring the continuation of atrocities and in reconciling by restoring and maintaining peace in the region. Justice and politics confuting interests were evident not only by the fact that ICTY's establishment was an alibi for the western allies not to intervene military but also because the head of states with whom the US and Europe were negotiating a political solution to end the conflict could at the same time be indicted for crimes against humanity from the ICTY. Politically conceived the *ad hoc* tribunal for the former Yugoslavia could not easily escape political pressures from the U.N. major member states. Depended on the good will of U.N.'s member states on financial and political level the ICTY's jurists gave a strong fight in order to raise and establish the tribunal up to its full legal power against the perpetrators of crimes of genocide and of violations of humanitarian law and the customs of war. Through the power of the rule of law the ICTY constituted a legal weapon against those who violated the human rights irrespective of their political rank including active head of states, hence the introduction of justice in the international relations.

Milosevic was the first active state leader who was indicted for crimes against humanity, war crimes and genocide the gravest of all crimes. He emerged in the political stage of the Yugoslav Federation in a time of dissolution of the 'Brotherhood and Unity' policy of Tito. After Tito's death the constituent republics of the Yugoslav Federation shifted from 'Brotherhood and Unity' to nationalistic grievances. Milosevic being either a Serbian nationalist or a political opportunist took advantage of the turmoil and triggered the Serbian nationalism which by its own turn led to horrors seen only before in the Second World War in Europe. As the highest responsible in the chain of command for the massacres in the Balkans, and at the same time the indispensible negotiator for the so desired political solution which the western powers pursued, his image was either pictured as the 'peacemaker' of the Dayton Peace Agreement or the 'Butcher' of the Balkans. This shift of Milosevic's image followed the shift of the diplomatic necessities and interests of the UN member states and therefore he was finally indicted in 1999. His arrest in 2001 and his trial while being the President of the Federal Republic of Yugoslavia shook the world

because it established the precedent of the end of the impunity of the strong and the powerful and above all the immunity of heads of states.

Notwithstanding the efforts of the ICTY to avoid the mistakes of the past namely the mistakes of the Nuremberg trials the politicization of justice was not avoided. Exactly that lack of impartiality and "victor's justice" was the basis of Milosevic defense strategy when he was brought to justice, shouting to delegitimize the tribunal. His trial unfortunately remained without verdict and closure because of his death in 2006, near the end of his trial, and thus empowered his legacy of division. To some a martyr to others the "butcher of the Balkans" and to some others indifferent Milosevic legacy continues after his demise. The absence of a verdict from the ICTY on Milosevic case offered space for different interpretations leaving again his crimes without a judgment upon which the society of the tormented region could start building its future without collective stigmatization of culpability or victimization.

The overall effectiveness or success of the ICTY remains highly questionable in the literature. From a strictly legal sense to some, the objective of sanction was considered a success. The other two statutory objectives of the ICTY however, are commonly argued that have failed. On one hand the ICTY did not succeed in deterrence since the atrocities continued even after its establishment and on the other hand reconciliation, even today, is still unattainable. It is naïve to believe in a pure justice without the influence of politics, in a world where the war crimes tribunals are means of international order against the vanquished advocated from the western world powers. Furthermore the International Criminal Tribunals do not yet have the international agreement to become an independent institution and thus a globalized justice. As long as justice will depend on the financial and political support of states and especially of powerful states its enforceability will always remain justice's weakest point. Thus, state sovereignty or else national interests as described in the realist theory of international relations will still overpower law and justice international institutions. On the other hand the existence of an independent institution of global justice especially when combined with enforceability, would concentrate tremendous power, which either would result even more prone to political pressures, or would risk becoming an uncontrollable global legal power of its own.

Notwithstanding these two confuting stands the existence of an international independent Justice is of paramount importance in the international arena which shows debatable abiding respect to human rights. Humanity should look forward to an institutionalized authority, ‘Archi”, in the “Anarchic” power driven world, with independent capabilities of implementing its decisions so as the protection of human rights can be secured irrespective of politics and political interests.

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