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# Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY

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## Abstract

This article will return to questions raised during the establishment of the ICTY and particularly the Tadic case. It will be argued here that the aspect of Tadic that remains unresolved is the fundamental question of whether the ICTY has been established legitimately. The legitimacy argument forms an important part of the legacy debate of the ICTY. Although the Tadic Appeals Chamber has formally answered the question of the legitimacy of the ICTY it will be argued that the reasoning of the Appeals Chamber was not sufficiently strong or persuasive. The legitimacy debate reflects the wider influence of the ICTY's jurisprudence since some of the arguments made by the Tadic Appeals Chamber have been replicated or repeated in the trials of Saddam Hussein and Charles Taylor. The legitimacy question is crucial since it affects the very foundations of the ICTY. If the legitimacy of the ICTY is not established satisfactorily, it affects how one considers the achievements mentioned above. In a sense the substantive and procedural achievements of the ICTY are dependent on the legitimacy of the ICTY. This article will consider the difference between the ICTY's self-perception and the way the work of the Tribunal over the last sixteen years has been perceived from the outside. The focus of the article will be on the lingering question of the legitimacy of the Tribunal. It has argued that legitimacy can also be acquired after the initial establishment. The article will consider whether the ICTY's initial defect in legitimacy could subsequently be remedied by the fairness of the proceedings and the moral power of the ICTY.


## A. Introduction

Much has been made of the impending closing of the International Criminal Tribunal for the former Yugoslavia [ICTY]. In formulating its completion strategy the Yugoslavia Tribunal started a process of reflection and self-examination of its own work and on what it perceives to be its legacy. Academic commentators have also started to comment on the ICTY's legacy.

It has been widely agreed that the Yugoslavia Tribunal has made various valuable contributions to the emerging discipline of international criminal law. The ICTY has been credited for going far beyond the legacy of Nuremberg in establishing a system based on high standards of fairness and due process. It is not an exaggeration to say that in the absence of the

ICTY International Criminal Law as a discipline would still have been in its infancy. As the first post-Nuremberg international criminal tribunal, the ICTY has set into motion a series of developments that would probably not have been possible in its absence. The creation of the ICTY by Security Council fiat was unprecedented and controversial. The ICTY's particular mandate was also new, particularly its *ad hoc* nature and the limits on its temporal jurisdiction. The ICTY has indeed been responsible for a number of "firsts".[1] In 2004 Ralph Zacklin wrote that "a new culture of human rights and human responsibility […] has gradually taken root"[2]. It can indeed be said that the Tribunal went beyond developing the substance and procedure and helped to create a new legal culture. In fact, the ICTY's impact and influence has been so strong and diverse that one article cannot do justice to all aspects of the ICTY's legacy. This article will acknowledge the many and varied achievements of the ICTY but will take a critical perspective. It will examine some of the "unanswered questions" raised by the creation and the *sui generis* nature of the ICTY.

The article will return to the dispute regarding the establishment of the ICTY: the Tadic case.[3] The Tadic case has been described as one of the cases which contributed the most to the jurisprudence of the ICTY. The case took an innovative approach to the law in many respects by changing the definition of "protected persons"[4], by addressing the distinction between

1 The ICTY deserves credit for a number of "firsts" in the sense of groundbreaking achievements. In *Tadic* the Court clarified the legal criteria for distinguishing between international and internal armed conflict. Also, taking one step further the ICJ's Nicaragua finding that Common Article 3 represents a minimum yardstick applicable also to international armed conflicts, the ICTY Appeals Chamber established that most of the protective rules of IHL are applicable to non-international armed conflicts. The ICTY has also been praised for recognizing rape as war crime, and for clarifying (and sometimes collapsing) the distinction between international and non-international armed conflicts and for the development of JCE. For more on the achievements of the ICTY see K. D. Askin 'Reflections on Some of the Most Significant Achievements of the ICTY', 37 *New England Law Review* (2003) 4, 903.
Furthermore, the *Milosevic* indictment was the first war crimes indictment against a sitting head of state.

2 R. Zacklin, 'The Failings of *ad hoc* Criminal Tribunals', 2 *Journal of International Criminal Justice* (2004) 2, 541.

3 *Prosecutor v. Tadic*, Appeals Judgment, IT-94-1-A, 15 July 1999.

4 *Prosecutor v. Tadic*, Appeals Judgment, IT-94-1-A, 15 July 1999, paras 163-169.

international and non-international armed conflicts[5] and by taking the first steps towards the formation of the notion of Joint Criminal Enterprise (JCE). It will be argued here that the aspect of Tadic that remains unresolved is the fundamental question of whether the ICTY has been established legitimately. Alvarez formulated the essential question: "whether the [Security] Council can create a denationalized body capable of depriving individuals of their liberty without national court appeal or involvement"[6]. The legitimacy argument forms an important part of the legacy debate of the ICTY. In the same way as one has to build a house on a firm foundation, the Tribunal had to be built on a firm and legitimate legal foundation.

Although the Tadic Appeals Chamber has formally answered the question of the legitimacy of the ICTY it will be argued that the reasoning of the Appeals Chamber was not sufficiently strong or persuasive. The legitimacy debate reflects the wider influence of the ICTY's jurisprudence since some of the arguments made by the Tadic Appeals Chamber have been replicated or repeated in the trials of Saddam Hussein and Charles Taylor.[7] The fact that other 'younger' international tribunals rely on the reasoning of the ICTY judges illustrates the impact of the ICTY and places a responsibility on the shoulders of the ICTY.

The legitimacy question is crucial since it affects the very foundations of the ICTY. If the legitimacy of the ICTY is not established satisfactorily, it affects how one considers the achievements mentioned above. In a sense the substantive and procedural achievements of the ICTY are dependent on the legitimacy of the ICTY.

The word "legacy" is increasingly being used by commentators as well as by the ICTY itself. But what does the term "legacy" mean? This article will consider the difference between the ICTY's self-perception and

5 *Prosecutor v. Tadic*, *Decision* on the Defence Motion for Interlocutory Appeal on *Jurisdiction*, IT-94-1-AR72A, 2 October 1997, paras 77-78.

6 J. E. Alvarez 'Nuremberg Revisited: The Tadic Case', 7 *European Journal of International Law* (1996) 2, 242, 252.

7 Newton describes the Iraqi Tribunal as the "intellectual twin" of the ICTY. See M. A. Newton, 'The Iraqi Special Tribunal: A Human Rights Perspective', *Vanderbilt University Law School, Public Law and Legal Theory, Working Paper Number 05-35*, 7.

the way the work of the Tribunal over the last sixteen years has been perceived from the outside. The focus of the article will be on the lingering question of the legitimacy of the Tribunal. It has argued that legitimacy can also be acquired after the initial establishment. The article will consider whether the ICTY's initial defect in legitimacy could subsequently be remedied by the fairness of the proceedings and the moral power of the ICTY.

## B. The Concept of "Legacy"

The term "legacy" is an ambitious and enigmatic concept. The noun "legacy" means an "amount of money or property left to someone in a will" or "something left or handed down by a predecessor"[8]. It can be argued that a "legacy" can most appropriately be determined *ex post facto*. One can most meaningfully speak of a legacy after the fact. Ultimately, one will have to distinguish between legacy 'during' its lifetime (in the sense that a public figure such as Nelson Mandela has a legacy even during his lifetime) but it is clear that the "real legacy" can only be assessed many years after the closing of the Tribunal.

Another characteristic of the term "legacy" is that a person or an institution cannot determine, predict or control its own legacy. It can be argued that a "legacy" is a quality others (usually the successor or recipient of the "gift") attribute to you or an evaluation others make of you. Yet the ICTY has been preoccupied by its own legacy quite intensely. An Associate Legal Officer at the ICTY, Dianne Brown, carries the title "Legacy Officer".

The question of the legacy of the ICTY has often been discussed in the context of the establishment and work of the International Criminal Court (ICC). Leila Sadat commented on the legacy of the ICTY as early as 2002. She described the ICC as the "heir apparent to the ICTY"[9]. The "success" of the ICTY probably made a significant contribution to the establishment of the ICC. In the absence of the precedent set by the ICTY, it is doubtful whether the international community would have had the confidence to establish the International Criminal Court.

8 Oxford Dictionaries Online, available at http://oxforddictionaries.com/definition/legacy?q=legacy (last visited 2 January 2012).

9 L. Sadat, 'The Legacy of the ICTY: The International Criminal Court', 37 *New England Law Review* (2002) 4, 1074.

## C. Self-Perception of the ICTY

One positive consequence of the sensitivity of the ICTY to its own legacy is the fact that the Tribunal is more sensitive to public perception and public criticism and concerned about procedural correctness in being aware of the wider "ripple effects" of its work. Former ICTY President has stated that the "Completion Strategy" of the ICTY could more aptly be described as a "Strategy of Continued Legacy Building"[10]. This was illustrated vividly by the fact that the ICTY hosted a conference on its legacy in February 2010 (with a specific focus on its legacy in the Balkans) and is in the process of planning a conference on the "Global Legacy" of its work for November 2011.

The February 2010 conference focused on the legacy of the ICTY specifically in the former Yugoslavia.[11] The idea behind the conference was that the ICTY would use this as an opportunity do stocktaking of its work. The results of the conference will not be analyzed or discussed here. However, the outlook on the willingness of political leaders in the region to pursue national reconciliation was very pessimistic.

Just as one cannot control one's reputation one cannot fundamentally control one's own legacy. The current ICTY President Robinson acknowledged this at the February 2010 conference on the Legacy of the ICTY hosted by the ICTY when he explicitly stated that the ICTY does not attempt to control its own legacy.[12] President Patrick Robinson spoke of the importance of being honest about experiences and results and of displaying full transparency. He mentioned the importance of creating a climate of

10 F. Pocar, 'Completion or Continuation Strategy, Appraising Problems and Possible Developments in Building the Legacy of the ICTY', 6 *Journal of International Criminal Justice* (2008) 4, 655.

11 The ICTY has been said to have adopted a strategy of 'continued legacy building' in the region of the former Yugoslavia. The aim of this strategy is to facilitate local institutional capacity to deal with the numerous cases that still has to proceed to trial. *Id.,* 665.

12 P. Robinson, 'Opening Remarks', Presentation at the Conference 'Assessing the Legacy of the ICTY', 23- 24 February 2010, The Hague.

impunity. He also emphasized the importance of creating an institutional memory as well as the importance of the creation of the ICTY archives.[13]

He added that it was important that the ICTY should assist in peace-building and peace maintenance in the Balkan region and help strengthen the rule of law. In this regard the ICTY has worked on a solution to the question of "what happens to middle and low ranking perpetrators". The ICTY worked on a solution to maintain its legitimacy while dealing pragmatically with the problem of thousands of potential defendants.[14]

On the same occasion Robinson stated that one of the main shortcomings of the ICTY was that it neglected victims. It is problematic that victims did not receive any reparation or compensation. The ICTY did not position itself close enough to the victim communities. He also mentioned other mistakes of the ICTY which impaired its legacy: the length and the expense of trials[15] as well as the lack of uniform criminal law policy were primary concerns.

The ICTY has also been working to ensure its legacy through a compilation of its best practices. The purpose of this compilation of expertise is to provide a blueprint to future international courts.[16]

## D. Unanswered Questions

A number of fundamental questions have never been addressed by the ICTY or never addressed in satisfactory manner. These include questions pertaining to whether the ICTY has respected the limits of the ICTY's lawmaking power as well as the legitimacy, legality and accountability of the ICTY. It is vital for the credibility of the ICTY that the Tribunal is an institution as well as its judgments be perceived as legitimate by the international community. The Tribunal must be perceived to be competent, fair and universal.[17] Integral to the question of legacy is the idea that judgments may help to establish norms that predispose rulers and citizens

13 The "immense" archive of the ICTY contains documents and evidence relating to the crimes and conflicts in the territory of the former Yugoslavia from 1991 up to 2001. See Pocar, *supra* note 10, 655.

14 W. Sandholtz, 'Creating Authority: The International Criminal Tribunals', *International Studies Association, San Diego* (2006), 25.

15 See in this regard Askin, *supra* note 1, 912.

16 Pocar, *supra* note 10, 663.

17 T. M. Franck, *The Power of Legitimacy Among Nations* (1990), 16.

alike to conform their behavior to legal expectations even without the application of coercive sanctions.[18]

## E. Legitimacy

Many have remarked that the existence of the Tribunals as a functional reality is in itself a great accomplishment.[19] It can be argued that only the legitimate establishment of the Tribunals would lend legitimacy both to the "ordinary" work of the judges and to the more innovative lawmaking activities of ICTY judges.

What does legitimacy mean in this context and why is it important? Since international law makes a claim to authority, the question of legitimacy is relevant to international law.[20] Similarly, the fact that the Tribunal makes a claim to authority necessitates an investigation into its legitimacy. Furthermore, the moral force of international law or duty to obey international law necessitates an enquiry as to legitimacy. In examining legitimacy as a construct[21] the starting point can be Thomas Franck's definition of legitimacy. Franck discusses legitimacy in the context of the broader question of why nations obey international law in the absence of coercion or threats of coercion such as sanctions.[22] Franck proposes the following partial definition of legitimacy adapted to the international system: a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively.[23] Legitimacy exerts a pull to compliance which is powered by the quality of the rule or the rule-making institution and not by coercive authority. It exerts a pull to compliance in the voluntarist mode. According to Franck legitimacy can be a matter of degree.

18 *Id.*, 16.

19 M. C. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), 236.

20 M. Kumm, 'The Legitimacy of international Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004) 5, 908.

21 See Franck, *supra* note 17; J. E. Alvarez 'The Quest for Legitimacy: An Examination of the Power of Legitimacy Among Nations by Thomas M. Franck', 24 *New York University Journal of International Law and Politics* (1991), 199.

22 Franck, *supra* note 17, 3.

23 *Id.,* 16.

Franck writes that legitimacy theorists fall into three categories. The first group defines legitimacy in terms of *process*.[24] Max Weber has played a leading role in evaluating legitimacy in such terms. Weber writes of the setting out of a superior framework of reference including rules about how laws are made, how governments are chosen and how public participation is achieved.[25] In the political sphere this means that the legislature who enacted the laws should be honestly elected. Legitimacy is also defined in procedural-substantive terms. One should look not just at how a ruler was chosen but also in whether the rules made and commands govern were objective.

A second group legitimacy can be defined in procedural-substantive terms.[26] Franck cites Habermas who wrote that "the procedures and presuppositions of justification are themselves now the legitimating grounds on which the validity of legitimation is based"[27].

A third group of legitimacy theorists focus on outcomes.[28] They hold that a system seeking to validate itself has to be defensible in terms of equality, fairness, justice and freedom which are realized by the system. It is intriguing to explore the question of whether an illegitimately established Tribunal could subsequently become legitimate because of the equality and fairness of its outcomes.[29]

Some believe that the meta-legal question of legitimacy is not only determined by the positive law. Legitimacy can be also be interpreted as "social legitimacy". Social legitimacy depends on the extent to which the Tribunal is viewed as unbiased and impartial by society. "Unbiased and impartial" here means free from outside influence, particularly from the Security Council and the Permanent Members.[30] The Trial Chamber in Tadic stated that criminal law is only efficacious if the body that determines

24 *Id.,* 17.

25 M. Weber, *Economy and Society: An Outline of Interpretive Sociology,* edited by G. Roth & C. Wittich (1968), 31.

26 Franck, *supra* note 17, 17.

27 J. Habermas, *Communication and the Evolution of Society* (1979), 185.

28 Franck, *supra* note 17, 18. Franck attributes this view to "neo Marxist philosophers and related students of radical social restructuring".

29 David Luban supports this view of legitimacy. See D. Luban 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 579.

30 G. P. Lombardi 'Legitimacy and the Expanding Power of the ICTY', 37 *New England Law Review* (2003) 4, 889.

criminality is "viewed as legitimate"[31]. This implies that the perception of legitimacy itself matters for the efficacy of the Tribunal. In international context the definition of legitimacy also includes: the perception of those addressed by a rule or rule-making institution that the rule has come into being and operates in accordance with generally accepted principle of right process.[32]

## F. The Tadic Case

In the early phase of the ICTY's existence, the question of the establishment of the ICTY attracted much attention and was seen as important since it affected the authority and credibility of the establishment of the ICTY.

Some States preferred the establishment of the Tribunal by way of a consensual act of nations or by treaty. Others believed that the General Assembly, being the most representative organ of the United Nations would have been the most appropriate organ to establish the ICTY since it would have guaranteed full representation of the international community.[33]

At the time Morris and Scharf wrote that the disadvantages of the treaty approach were that it provided States with an opportunity to "carefully examine and elaborate provisions on all aspects of the tribunal"[34] and to exercise their sovereign will in the negotiation and conclusion of such treaty. The main argument against the treaty approach was that too much time would be needed for the negotiation and conclusion of a treaty and for obtaining the necessary ratifications for its entry into force. In light of the sensitive political situation there was no guarantee that the States whose participation would be essential for the effectiveness of the tribunal would have to become party to the treaty.[35] Commentators such as Bassiouni argued that the involvement of the General Assembly in the preparation of the statute would have added a potentially time-consuming phase.[36]

31 *Prosecutor v. Tadic*, Decision on the Defense Motion on Jurisdiction, IT-94-1, 10 August 1995.

32 Franck, *supra* note 17, 19.

33 V. Morris & M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia:Documentary History and Analysis* (1995), 326.

34 *Id.,* 40.

35 *Id.*

36 Bassiouni & Manikas, *supra* note 19, 220.

Doubts about the establishment were already raised during the debate on Security Council Resolution 827. Some delegates referred to 'the exceptional nature or character of establishing the Tribunal' and indicated that for political reasons they were willing to accept the method of establishment.[37]

The most important case in this regard was the *Tadic Jurisdictional Decision*.[38] The diverse responses of the Trial Chamber and Appeals Chamber in Tadic show the contested propositions regarding the reviewability of Security Council decisions posed by the creation of the Tribunal.

The Trial Chamber in Tadic concluded that it did not have jurisdiction to review the action taken by the Security Council. The Trial Chamber concluded that it was a Tribunal with "a limited criminal jurisdiction" derived solely from the Statute and that the Tribunal did not have the jurisdiction to determine the legality of its own creation.[39] The Trial Chamber stated:

> "The International Tribunal is not a constitutional court set up to scrutinize the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. It is to confine its jurisdiction to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council."[40]

The Trial Chamber held that the competence of the Tribunal is narrowly defined and does not extend beyond the prosecution of persons responsible for serious violations of international humanitarian law. The Trial Chamber resorted to the political question doctrine derived from US

37 Security Council, Provisional Verbatim Record of the 3217th meeting, 23 May 1993, Representative of China, UN Doc S/PV 3217. The Chinese representative said that "the international tribunal can only be an *ad hoc* arrangement suited only to the special circumstances of the former Yugoslavia and shall not constitute any precedent".

38 *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995 [Tadic Jurisdictional Decision].

39 *Prosecutor v. Tadic*, Trial Chamber Decision on the Defence Motion on Jurisdiction, IT-94-1-T, 10 August 1995.

40 *Prosecutor v. Tadic*, Decision on the Defence Motion on Jurisdiction, IT-94-1-T, 10 August 1995.

constitutional law and considered the Article 39 determination of 'threat to the peace' and its choice of means to meet the threat as a non-justiciable policy determination.[41]

The Appeals Chamber disagreed, holding that in terms of the principle *competence de la competence* it had the inherent jurisdiction to determine its own jurisdiction:

> "To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council 'intended' to entrust it with, is to envisage the International Tribunal exclusively as a 'subsidiary organ' of the Security Council […] a 'creation' totally fashioned to the smallest detail by its creator and remaining totally in its power and at its mercy."[42]

According to the Appeals Chamber the Tribunal is a self-contained system whose "inherent" or "incidental" jurisdiction derives automatically from the exercise of the judicial function. The Appeals Chamber went even further and stated that *competence de la competence* was not only a power but an obligation in international law.[43] In support of this the Appeals Chamber quoted Judge Cordova who stated that it was the "first obligation of the Court" as it would be of any other judicial body to establish its own competence.[44]

In response to Tadic's argument that the tribunal was not "established by law", as required by *inter alia* the International Covenant on Civil and Political Rights (ICCPR) the Appeals Chamber held that this merely means that the ICTY is "established in accordance with the proper international standards" and that it provides all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.[45] According to the Appeals Chamber these standards were met.

41 The Trial Chamber cited the criteria for "political questions" delineated by the *US Supreme Court in Baker v. Carr* 369 US 186, 217 (1962). *Prosecutor v. Tadic* IT-94-1-T, 10 August 1995, para. 24.

42 *Tadic Jurisdictional Decision*, para. 15.

43 *Tadic Jurisdictional Decision*, para. 18.

44 Judge Cordova, Dissenting Opinion, *Advisory Opinion on Judgements of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, 1956 I.C.J. Reports (Advisory Opinion of 23 October) 77, 163.

45 M. P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (1997), 104, 106.

## G. Criticising Tadic

The reasoning of both the Trial Chamber and Appeals Chamber in Tadic has been widely criticized. In a dissenting opinion to the Appeals Chamber decision Judge Li disagreed with the view that the Tribunal had the competence to determine its own jurisdiction. He argued that the Tribunal cannot review the legality of the resolutions by the Security Council. According to him such review is *ultra vires* and unlawful. In his comment in a collection of essays in memory of Judge Li, Judge Shahabuddeen asks: If jurisdiction entitles the ICTY to say that it has not been validly established, in what capacity is it acting when it makes that determination?[46] According to Shahabuddeen the view that persons who accept appointments as judges of a court and who swear to serve such a court can, in their capacity as judges, question the validity of the law establishing the court. In what capacity are such persons acting when they make that decision? Are they acting as judges or as individuals?[47] Shahabuddeen points out that if judges say that their court was never lawfully established they are speaking s individuals. He writes:

> "If they are speaking as court, they are exercising judicial power and therefore recognizing the authority from which that judicial power flows; for the only way they can decide as a court is by affirming the validity of the law by which the court is established. The contradiction will be that they are accepting that they are a court at the same time when they are denying that they are a court."[48]

Shahabuddeen continues that the Security Council, acting under Article 96 of the Charter, could have referred the matter to the ICJ for an advisory opinion. In the Effects of Awards case, the ICJ decided that the General Assembly was competent to establish the United Nations Administrative Tribunal as a judicial body.[49] By a similar procedure the

46 M. Shahabuddeen, 'The competence of a tribunal to deny its existence', in S. Yee & W. Tieya (eds) *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001), 474.

47 *Id.*, 475.

48 *Id.*, 476.

49 *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal,* 1954, *Advisory Opinion of 13 July 1954,* I.C.J. Reports 1954, 47, 56-58.

court could have been asked for advice as to whether the Security Council was competent to establish the ICTY.

Alvarez attacks the Trial Chamber position. He finds it inconsistent that the Trial Chamber judges aver that an issue is non – justiciable and then the purport to dismiss this issue as "perfunctorily on the merits".[50] If the judges believe there is "no law" to apply with regard to certain questions, they should also not pronounce on these questions. Judge Li takes the same absolutist yet logical position. In his Separate Opinion he argues that judicial statements about either the Security Council's Article 39 determination or its chosen means of dealing with a threat to the peace are "imprudent and worthless in both fact and law"[51]. Alvarez states that the reason why the majority of the judges in the Trial and Appeals Chambers reject this position may be because they regard it as unacceptable for an international criminal court to admit that a defendant will be subject to the "capricious whim" of the Security Council instead of the rule of law.[52]

Bassiouni wrote that similar challenges to Security Council actions have been unsuccessful in the past. He points out that organs of the UN enjoy a presumption of legality. Security Council actions only become *ultra vires* once the presumption is rebutted.[53] To rebut such a presumption there would have to be a showing that the establishment of the tribunal is not rationally related to the establishment, maintenance and restoration of peace. Considering the international character and the *ius cogens* nature of the crimes committed in the Balkans it is hard to conceive the possibility that the presumption of validity would be rebutted. The ICJ, despite being described by some as the "ultimate guardian of UN legality" has not yet resolved the question of whether it can legitimately review the legality of Security Council action.

Alvarez states that the legal arguments used by the Trial Chamber and the Appeals Chamber to affirm the legality of Tadic's prosecution by the ICTY are in themselves not sufficient to legitimize a Tribunal with "political, foundational and epic goals". He writes it "would be naive to believe that this Tribunal, whose questionable pedigree is at stake" has

50 Alvarez, *supra* note 6, 250, 251.
51 *Id.*, 251.
52 Alvarez, *supra* note 6.
53 Bassiouni & Manikas, *supra* note 19, 24.

conclusively settled a question which even the ICJ has avoided.[54] According to Alvarez the Appeals Chamber should have adopted some model of judicial review and of UN constitutional interpretation.[55]

In the *Tadic Jurisdictional Decision* the Prosecutor stated that the ICTY is not a constitutional court set up to scrutinize the actions of the Security Council.[56] The Prosecutor emphasized that the ICTY is a criminal tribunal with very limited defined powers and that if it were to confine its adjudication to those limits "it will not have authority to investigate the legality of its creation by the Security Council"[57].

## H. Legitimacy Questions before Other Tribunals

The ICTR's establishment by Security Council Resolution instead of by treaty was equally controversial. The legitimacy of the ICTR was initially challenged in a district court in the United States in the *Ntakirutimana*[58] case. In this case the United States requested the extradition of Elizaphan Ntakirutimana. The first request for extradition was refused by the magistrate of the US district court. Ntakirutimana's counsel argued that, in establishing the Rwanda Tribunal the UN Security Council exceeded its powers under Chapter VII of the UN Charter. The magistrate explained why the Tadic judgment did not settle the legitimacy question:

> "The Tadic opinion adds nothing to the issue. The Yugoslavia Tribunal is a creature of the very statute that was under challenge. The several views of the judges show they cannot agree on anything except their own legitimacy. But they fail to find a source for their creation in the Charter."[59]

Ntakirutimana appealed the case to the fifth Circuit of Appeals. The majority of the Fifth Circuit decided that Ntakirutimana could be extradited.

54 Alvarez, *supra* note 6, 250. *In The Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) notwithstanding the Security Council Resolution 276 (1970).

55 Alvarez, *supra* note 6, 245. 261.

56 *Tadic Jurisdictional Decision*, para. 20

57 *Tadic Jurisdictional* Decision, para. 20.

58 *In Re The Surrender of Eliziphan Ntakirutimana*, Misc No L-96-005 (SD Texas. 1997).

59 *Ntakirutimana v. Reno*, 184 F 3d 419, 430 (5th Cir 1999), cert denied, 68 USLW 3479 (US 25 January 2000) (No 99-4790).

The first challenge to the legitimacy of the ICTR brought before the ICTR was by Joseph Kanyabashi. Similar to the Tadic Trial Chamber, the *Kanyabashi* Trial Chamber rejected the defense challenges to the jurisdiction of the ICTR.[60] *Kanyabashi* did however not merely copy Tadic. The Trial Chamber stated that even though some of the issues raised by the defense have already been dealt with in the Tadic case, "in view of the issues raised regarding the establishment of this Tribunal, its jurisdiction and its independence in the interest of justice […] the Defence Counsel's motion deserves a hearing and full consideration"[61].

In considering the merits of the motion, the Trial Chamber rejected the principal objections raised by the defense. The defense argued that the establishment of the Rwanda Tribunal violated the sovereignty of States, particularly Rwanda, because it was not established by means of a treaty. The Trial Chamber concluded that the ICTR did not violate the sovereignty of Rwanda or other members of the United Nations which had accepted certain limitations on their sovereignty by virtue of the United Nations Charter and had agreed to follow and carry out Security Council resolutions under Article 25 UN Charter.[62] The Trial Chamber further stated that there was no merit in the argument by the defense that the Rwandan conflict did not pose a threat to international peace and security.[63]

Ten years into the life of the ICTY, the legitimacy question was revived during the trial of Slobodan Milosevic. Milosevic's defense lawyers summoned the Netherlands to release him. When the request was refused, the defense lawyers instituted injunction proceedings against the Netherlands in the District Court in The Hague. The Hague District Court considered itself incompetent to consider the question of the legality of the ICTY. The President of the District Court addressed the matter and said that the issue of Security Council competence has already been dealt with at length by the Trial Chamber II and the Appeals Chamber of the Tribunal in the Tadic decision.[64] The Trial Chamber stated that it respected the 'persuasive authority' of the decision of the Appeals Chamber in the Tadic

60 *Prosecutor v. Kanyabashi,* Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997.

61 *Id.*, para. 6.

62 *Id*., para. 13.

63 *Id*., para. 24.

64 See the summary of the case 'Judgement in the Interlocutory Injunction Proceedings: Slobodan Milosevic v The Netherlands', 2 *Netherlands International Law Review* (2001), 357, 360.

case.[65] Kress writes that the ICTR's acceptance of Tadic as quasi-precedent for *Kanyabashi* is desirable as a matter of judicial policy.[66]

Milosevic questioned and attacked the legitimacy of the Tribunal during his very first appearance before the Tribunal. In responding to Judge May's inquiry as to whether he would like to be represented by Counsel he stated: "I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to [an] illegal organ"[67]. At his next appearance he stated that the Tribunal was not a "juridical institution" but a "political tool"[68].

The *Milosevic* Trial Chamber held that the ICTY was created to "restore international peace and security" and dismissed Milosevic's motion. In the view of the Trial Chamber, the Security Council Resolution 827 (establishing the ICTY) centered on the ICTY's role of promoting peace and reconciliation in the former Yugoslavia.[69] The Trial Chamber therefore came to the conclusion that the creation of the ICTY was within the powers of the Security Council under Articles 39[70] and Article 41[71] of the United Nations Charter and the motion was dismissed.[72] The *Milosevic* Trial Chamber deferred to the Appeals Chamber decision in Tadic on the question of whether the Tribunal had the competence to determine its own legality.[73]

65 *Prosecutor v. Kanyabashi,* Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997, para. 8.

66 See the Commentary by C. Kress, in A. Klip & G. Sluiter (eds), *Annotated Leading Cases on International Criminal Tribunals, The International Criminal Tribunal for Rwanda*, Vol. 2 (2001), 23.

67 *Prosecutor v. Milosevic,* Transcript of Initial Appearance, IT-02-54, 3 July 2001, 2.

68 *Prosecutor v. Milosevic*, Transcript of Status Conference, 30 August 2001, IT-02-54, 24-25.

69 *Id*. B, para. 7.

70 Art. 39 Charter of the United Nations (giving the Security Council the power to "determine the existence of a threat to the peace, breach of peace, or act of aggression" and "shall make recommendations, or decide what measures shall be taken in accordance with Art. 41 […] to maintain or restore international peace and security").

71 Art. 41 Charter of the United Nations (authorizing the Security Council to decide which "measures not involving the use of armed force" will be taken to fulfill Art. 39).

72 *Prosecutor v. Milosevic*, Decision on Preliminary Motions, IT-02-54, 8 November 2001, 3.

73 *Id.*

At the start of this trial in 2009 Radovan Karadic similarly filed a motion challenging the legitimacy of the ICTY. Karadic claimed that the SC overstepped its powers when creating the ICTY.[74] Karadic wrote that it was his "moral duty" to challenge the legal validity and legitimacy of the Tribunal.[75]

Following Tadic, challenges to the legitimacy of war crimes courts became a "routine defence" especially in the case of high profile accused. Saddam Hussein followed in the footsteps of Tadic and used the "legitimacy" defense.[76] During his pretrial hearing in July 2004, Hussein attacked the legitimacy of the Iraqi Special Tribunal (IST). Hussein questioned the judge on the law under which the IST was created.[77] The assessment of legitimacy depends partly on the method of establishment of a court. The legitimacy of the IST was called into question because the IST was established by the transitional governing council (Coalition Provisional Authority) that received funding and other kinds of support from the U.S. The fundamental legitimacy of a Tribunal being created under an occupation has been questioned. The illegitimacy of the occupation tainted the legitimacy of the IST. Many would have preferred a tribunal created under the authority of the United Nations. However some have commented that the question of whether the IST has been fundamentally tainted by its method of establishment depends on how fair its standards and procedures will be.[78] This view complies with the "outcome" based notion of legitimacy: a system can validate itself if it meets certain standards of equality, fairness, justice and freedom.

Unlike the ICTY and ICTR, the Special Tribunal for Sierra Leone [SCSL] was established by a treaty between the Government of Sierra Leone and the United Nations to prosecute those with the greatest

74 The Centre for Peace in the Balkans, 'Karadic challenges war crimes court's legitimacy' (30 November 2009) available at http://www.balkanpeace.org/index.php?index=article&articleid=15667 (last visited 2 January 2012).

75 *Id*.

76 See A. Kang, 'Memorandum for the Iraqi Special Tribunal', *Case Western Reserve University School of Law, International War Crimes Research Lab* (2004), 3.

77 See R. Cornwell 'Saddam in the Dock: Listen to His Victims, Not Saddam, Says White House', *The Independent,* 2 July 2004.

78 C. Eckhart 'Saddam Hussein's Trial in Iraq: Fairness, Legitimacy and Alternatives, a Legal Analysis', *Cornell Law School Graduate Student Papers* (2006), 5

responsibility for violations of international humanitarian law.[79] The SCSL Appeals Chamber has stated that it was not vested with the power to determine its own legality. The Appeals Chamber in the Taylor case explicitly stated that the ICTY's Tadic decision was not binding on it.[80] The Appeals Chamber of the SCSL has dealt with the question of the legality and legitimacy of the SCSL on numerous occasions.[81] The legal basis for the SCSL was articulated in *Prosecutor v. Charles Taylor*.[82] The judges in the Taylor case stated that although the SCSL was established in a different manner from the ICTY and ICTR, it was set up in a lawful manner by the Security Council which derives its power from the UN Charter.[83]

The IST was said to be legitimized by the fact that its statue was subsequently amended and approved by the Iraqi Transitional Assembly. The Court was also expressly mentioned in the Iraqi Constitution.[84] The fact that the court has been approved by the Iraqi people through a direct vote in adopting the Constitution and through the Transitional Assembly (a body that was popularly elected by the Iraqi people) adds to its legitimacy.[85]

It is clear that any new Tribunal or international court should henceforth expect a challenge to its legitimacy and should be ready to defend the legality and legitimacy of its establishment. Although judges form other international tribunals may not always defer (or even refer) to Tadic, the Tadic approach to legitimacy will undoubtedly be influential.

According to Lombardi the "longevity of the legitimacy debate" can be attributed to the "continuing tension inherent in the dual form of the

79 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, UN Doc S/2000/915.

80 *Prosecutor v. Charles Taylor*, Decision on Immunity from Jurisdiction, SCSL 2003-01-I, 31 May 2004, paras 6-8, 11, 15.

81 See for example *Prosecutor v. Moinina Fafana,* Decision on the Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Power by the UN, SCSL-2004-14-PT, 25 March 2004

82 *Prosecutor v. Taylor*, Decision of the Immunity from Jurisdiction, SCSL-2003-01-1, 31 May 2004.

83 *Id*., para. 37.

84 Art. 134 of the Iraqi Constitution (adopted on 15 October 2005) reads: "The Iraqi High Tribunal shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols. The Council of Representatives shall have the right to dissolve by law the Iraqi High Criminal Court after the completion of it work".

85 See C. Eckart 'Saddam Hussein's Trial in Iraq: Fairness, Legitimacy and Alternatives, a Legal Analysis', *Cornell Law School Graduate Student Papers* (2006), 16.

Tribunal"[86]. On the one hand the Tribunal is a body with circumscribed powers that would serve the political goals of the Security Council and on the other hand the Tribunal, to achieve that goal, should be seen as independent. The judges have acknowledged that their jurisprudential and rulemaking powers emanates from the Security Council but have also expanded their power beyond what the Statute provides.[87] This dilemma or tension between the pedigree of the ICTY and its attempts to carve out its own identity can be seen in many aspects of the ICTY's work.

It has been suggested that the legal arguments presented by the Trial Chamber and Appeals Chamber in the *Tadic Jurisdictional Decision* were not sufficient to legitimize a Tribunal with political, epic and foundational goals.[88] The position of the Trial Chamber was especially problematic. In light of the controversial nature of the Tribunals and the adventurous lawmaking by the judges the Trial Chamber should not have glibly dismissed the matter as non-justiciable.

Stronger reasoning in Tadic could have legitimized not only the work of the ICTY but also of successor Tribunals established by the Security Council Resolution such as the ICTR and could have had an impact even on second generation Tribunals[89] such as the Special Court for Sierra Leone [SCSL], Special Court for Lebanon [SCL], Extraordinary Chambers for Cambodia [ECCC] and East Timor. For similar reasons it is important that the Tribunals be independent. But it seems all is not lost. Could one argue that the ICTY could have legitimized itself through its work?

# I. Subsequent Legitimization

David Luban has argued that Tribunals might compensate for the fact that they lack the authority of world governments, by building their legitimacy from the bottom up. This means that tribunals can build legitimacy by the fairness of their proceedings and the moral power they

86 G. P. Lombardi, 'Legitimacy and the Expanding Power of the ICTY', 37 *New England Law Review* (2003) 4, 887.

87 *Id*., 888.

88 Alvarez, *supra* note 6, 245*,* 246.

89 D. Shraga 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions', in C. P. Romano *et al*. (eds), *Internationalized Criminal Courts and Tribunals* (2004), 15.

project.[90] In the view of Luban, legitimacy of international trial emanates not from the "shaky political authority that creates them" but from the manifested fairness of their procedures and punishments. He writes that it is important that the ICTY deliver "champagne quality justice" by adhering to due process and fair, humane punishments and that in most respects they do.[91] Because of the insecure pedigree and legitimacy of the ICTY, the authority of the Tribunal must be largely self-generated by strict adherence to natural justice.[92] According to this view, international tribunals must earn their legitimacy rather than inheriting it.[93]

The legitimacy of the tribunals refers to the belief on the part of states and other actors that requests and commands of the tribunal merit compliance.[94] Sandholtz proposes that legitimacy of international institutions can fluctuate over time. Institutions initially need procedural legitimacy (by means of procedures that are accepted as consistent with prevailing norms and standards). After the establishment of an institution the nature of legitimacy shifts to performance legitimacy. Performance legitimacy requires that the functioning of institutions be seen as effective.[95] Sandholtz proposes that tribunals can lose legitimacy if in spite of the initial legitimate establishment they do not act in a way that shows that they deserve continued respect and compliance. The intriguing question is whether tribunals can also acquire legitimacy if they did not initially possess such legitimacy. Sandholtz, however, suggests that the test of legitimacy lies in whether there was substantial opposition to the creation of the tribunals which was not the case with the ICTY. There was a strong degree of consensus in the international community about the establishment of the

90 D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', *Georgetown Public Law Research Paper No. 1154117*, (July 2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154177 (last visited 28 December 2011), 24.

91 *Id*., 14

92 Natural justice includes all the basic procedural rights including the right to a speedy, public trial before an impartial tribunal, the right to offer a defense, the right to be informed of the charges against one in a language one understands, the right to counsel and the right against self-incrimination; the ban on double jeopardy and the right to an appeal.

93 Luban, *supra* note 89, 15.

94 Sandholtz, *supra* note 14, 27.

95 *Id*., 16; J. d'Asprémont distinguishes between legitimacy of origin and legitimacy of exercise. See J. d'Asprémont & E. De Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise', 34 *Fordham International Law Journal* (2011) 2, 190, 232.

ICTY. He suggests that initial legitimacy can fade if an institution is ineffective, incompetent or unfair.

But the procedural fairness of the ICTY has not gone unquestioned. One of the major procedural "deficiencies" at the ICTY has been the judges' ability to make and amend the Rules of Procedure and Evidence. It is problematic that the judges themselves are implicated in the procedural system and the decisions made about it.[96] Whiting has described this as one of the drawbacks of the flexible procedural system at the ICTY.[97] The process of easy amendments of the Rules may lead to expedient, short-term solutions "that sacrifice long-term or more diffuse interests or the rights of the accused"[98]. The practice of frequently amending rules can threaten the principle of legality and legal certainty.[99] And a system that allows for easy amendments can lead to stop-gap or cherry-picked procedural solutions resulting in an incoherent system. Whiting describes the legacy of procedure at the ICTY as a process of essential, though imperfect, experimentation.[100] Albin Eser has highlighted the procedural deficiencies relating to the principle of equality of arms. In his view this goes to the heart of fair trial guarantee.[101] In his view it may be doubted whether the defense is in factual status equal to that of the prosecution. He also highlights concerns regarding the impartiality of the judges despite the fact that repeatedly described by the Appeals Chamber as an important "component of the right to a fair trial".

What explains the widespread tolerance on the part of academic and other commentators for the way the judges have dealt with the Rules and for much of the lawmaking at the ICTY? One explanation for this tolerance could be the lack of a reference point in another system may explain the

96 A. Whiting, 'The ICTY as a Laboratory of International Criminal Procedure', in B. Swart, A. Zahar & G. Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslovia* (2011), 83, 85. See also M. Swart, 'Ad Hoc Rules for ad hoc Tribunals?', 18 *South Africa Journal on Human Rights* (2002), 570-589.

97 Whiting, *supra* note 96, 107.

98 *Id*. According to Whiting it is problematic that the ICTY Trial Chambers will often apply the Rules differently, leading to greater variation among chambers than may be found in domestic criminal justice systems.

99 Swart, *supra* note 96, 577.

100 Whiting, *supra* note 96, 105.

101 A. Eser, 'Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY', in B. Swart, A. Zahar & G. Sluiter (eds), *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (2011), 108, 133.

easier acceptance of commentators.[102] Because the procedures at the ICTY were created within a previously unoccupied space they were accepted by commentators at the outset.[103] The gravity of the crimes committed in the Yugoslavia also contributed to the large measure of international support for the ICTY. David Luban has argued that the ICC's legitimacy hinges on respect for individual rights.[104] Perhaps the same can be said for the ICTY.

Allen Buchanan challenges the contemporary view that adherence to human rights and acting in accordance with the major human rights conventions or articulating international human rights norms legitimizes an institution.[105] He argues that in order to be legitimate an international legal order would have to overcome the "parochialism objection" – the view that human rights are not really universal but a reflection of "Western" or "liberal individualist" thinking. He writes that institutions should not merely be viewed as venues in "which antecedently justified moral norms are given legal form" but as institutions for global public deliberation that can contribute to the moral justification of human rights norms and to their own legitimacy and to the legitimacy of the international legal order as a whole"[106].

## J. Accountability

The question of the legitimacy of the ICTY is closely related to the question of accountability. The accountability of the Tribunals has been affected by questions regarding the funding and independence of the Tribunals. Independence includes both, the independence of mind of a judge (what Franck calls internal independence) as well as the independence of the judges from the countries that nominated them as well as the institutional independence of the Tribunal from the Security Council ("external independence"). Independence can refer to formal or "structural" independence or substantive independence. Over the years of the ICTY's

102 Whiting, *supra* note 96, 83.

103 For more criticism in this regard see P. Murphy, 'Excluding Justice or Facilitating Justice? International Criminal Law would benefit from Rules of Evidence', 12 *International Journal of Evidence and Proof* (2008), 1. See also R. Skilbeck,'Frankenstein's Monster: Creating a New International Procedure', 8 *Journal of International Criminal Justice* (2010) 2, 451, 452.

104 Luban, *supra* note 90, 775.

105 A. Buchanan, 'The Legitimacy of International Law', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 79, 95.

106 *Id*., 96.

existence, doubts have been raised about the independence of certain Tribunal judges. There are other structural features affecting the independence of the Tribunals. Two of the more important are the absence of a separate, structurally independent Appeals Chamber and the fact that the Office of the Prosecutor and Chambers are housed in the same building. And it is argued that the political nature of the appointment process of the judges and the political nature of work of Tribunal judges could militate against an activist approach to lawmaking at the Tribunals.

It is clear that the question of funding has some impact on the independence of the Tribunals. The fact that the Tribunals are funded by the United Nations means that they are not completely independent from the Security Council.[107] It has been argued that the expense of international Tribunals place greater responsibility and accountability on the shoulders of judges.[108]

Trifunovska has written that the manner of financing of the Tribunal through "private donors and "intermeshing of NATO governments" indicates the influence which some countries might exercise on ICTY activities and the lack of independent review of the whole system"[109].

## K. Conclusion

The question of the legality and the legitimacy of the ICTY is important since an unsatisfactory answer to a challenge to its legitimacy taints all other achievements of the ICTY as well as the legacy of the ICTY. To an extent, one can argue that the ICTY's adherence to fair trial standards had a legitimizing effect on the Tribunal and that the end justifies the means. This does not however remove the concerns over the effect the method of establishment had on the legitimacy of the ICTY.

Even if the Tadic Appeals Chamber judges were more persuasive in finding that the ICTY's creation by the SC was legitimate, the legitimacy inquiry does not stop there. It can further be asked whether the Security Council has democratic legitimacy which in itself is a controversial

[107] S. Trifunovska, 'Fair Trial and International Justice: The ICTY as an example with special reference to the Milosevic case', *Rechtsgeleerd Magazijn Themis* (2003) 1, 3, 11. See also F. Mégret, 'The politics of International Criminal Justice', 13 *European Journal of International Law* (2002) 5, 1261.

[108] See M. Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda* (unpublished PhD thesis, 2006), 290.

[109] Trifunovska, *supra* note 106, 11.

question. Alvarez wrote that the Tadic trial was "foundational, political and epic". The Tadic trial was foundational in that it sought to reinvigorate the Nuremberg principles and indirectly the rule of law, political in as far as it sought to deter future war crimes and make reconciliation in Yugoslavia possible and epic since what was at stake is the SC's power to direct the first international criminal proceedings since World War II through *ad hoc* tribunals established by SC fiat.[110] Because of the importance of the *Tadic* judgment and because of the impact this judgment had on subsequent trials (by the ICTY and other Tribunals) the Trial and Appeals Chamber could have formulated more powerful arguments to place the legitimacy of the establishment beyond doubt.

One will of course have a deeper sense of the legacy of the ICTY with the passing of time. It is however not premature to say that the impact of the ICTY has been substantial and groundbreaking. There are already clear signs that the international community has taken the concerns flowing from Tadic seriously. One such concern is that the ICC was established by way of treaty and not by Security Council fiat. As the work of the ICC progresses, the impact and legacy of the ICTY will become clearer.

[110] Alvarez, *supra* note 6, 245.