Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

1995

Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

Chapter VII. Decisions and advisory opinions of international tribunals

Chapter VII

DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS

International Tribunal for the Former Yugoslavia

PROSECUTOR *v.* TADIC[1]

(JURISDICTION)[2]

International Tribunal for the Former Yugoslavia

Trial Chamber. 10 August 1995

(McDonald, *Presiding Judge*; Stephen and Vohrah, *Judges*)

Appeals Chamber. 2 October 1995

(Cassese, *President*; Li, Deschênes, Abi-Saab and Sidhwa, *Judges*)

SUMMARY: *The facts*:—The accused, Mr. Dusko Tadic, was charged by the Prosecutor of the International Tribunal for the Former Yugoslavia[3] with grave breaches of the Geneva Conventions, 1949, serious violations of the laws and customs of war and crimes against humanity, under articles 2, 3 and 5 of the Statute of the Tribunal.[4] The Prosecutor alleged that the accused had taken part in the murder, rape, torture and ill-treatment of persons detained at a prison camp maintained by Bosnian Serbs at Omarska in the Prijedor region of Bosnia and Herzegovina during the summer of 1992 and in the murder and ill-treatment of other captured persons.

The accused challenged the jurisdiction of the Tribunal on the grounds that:

(1) The establishment of the Tribunal and the adoption of its Statute had been beyond the powers of the Security Council, so that the Tribunal had not been established by law and was not entitled to try the accused;

"*Article 2: Grave breaches of the Geneva Conventions of 1949*

"The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(*a*) Wilful killing;

(*b*) Torture of inhuman treatment, including biological experiments;

(*c*) Wilfully causing great suffering or serious injury to body or health;

(*d*) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(*e*) Compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(*f*) Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(*g*) Unlawful deportation or transfer or unlawful confinement of a civilian;

(*h*) Taking civilians as hostages.

"*Article 3: Violations of the laws or customs of war*

"The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(*a*) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(*b*) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(*c*) Attack or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

(*d*) Seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(*e*) Plunder of private property.

"*Article 5: Crimes against Humanity*

"The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(*a*) Murder;

(*b*) Extermination;

(*c*) Enslavement;

(*d*) Deportation;

(*e*) Imprisonment;

(*f*) Torture;

(*g*) Rape;

(*h*) Persecutions on political, racial and religious grounds;

(*i*) Other inhumane acts."

No charges were brought under article 4 of the Statute, which gives the Tribunal jurisdiction over allegations of genocide.

(2) The primacy given to the Tribunal over national courts by article 9 of the Statute was contrary to international law. The accused had a right to trial before a national court;

(3) The Tribunal lacked subject-matter jurisdiction, because under international law the offences listed in articles 2, 3, and 5 of the Statute of the Tribunal could only be committed in the course of an international armed conflict and no such conflict had been taking place in the Prijedor region at the time the offences were allegedly committed.

Both the Prosecutor and the United States of America, which submitted arguments as an *amicus curiae*, contested these grounds.

Held (by the Trial Chamber):—The challenge to the establishment of the Tribunal was incompetent. The other grounds of challenge were dismissed.

(1) The Tribunal did not have the power to question the lawfulness of the actions of the Security Council in establishing the Tribunal. There was no basis in international law for holding that an international court or tribunal had powers of judicial review in respect of decisions of the Security Council in the exercise of its powers to restore and maintain international peace and security under Chapter VII of the Charter of the United Nations. In particular, the decision that the situation in the former Yugoslavia constituted a threat to international peace and security was a political, non-justiciable decision by the Security Council. Moreover, the action of the Security Council in establishing the Tribunal had been a reasonable measure within the scope of its powers under Article 41 of the Charter of the United Nations.

(2) The accused lacked standing to raise the issue of the primacy of the Tribunal over national courts. In addition, the accused had failed to establish that there was a peremptory norm of international law to the effect that a defendant was entitled to trial before a particular national court.

(3) Article 2 of the Tribunal's Statute was a self-contained provision and did not import all the requirements of the Geneva Conventions' system of grave breaches. In particular, there was no requirement that the offences enumerated in that Article had to have been committed in the context of an international armed conflict.

(4) The jurisdiction of the Tribunal to try persons accused of violations of the laws and customs of war under article 3 of the Statute also did not depend upon whether the armed conflict in which those violations were alleged to have been committed was characterized as international or internal. The customary international law of armed conflict included rules applicable to internal armed conflicts, as did common article 3 of the Geneva Conventions, violations of which constituted war crimes.

(5) Crimes against humanity formed part of customary international law and as such were not limited to crimes committed in the course of an international armed conflict. The decision of the International Military Tribunal at Nürnberg to the opposite effect was due to the interpretation which that Tribunal put upon the wording of its Charter and did not reflect contemporary international law.

The accused appealed to the Appeals Chamber of the International Tribunal.

Held (by the Appeals Chamber):—The appeal was dismissed.

1. *The legality of the establishment of the Tribunal*

(Judge Li dissenting) The Tribunal was entitled to inquire, in the context of a challenge to its jurisdiction, into the legality of its own establishment by the Security Council.

(Unanimously) In the circumstances, the Council had been entitled to establish the Tribunal.

(1) The question whether the Tribunal had been lawfully established was a question of jurisdiction, since the Tribunal would lack jurisdiction if it had not been lawfully established.

(2) Although the Tribunal was a subsidiary organ of the Security Council, it was a judicial body and thus different from most of the subsidiary organs which the Council had established. While it did not possess powers of judicial review in respect of resolutions of the Security Council, it had an incidental jurisdiction to determine whether it had been lawfully established which it could exercise solely for the purpose of ascertaining whether it had primary jurisdiction over the case before it.

(3) There was no doctrine of political question or non-justiciability in international law and the Tribunal was not debarred by any such doctrine from examining the accused's challenge to the legality of the establishment of the Tribunal.

(4) The Security Council enjoyed a wide discretion in determining what constituted a threat to international peace and security, a breach of the peace or an act of aggression and what measures were appropriate to deal with such a situation. That discretion was not, however, unlimited. In the present case, the Council's determination that the situation in the former Yugoslavia constituted a threat to the peace was clearly within the scope of that discretion. Similarly, the establishment of the Tribunal was a legitimate exercise by the Council of its power to take non-military measures under article 41 of the Charter.

(5) While there was a general principle of law that a criminal tribunal had to be "established by law", that principle did not apply in such a way that the creation of an international criminal tribunal by resolution of the Security Council would be unlawful. Although the Security Council was not a legislature, it was an organ of the United Nations competent to establish a tribunal with criminal jurisdiction. Provided the tribunal subsequently functioned in accordance with legal standards, it satisfied the general principle of legality.

2. *Primacy over national courts*

(Unanimously) The challenge to the primacy of the Tribunal was unfounded and had to be dismissed.

(1) Although the accused had been the subject of an investigation in Germany, he had not been brought to trial there. There was accordingly no question of a breach of the principle *ne bis in idem* or of needing to invoke the provisions of article 10 of the Statute, which provided for the holding of a new trial in exceptional circumstances.

(2) The accused was entitled to raise an objection to the jurisdiction of the Tribunal based upon the supposed infringement of State sovereignty. The national authorities to the contrary, such as the decisions of the Israel Supreme Court in *Eichmann*[5] and the United States District Court in *United States* v. *Noriega,*[6] did not carry the same weight before an international tribunal. However, the circumstances in which the Tribunal was established and the nature of the offences in respect of which it had jurisdiction justified the primacy which it had been given and which was necessary if the Tribunal was to be effective.

(3) The right of the accused to be tried before a national court in accordance with the principle *jus de non evocando* did not preclude his trial before a properly constituted international tribunal.

3. *Subject-matter jurisdiction*

(Judge Sidhwa dissenting, Judges Li and Abi-Saab dissenting on certain aspects of the reasoning but concurring in the decision) The Tribunal had subject-matter jurisdiction over the case.

(1) An armed conflict existed whether there was a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applied from the initiation of such armed conflicts and extended beyond the cessation of hostilities until a general conclusion of peace was reached or, in the case of internal armed conflicts, a peaceful settlement was achieved. Until that time, international humanitarian law continued to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat took place there. There had therefore been an armed conflict in the Prijedor region of Bosnia and Herzegovina at the time the offences were alleged to have been committed, even though the accused had argued that there had been no fighting in that region and that the Bosnian Serbs had "assumed power" there without encountering opposition.

(2) The conflicts which had occurred in the territory of the former Yugoslavia since 1991 had both internal and international aspects. The Security Council had not characterized those conflicts as international and had intended the Tribunal to adjudicate violations of humanitarian law that occurred in both types of conflict. The subject-matter jurisdiction of the Tribunal thus extended to offences committed in both internal and international armed conflicts.

(3) Article 2 of the Statute, which gave the Tribunal jurisdiction in respect of grave breaches of the Geneva Conventions, was applicable only to offences committed in the context of an international armed conflict. Articles 2 to 5 of the Statute were jurisdictional, not substantive, provisions and neither created nor defined the offences in respect of which they conferred jurisdiction. To determine the content of the law on grave breaches; therefore it was necessary to turn to the Geneva Conventions. The text of the Conventions made clear that the grave breaches provisions which they contained were not applicable to breaches of the law on internal armed conflicts.

(4) Article 3 of the Statute covered all violations of international humanitarian law other than the grave breaches of the Geneva Conventions which were covered by article 2 and those offences covered by articles 4 and 5. It was, therefore, broad enough to give the Tribunal jurisdiction in respect of serious violations of the international law of internal armed conflicts, including common article 3 of the Geneva Conventions and the customary law applicable to internal armed conflicts.

(5) Internal armed conflicts were subject to an extensive body of customary international law which extended beyond the rules codified in common relating to the conduct of combat, such as rules on weaponry and what constituted a legitimate target. They included, but were not limited to, many of the rules set down in Additional Protocol II to the Geneva Conventions. Although many of these rules were similar to those applicable in international armed conflicts, only a number of the rules of the law of international armed conflicts had been extended to conflicts of an internal character. Moreover, it was the general essence of those rules, rather than their detailed regulation, which had become applicable to internal armed conflicts.

(6) Violation of the rules of international law regulating internal armed conflicts entailed individual criminal responsibility.

(7) Article 5 of the Statute was expressly stated to apply to crimes against humanity committed in internal as well as international armed conflicts. The Security Council had, in this respect, adopted a more restrictive view than modern customary international law, which did not require any nexus between crimes against humanity and armed conflict, whatever the position may have been at the time of the Nürnberg trial.

(8) In addition to offences against customary international law, the Tribunal was authorized to apply any treaty which was unquestionably binding on the parties at the time of the alleged offence and the provisions of which were not contrary to peremptory norms of international humanitarian law. In general, therefore, the violation of agreements concluded between the warring parties fell within the Tribunal's jurisdiction under article 3 of the Statute.

Separate opinion of Judge Li

(1) The Tribunal had no jurisdiction to review the legality of the actions of the Security Council and should not have examined the legality of its own establishment.

(2) The interpretation of article 3 of the Statute in the decision of the Appeals Chamber was too far-reaching. The law applicable to internal armed conflicts was far more restricted than the decision suggested.

(3) The Appeals Chamber should have treated the entire conflict in the former Yugoslavia as an international armed conflict.

Separate opinion of Judge Abi-Saab

The Laws applicable in armed conflicts had evolved in such a way that grave breaches should now be seen merely as a specific category of war crimes. The concept of grave breaches should now be regarded as applicable to internal as well as international armed conflicts.

Separate opinion of Judge Sidhwa

(1) The accused was entitled, under article 25 of the Statute and rule 72(B) of the Rules of Procedure,[7] to appeal against the decision of the Trial Chamber, notwithstanding that that decision was of an interlocutory character.

(2) Although the Tribunal did not possess powers of judicial review over Security Council decisions, it was entitled to examine the legality of its own establishment by the Council. It was not necessary in the present case to determine what the Tribunal should have done if it had found that it had not been lawfully established.

(3) The Tribunal had been lawfully established by the Security Council in the exercise of its powers under Chapter VII of the Charter. Whether it had been "established by law" within the meaning of article 14(1) of the International Covenant on Civil and Political Rights was a more difficult question. The Covenant was designed to protect individuals from being tried before tribunals specially created for political purposes. That was not the case here. The Security Council was not a political body in the sense in which a national legislative body in power could be characterized as political. The Council had not acted arbitrarily in establishing the Tribunal and the Tribunal would operate with scrupulous regard for the concept of a fair trial. Nor was there any substance in the objection that the Council would exercise power only in respect of States and not individuals.

(4) The accused lacked standing to complain that the establishment of the Tribunal and its primacy over national courts violated the sovereignty of States. The principle *jus de non evocando* had no application in a case where sovereign States had given up their sovereign right to try certain offences to the Tribunal.

(5) Article 2 of the Statute was applicable only to offences committed in an international armed conflict. Article 3, on the other hand, gave the Tribunal jurisdiction to apply the whole of the law applicable in internal and international armed conflicts.

(6) Whether there had been an armed conflict in the Prijedor region at the relevant time and, if so, whether it was internal or international in character were questions which required findings of fact. The relevant facts should have been established by the Trial Chamber. The Appeal Chamber had an inherent power to remand a case to the Trial Chamber so that the relevant facts could be established and should have done so.

Declaration of Judge Deschênes

The official languages of the Tribunal were English and French and it was therefore regrettable that the Tribunal had given its decision only in English with merely the promise of a French translation in the future.

The following is the text of the decision of the Trial Chamber:

Decision

On 23 June 1995 the Defence filed a preliminary motion, pursuant to rule 73(A)(i) of the Rules of Procedure and Evidence ("the Rules"), which provides for objections based on lack of jurisdiction, seeking dismissal of all of the charges

against the accused. The defence motion challenges the powers of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal") to try the accused under three heads: the alleged improper establishment of the International Tribunal; the improper grant of primacy to the International Tribunal; and challenges to the subject-matter jurisdiction of the International Tribunal. The Prosecutor contends that none of these points is valid and that the International Tribunal has jurisdiction over the accused as charged. The Government of the United States of America has submitted a brief as amicus curiae.

The argument of the parties on this motion was heard on 25 and 26 July and judgment on the motion was reserved, to be delivered this day.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties and the written submission of the amicus curiae,

HEREBY ISSUES ITS DECISION.

REASONS FOR DECISION

I. The establishment of the International Tribunal

A. *Legitimacy of creation*

1. The attack on the competence of the International Tribunal in this case is based on a number of grounds, some of which may be subsumed under one general heading: that the action of the Security Council in establishing the International Tribunal and in adopting the Statute under which it functions is beyond power; hence the International Tribunal is not duly established by law and cannot try the accused.

2. It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what the creation of the International Tribunal did; that there existed and exists now no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council

is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong.

3. Essential to these submissions is, of course, the concept that this Trial Chamber has the capacity to review and rule upon the legality of the acts of the Security Council in establishing the International Tribunal. This the defence asserts, doing so by way of attack upon the jurisdiction of the International Tribunal.

4. There are, clearly enough, matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather of the lawfulness of its creation, involving scrutiny of the powers of the Security Council and of the manner of their exercise; perhaps, too, of the appropriateness of its response to the situation in the former Yugoslavia.

5. The Trial Chamber has heard out the defence in its submissions involving judicial review of the actions of the Security Council. However, this 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 jurisdictional. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.

6. The force of criminal law draws its efficacy, in part, from the fact that it reflects a consensus on what is demanded of human behaviour. But it is of equal importance that a body that judges the criminality of this behaviour should be viewed as legitimate. This is the first time that the international community has created a court with criminal jurisdiction. The establishment of the International Tribunal has now spawned the creation of an ad hoc Tribunal for Rwanda. Each of these ad hoc Tribunals represents an important step towards the establishment of a permanent international criminal tribunal. In this context, the Trial Chamber considers that it would be inappropriate to dismiss without comment the accused's contentions that the establishment of the International Tribunal by the Security Council was beyond power and an ill-founded political action, not reasonably aimed at restoring and maintaining peace, and that the International Tribunal is not duly established by law.

7. Any discussion of this matter must begin with the Charter of the United Nations. Article 24, paragraph 1, provides that the Members of the United Nations:

> "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

The powers of the Security Council to discharge its primary responsibility for the maintenance of international peace and security are set out in Chapters VI, VII, VIII and XII of the Charter. The International Tribunal was established

under Chapter VII. The Security Council has broad discretion in exercising its authority under Chapter VII and there are few limits on the exercise of that power. As indicated by the *travaux préparatoires:*

> "Wide freedom of judgment is left as regards the moment [the Security Council] may choose to intervene and the means to be applied, with sole reserve that it should act 'in accordance with the purposes and principles of the [United Nations]'." (See Statement of the Rapporteur of Committee III/3, document 134, III/3/3, 11 UNCIO documents 785 (1945).)

The broad discretion given to the Security Council in the exercise of its Chapter VII authority itself suggests that decisions taken under this head are not reviewable.

8. For the defence it is said that it is a basic human right of an accused to have a fair and public hearing by a competent, independent and impartial tribunal established by law. The defence asserts that this right is protected by a panoply of principles of fundamental justice recognized by human rights law. There can be no doubt that the International Tribunal should seek to provide just such a trial; indeed, in enacting its Statute, care has been taken by the Security Council to ensure that this in fact occurs and the judges of the International Tribunal, in framing its Rules, have also paid scrupulous regard to the requirements of a fair trial. For example, article 21 of the Statute of the International Tribunal guarantees the accused the right to a fair trial and article 20 obligates the Trial Chambers to ensure that trials are, in fact, fair. There are several other provisions to the same effect. However, it is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal.

9. The defence seeks to extend the competence of the International Tribunal to review the actions of the Security Council by reference to the Rules of the International Tribunal. It refers first to rule 73(A)(i), which provides that preliminary motions by the accused can include: "objections based on lack of jurisdiction". That rule relates to challenges to jurisdiction and is no authority for engaging in an investigation, not into jurisdiction, but into the legality of the action of the Security Council in establishing the International Tribunal. The defence also points to rule 91, "False testimony under solemn declaration", as an example of the exercise by the International Tribunal of powers that are not explicitly provide for in its Statute. There is, however, no analogy to be drawn between the inherent authority of a Chamber to control its own proceedings and any suggested power to review the authority of the Security Council. Therefore, even were it conceivable that the Rules adopted by the judges could extend the competence of the International Tribunal, the Rules referred to by the defence do not support such an enlargement.

10. The defence relies on, or at least refers to, what has been said by the International Court of Justice ("the Court") in three cases: *Certain Expenses of the United Nations, ICJ Reports 1962*, p. 151, at p. 168 (Advisory Opinion of 20 July) (the "*Expenses Advisory Opinion*"),[8] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971,* p. 16, at p. 45 (Advisory Opinion of 21 June) (the "*Namibia Advisory Opinion"*)[9] and *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United States), ICJ Reports 1992,* p. 114, at p. 176 (Provisional Measures Order of 14 April) (the "*Lockerbie* decision").[10] In the first of these, the *Expenses Adivosry Opinion*, the Court specifically stated that, unlike the legal system of some States, there exists no procedure for determining the validity of acts of organs of the United Nations. It referred to proposals at the time of drafting of the Charter that such a power should be given to the Court and to the rejection of those proposals.

11. In the second of these cases, the *Namibia Advisory Opinion*, the Court dealt very specifically with this matter, stating that: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned."[11]

12. Finally, in the *Lockerbie* decision, Judge Weeramantry, in his dissenting opinion, but in this respect not in dissent from other members of the Court, said that "It is not for this Court to sit in review on a given resolution of the Security Council"[12] and, that in relation to the exercise by the Security Council of its powers under Chapter VII:

> "the determination under Article 29 of the existence of any threat to the peace … is one entirely within the discretion of the Council. … the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. … Once [such a determination is] taken the door is opened to the various decisions the Council may make under that Chapter."[13]

13. These opinions of the Court clearly provide no basis for the International Tribunal to review the actions of the Security Council, indeed, they are authorities to the contrary.

14. In support of its submission that this Trial Chamber should review the actions of the Security Council, the defence contends that the decisions of the Security Council are not "sacrosanct". Certainly, commentators have suggested that there are limits to the authority of the Security Council. It has been posited that such limits may be based on Article 24, paragraph 2, which provides that the Security Council:

> "shall act in accordance with the Purposes and Principles of the United Nations. The specific powers appointed to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

One commentator interprets this provision to mean that the Security Council "cannot, in principle, act arbitrarily and unfettered by any restraints". (D.W. Bowett, *The Law of International Institutions*, p. 33 (1982).) Another commentator has

taken the position that, although the Security Council has broad discretion in the field of international peace and security, it cannot "act arbitrarily or use the existence of a threat to the peace as a basis for action which … is for collateral and independent purposes, such as the overthrow of a government or the partition of a State". (Ian Brownlie, "The Decisions of Political Organs of the United Nations and the Rule of Law", in *Essays in Honour of Wang Tieya*, p. 95 (1992).)

15. Support for the view that the Security Council cannot act arbitrarily or for an ulterior purpose is found in the nature of the Charter as a treaty delegating certain powers to the United Nations. In fact, such a limitation is almost a corollary of the principle that the organs of the United Nations must act in accordance with the powers delegated them. It is a matter of logic that if the Security Council acted arbitrarily or for an ulterior purpose it would be acting outside the purview of the powers delegated to it in the Charter.

16. Although it is not for this Trial Chamber to judge the reasonableness of the acts of the Security Council, it is without doubt that, with respect to the former Yugoslavia, the Security Council did not act arbitrarily. To the contrary, the Security Council's establishment of the International Tribunal represents its informed judgment, after great deliberation, that violations of international humanitarian law were occurring in the former Yugoslavia and that such violations created a threat to the peace. One commentator has noted the "careful, incremental approach" of the Security Council to the situation in the former Yugoslavia and described the establishment of the International Tribunal as a protracted, four-step process involving: "(1) condemnation; (2) publication; (3) investigation; and (4) punishment". (James C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", 87 *AJIL* 639, at pp. 640-2 (1993).) First, with its resolution 764 (1992) adopted on 13 July 1992, the Security Council stressed that "persons who commit or order the commission of grave breaches of the[1949 Geneva] Conventions are individually responsible in respect of such breached". Second, the Security Council publicized this condemnation by adopting, on 12 August 1992, resolution 771 (1992), which called upon States and other bodies to submit "substantiated information" to the Secretary-General, who would report to the Security Council "recommending additional measures that might be appropriate". Third, by resolution 780 (1992) of 6 October 1992, the Security Council established the Commission of Experts to investigate these violations of international humanitarian law. The Security Council in due course received the report of the Commission of Experts, which concluded that grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia including wilful killing, ethnic cleansing, mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. (See interim report of the Commission of Experts, document S/25274 (26 January 1993).) Finally, on 22 February 1993, by resolution 808 (1993), the Security Council decided that an international tribunal should be established and directed the Secretary-General to submit specific proposals for the implementation of that decision. On 25 May 1993, in resolution 827 (1993), the Security Council adopted the draft Statute and thus established the International Tribunal.

17. None of the hypothetical cases which commentators have suggested as example of limits on the powers of the Security Council, whether imposed by the terms of the Charter or general principles of international law and, in particular, *jus cogens*, have any relevance to the present case. Moreover, even if there be such limits, that is not to say that any judicial body, let alone this International Tribunal, can exercise powers of judicial review to determine whether, in relation to an exercise by the Security Council of powers under Chapter VII, those limits have been exceeded.

18. One may add that in the present case any submission to the contrary becomes particularly unattractive when, in the notorious circumstances of the former Yugoslavia, the Security Council has done no more than take the step of "ameliorating a threat to international peace and security by providing for the prosecution of individuals who violate well-established international law … [something] best addressed by a judicial remedy". (O'Brien, *supra*, at p. 643.)

19. It is not irrelevant that what the Security Council has enacted under Chapter VII is the creation of a tribunal whose jurisdiction is expressly confined to the prosecution of breaches of international humanitarian law that are beyond any doubt part of customary law, not the establishment of some eccentric and novel code of conduct or some wholly irrational criterion, such as the possession of white hair, as was instanced in argument by the defence. Arguments based upon *reductio ad absurdum* may be useful to destroy a fallacious proposition but will seldom provide a firm foundation for the creation of a valid one.

20. In argument the spectre was raised of interference by the Security Council in the proceedings of the International Tribunal, for instance, by the abolition of the International Tribunal, in midstream as it were, for wholly political reasons. No doubt this would be within the power of the Security Council, but so too is like action in a national context. National legislatures, with greater or lesser ease, depending upon their powers under their respective constitutions or governing laws, may abolish courts previously created but this in no way detracts from the status of those courts as entities established by law.

21. The Security Council established the International Tribunal as an enforcement measure under Chapter VII of the Charter of the United Nations after finding that the violations of international humanitarian law in the former Yugoslavia constituted a threat to the peace. In making this finding, the Security Council acted under Article 39 of the Charter, which provides:

> "The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

22. When, in resolution 827 (1993), the Security Council stated that it was "convinced" that, in the "particular circumstances of the former Yugoslavia", the establishment of the International Tribunal would contribute to the restoration and maintenance of peace, the course it took was novel only in the means adopted but not in the object sought to be attained. The Security Council has on a number of occasions addressed humanitarian law issues in the context

of threats to the peace, has called upon States to comply with obligations imposed by humanitarian law and has on occasion taken steps to ensure such compliance. It has done so, for example, in relation to Southern Rhodesia in 1965 and 1966, South Africa in 1977, Lebanon on a number of occasions in the 1980s, Iran and Iraq in 1987, Iraq again in 1991, Haiti and Somalia in 1993 and, of course, Rwanda in 1994. In the last of these, the establishment of the Rwanda Tribunal by the Security Council followed its finding that the conflict there involved violations of humanitarian law and was a threat to the peace.

23. The making of a judgment as to whether there was such an emergency in the former Yugoslavia as would justify the setting up of the International Tribunal under Chapter VII is eminently one for the Security Council and only for it; it is certainly not a justiciable issue but one involving considerations of high policy and of a political nature. As to whether the particular measure of establishing the International Tribunal is, in fact, likely to be conducive to the restoration of peace and security is, again pre-eminently a matter for the Security Council and for it alone and no judicial body, certainly not this Trial Chamber, can or should review that step.

24. The concept of non-justiciability, in a national context, has been described as follows:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate braches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." (*Baker v. Carr*, 369 US 186, at p. 217 (1962).)

The validity of the decision of the Security Council to establish the International Tribunal rests on its finding that the events in the former Yugoslavia constituted a threat to the peace. This finding is necessarily fact-based and raises political, non-justiciable issues. As noted by Judge Weeramantry, such a decision "entails a factual and political judgment and not a legal one". (The *Lockerbie* decision, at p. 176).[14] A commentator has agreed, saying that "a threat to international peace and security is not a fixed standard which can be easily and automatically applied" (David L. Johnson, Note, "Sanctions and South Africa", 19 Harv. Intl LJ 887, at p. 901 (1978). The factual and political nature of an Article 29 determination by the Security Council makes it inherently inappropriate for any review by this Trial Chamber.

25. The defence contends that there has been a lack of consistency in the actions of the Security Council. Certainly the International Tribunal is the first of its kind to be created. However, the fact that the Security Council has not taken a similar step in other, earlier cases cannot in itself be of any relevance in determining the legality of its action in this case.

26. Article 41 of the Charter provides:

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

The Article, on its face, does not limit the discretion of the Security Council to take measures not involving the use of armed force.

27. That it was not originally envisaged that an ad hoc judicial tribunal might be created under Chapter VII, even if that be factually correct, is nothing to the point. Chapter VII confers very wide powers upon the Security Council and no good reason has been advanced why Article 41 should be read as excluding the step, very appropriate in the circumstances, of creating the International Tribunal to deal with the notorious situation existing in the former Yugoslavia. This is a situation clearly suited to adjudication by a tribunal and punishment of those found guilty of crimes that violate international humanitarian law. This is not, as the defence puts it, a question of the Security Council doing anything it likes; it is a seemingly entirely appropriate reaction to a situation in which international peace is clearly endangered.

28. The defence argues that the establishment of the International Tribunal is not a measure contemplated by Article 41 because the examples included in that Article focus on economic and political measures, not judicial measures. As the defence concedes, however, the list in that Article is not exhaustive. Once again, the decision of the Security Council in this regard is fraught with fact-based, policy determinations that make this issue non-justiciable.

29. Further, the defence contends that the International Tribunal is not an appropriate measure under Article 41 because it has failed to restore peace in the former Yugoslavia. However, the accused is but the first and, as yet, the only accused to be brought before the International Tribunal, and it is wholly premature at this initial stage of its functioning to attempt to assess the effectiveness of the International Tribunal as a measure to restore peace, even were it the function of the International Tribunal to do so.

30. The Security Council discussions on the situation in the former Yugoslavia suggest two ways in which the International Tribunal would help in restoring and maintaining peace. First, several States expressed the view that the creation of the International Tribunal would deter further violations of international humanitarian law. (See Provisional Verbatim Record, UN SCOR, 48th Session, 3175th mtg., pp. 8 and 22, S/PV 3175, 3217th mtg., S/PV 3217, pp. 12, 19.

31. Second, States took the position that the establishment of the International Tribunal would assist in the restoration of peace in the region. At the Security Council meeting on resolution 808 (1993), Hungary, in supporting the establishment of the International Tribunal, explained how the International Tribunal would be helpful in this regard:

> "The way the international community deals with questions relating to the events in the former Yugoslavia will leave a profound mark on the future of that part of Europe, and beyond. It will make either easier or more painful, or even impossible, the healing of the psychological wounds the conflict

has inflicted upon peoples who for centuries have lived together in harmony and good-neighbourliness, regardless of what we may hear today from certain parties to the conflict. We cannot forget that the peoples, the ethnic communities and the national minorities of Central and Eastern Europe are watching us and following our work with close attention. (Provisional Verbatim Record of 22 February 1993, *supra*, at 19-20.)

Slovenia also indicated its conviction that:

"[T]he establishment of such a tribunal is a necessary and very important step, given the fact that those responsible for such crimes would be judged by an impartial judicial body as well as the fact that it could also contribute positively to the finding of solutions for the restoration of peace in the above-mentioned regions. (Letter from the Permanent Representative of Slovenia to the United Nations addressed to the Secretary-General, document S/25652 (22 April 1993))

Similarly, a commentator who has written extensively about the International Tribunal has stated:

"[I]t is important to try individuals responsible for crimes if there is to be any real hope of defusing ethnic tensions in this region. Blame should not rest on an entire nation but should be assigned to individual perpetrators of crimes and responsible leaders." (Theodor Meron, "Case for War Crimes Trials in Yugoslavia", 72 *Foreign Afairs* 122, at p. 134 (1993))

The Trial Chamber agrees that due to the nature of the conflict, an adjudicatory body is a particularly appropriate measure to achieve lasting peace in the former Yugoslavia. In any case, the ultimate success or failure of the International Tribunal is certainly not an issue for this Trial Chamber.

32. Then it is said that international law requires that criminal courts be independent and impartial and that no court created by a political body such as the Security Council can have those characteristics. Of course, criminal courts worldwide are the creations of legislatures, eminently political bodies. The Court, in the *Effect of Awards* case, specifically held that a political organ of the United Nations—in that case, the General Assembly—could and had created "an independent and truly judicial body". (*Effect of Awards of Compensation made by the United Nations Administrative Tribunal, ICJ Reports 1954,* p. 47, at p. 53 (Advisory Opinion of 13 July) ("*Effect of Awards"*).[15]) The question whether a court is independent and impartial depends not upon the body that creates it but upon its constitution, its judges and the way in which they function. The International Tribunal has, as its Statute and Rules attest, been constituted so as to ensure a fair trial to an accused and it is to be hoped that the way its Judges administer their jurisdiction will leave no room for complaints about lack of impartiality or want of independence.

33. The fact that the Security Council has established an ad hoc tribunal is also said to reveal invalidity because it is said to deny to the accused the right conferred by Article 14 of the International Convention on the Protection of Civil and Political Rights ("ICCPR") to be tried by a tribunal "established by law". However, on analysis this introduces no new concept; it is but another way of expressing the general complaint that the creation of the International Tribunal was beyond the power of the Security Council.

34. It is noteworthy that, in the context of the International Covenant and its entitlement in Article 14 to a trial by a "tribunal established by law", this phrase requires only that the tribunal be legally constituted. At the time Article 14 was being drafted, it was sought unsuccessfully to amend it to require that tribunals should be "pre-established". As Professor David Harris puts it in his article "The Right to a Fair Trial in Criminal Proceedings as a Human Right", 16 ICLQ 353, at p. 356 (1967):

> An amendment which sought to change the wording of the United Nations text to read "pre-established" and so cover all ad hoc or special tribunals was firmly and successfully opposed, however, on the ground that this would make normal judicial reorganization difficult. Mention was also made of the Nuremberg and Tokyo Tribunals which were ad hoc and yet which, it is generally agreed, gave the accused a fair trial in a procedural sense in most respects … the important consideration is whether a court observes certain other requirements once it begins to function, however it might be created.

35. It is also argued that Article 29 of Chapter VI of the Charter does not contemplate the creation by the Security Council of an international judicial body when it refers to the creation of subsidiary organs. The reasoning behind this submission is no more than an assertion that a judicial body cannot be an additional organ of some other body; yet Article 29 is expressed in the broadest terms and nothing appears to limit its scope to non-judicial organs. In any event, it is not under Chapter VI of the Charter that the Security Council has established this Tribunal; as the Statute of the International Tribunal declares in its opening paragraph, it is as a measure under Chapter VII that the Security Council has created this International Tribunal. Moreover, in the *Effect of Awards* case mentioned above, the Court specifically decided that the General Assembly had the power to create an administrative tribunal. (*Effect of Awards* case at pp. 56-61.)[16] If the General Assembly has the authority to create a subsidiary judicial body, then surely the Security Council can create such a body in the exercise of its wide discretion to act under Chapter VII.

36. Nor has any basis been established for denying to the Security Council the power of indirect imposition of criminal liability upon individuals through the creation of a tribunal having criminal jurisdiction. On the contrary, given that the Security Council found that the threat to the peace posed by the conflict in the former Yugoslavia arose because of large-scale violations of international humanitarian law committed by individuals, it was both appropriate and necessary for the Security Council, through the International Tribunal, to act on individuals in order to address the threat to the peace. In this regard it is important that when, in its resolutions 731 (1992) and 748 (1992), the Security Council required the Libyan Government to surrender the two Libyan nationals who were accused of the Lockerbie bombing and imposed mandatory commercial and diplomatic sanctions to obtain Libya's compliance with its decision, it was in substance acting upon individuals, seeking the extradition and trial of those Libyan nationals.

37. Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is it issue is

the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter. In particular, that was achieved, in the case of action by the Security Council under Chapter VII, by Article 2, paragraph 7, of the Charter and its reference to the application of enforcement measures under Chapter VII. The same observation applies to the contention that there is some vice involved in the conferring of primacy upon this Tribunal. That is no more than a means by which the Security Council seeks to give effect to the powers conferred upon it by Chapter VII. In any event, it is by no means clear that an individual defendant has standing to raise this point.

38. The submission that there should have been involvement of the General Assembly in the creation of the International Tribunal can only have any meaning if what is suggested is the creation of a tribunal by means of an amendment of the Charter. If, however; the International Tribunal can, as seems clear, be created under Chapter VII, the suggestion of an amendment of the Charter is as unnecessary, as it is impractical as a measure appropriate by way of a response to the current situation in the former Yugoslavia.

39. It was claimed on behalf of the accused that he was disadvantaged by his removal from the jurisdiction of German courts to that of the International Tribunal since that denied him the opportunity under the Optional Protocol to the International Covenant on Civil and Political Rights to have recourse to the Human Rights Committee to complain about the trial accorded him. No doubt this is so, since that right does not appear to apply to proceedings before international tribunals, but that is nothing to the point in any challenge to the jurisdiction of this Trial Chamber; it can only be remedied, if remedy is required, by a further Protocol to the Covenant. A similar comment applies in the case of the European Convention on Human Rights to which the defence also refers.

40. The foregoing disposes of the various submissions of the defence so far as they relate to the legality of the creation of the International Tribunal, submissions to which the Trial Chamber felt it proper to refer since the defence raised them but, many of which, as stated above, it does not regard as properly open for consideration by this Trial Chamber since they go, not so much to its jurisdiction, as to the unreviewable lawfulness of the actions of the Security Council.

B. *Primacy of the International Tribunal*

41. The Trial Chamber deals next with the defence argument that the primacy jurisdiction conferred upon the International Tribunal by Article 9, paragraph 2, finds no basis in international law because the national courts of Bosnia and Herzegovina or, alternatively, of the entity known as the Bosnian Serb Republic, have primary jurisdiction to try the accused. This argument in effect again challenges the legality of the action of the Security Council in establishing the International Tribunal: the answer to this has already been provided above. The Trial Chamber is not entitled to engage in an exercise involving the review of a resolution passed by the Security Council. In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves

a plea that the sovereign State may raise or waive and a right clearly the accused cannot take over from that State. (See *Israel* v. *Eichmann,* 36 *ILR* 5, at 62 (1961).) In this regard, it is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused—Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction. As to the entity known as the Bosnian Serb Republic, similarly, the accused as an individual, has no *locus standi*, for the reasons given above, to raise the issue of this entity's sovereignty rights should it have been endowed with all the attributes of Statehood.

42. Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.

43. As to the invocation of *jus de non evocando*, which has been dealt with above, nothing more need be said except that the defence has in no way established that the principle is so universal in application that it amounts to a peremptory norm of international law which cannot be breached in any event. Therefore the Trial Chamber proposes to speak no more of it.

44. One final word before leaving this topic. The crimes with which the accused is charged form part of customary international law and existed well before the establishment of the International Tribunal. If the Security Council in its informed wisdom, acting well within its powers pursuant to Articles 39 and 41 under Chapter VII of the Charter, creates the International Tribunal to share the burden of bringing perpetrators of universal crimes to justice, the Trial Chamber can see no invasion into a State's jurisdiction because, as it has been rightly argued on behalf of the Prosecutor, they were never crimes within the exclusive jurisdiction of any individual State. In any event, Article 2, paragraph 7, of the Charter, as has been noted above, prohibiting intervention by the United Nations in matters essentially within a State's domestic jurisdiction, is qualified in that "this principle shall not prejudice the application of enforcement measures under Chapter VII".

…

The following is the text of the decision of the Appeals Chamber:

…

B. Admissibility of plea based on the invalidity of the establishment of the International Tribunal

13. Before the Trial Chamber, the Prosecutor maintained that:

(1) The International Tribunal lacks authority to review its establishment by the Security Council (*Prosecutor Trial Brief*, at pp. 10-12); and that in any case

(2) The question whether the Security Council in establishing the International Tribunal complied with the Charter of the United Nations raises "political questions" which are "non-justiciable" (*ibid*., at pp. 12-14).

The Trial Chamber approved this line of argument.

This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject matter of the plea as a "political question" and, as such, "non-justiciable", regardless of whether or not it falls within its jurisdiction.

1. *Does the International Tribunal have jurisdiction?*

14. In its decision, the Trial Chamber declares:

> "[I]t is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal." (*Decision at Trial*, para. 8.)

Both the first and the last sentences of this quotation need qualification. The first sentence assumes a subjective stance, considering that jurisdiction can be determined exclusively by reference to or inference from the intention of the Security Council, thus totally ignoring any residual powers which may derive from the requirements of the "judicial function" itself. That is also the qualification that needs to be added to the last sentence.

Indeed, the jurisdiction of the International Tribunal, which is defined in the middle sentence and described in the last sentence as "the full extent of the competence of the International Tribunal", is not in fact so. It is what is termed in international law "original" or "primary" and sometimes "substantive" jurisdiction. But it does not include the "incidental" or "inherent" jurisdiction which derives automatically from the exercise of the judicial function.

15. 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 s "subsidiary organ" of the Security Council (see Charter of the United Nations, Articles 7(2) and 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Council not only decided to estab-

lish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal.

16. In treating a similar case in its advisory opinion on the *Effect of Awards of the United Nations Administrative Tribunal*, the International Court of Justice declared:

> "[T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgments cannot bind the General Assembly which established it.
>
> …
>
> The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body. (*Effect of Awards of Compensation made by the United Nations Administrative Tribunal, ICJ Reports 1954,* p. 47 at pp. 60-1 (Advisory Opinion of 13 July) (hereinafter "*Effect of Awards"*).[17])

17. Earlier, the Court had derived the judicial nature of the United Nations Administrative Tribunal (UNAT) from the use of certain terms and language in the Statute and its possession of certain attributes. Prominent among these attributes of the judicial function figures the power provided for in article 2, paragraph 3, of the Statute of UNAT:

> "In the event of a dispute as to whether the Tribunal has competence the matter shall be settled by the decision of the Tribunal. (ibid., at pp. 51-52, quoting statute of the United Nations Administrative Tribunal, article 2, para. 3.[18])

18. This power, known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction". It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done (see, e.g., Statute of the International Court of Justice, Article 36, para. 6). But in the words of the International Court of Justice:

> "[T]his principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal … but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation." (*Nottebohm Case (Liechtenstein v. Guatemala*), *ICJ Reports 1953*, p. 7, at p. 119 (21 March).[19])

This is not merely a power in the hands of the Tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court—as of any other judicial body—is to ascertain its own competence". (Judge Cordova, dissenting opinion, *Advisory Opinion on Judgments of the Administrative Tribunal of ILO upon Complaints made against UNESCO, ICJ Reports 1956,* p. 77 at p. 163 (Advisory Opinion of 23 October) (Cordova J dissenting).[20])

19. It is true that this power can be limited by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character of the independence of the Tribunal. But it is absolutely clear that such a limitation to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.

As no such limitative text appears in the Statute of the International Tribunal, the International Tribunal can and indeed has to exercise its "*compétence de la compétence*" and examine the jurisdictional plea of the defence, in order to ascertain its jurisdiction to hear the case on the merits.

20. It has been argued by the Prosecutor, and held by the Trial Chamber, that:

> "[T]his 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. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council." (Decision at Trial, pra. 5; see also para. 7, 8, 9, 17, 24.)

There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own "creator". It was not established for that purpose, as is clear from the definition of the ambit of its "primary" or "substantive" jurisdiction in articles 1 to 5 of its Statute.

But his is beside the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it.

21. The Trial Chamber has sought support for its position, in some dicta of the International Court of Justice or its individual judges (see *Decision at Trial* para. 10-13.) to the effect that:

> "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, p. 16, para. 89* (Advisory Opinion of 21 June) (hereafter the *"Namibia Advisory Opinion"*).[21])

All these dicta, however, address the hypothesis of the Court exercising such judicial review as a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it. Indeed, in the *Namibia Advisory Opinion,* immediately after the dictum reproduced above and quoted by the Trial Chamber (concerning its "primary" jurisdiction), the International Court of Justice proceeded to exercise the very same "incidental" jurisdiction discussed here:

> "[T]he question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions. (ibid., at paragraph 89.[22])

The same sort of examination was undertaken by the International Court of Justice, inter alia, in its advisory opinion on the *Effect of Awards Case*:

> "[T]he legal power of the General Assembly to establish a tribunal competent to render judgments binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter." (*Effect of Awards*, at p. 56[23])

Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.

22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.

2. *Is the question at issue political and as such non-justiciable?*

23. The Trial Chamber accepted this argument and classification (See *Decision at Trial*, para. 24.)

24. The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc., in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to exercise jurisdiction over it, regardless of the political background or the other political facets of the issue.

On this question, the International Court of Justice declared in its advisory opinion on *Certain Expenses of the United Nations*:

> "[I]t has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." (*Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), ICJ Reports 1962,* p. 151 at p. 155 (Advisory Opinion of 20 July).[24])

This dictum applies almost literally to the present case.

25. The Appeals Chamber does not consider that the International Tribunal is barred from examination of the defence jurisdictional plea by the so-called "political" or "non-justiciable" nature of the issue it raises.

C. The issue of constitutionality

26. Many arguments have been put forward by appellant in support of the contention that the establishment of the International Tribunal is invalid under the Charter of the United Nations or that it was not duly established by law. Many of these arguments were presented orally and in written submissions before the Trial Chamber. The appellant has asked this Chamber to incorporate into the argument before the Appeals Chamber all the points made at trial. (See *Appeal Transcript*, 7 September 1995, p. 7) Apart from the issues specifically dealt with below, the Appeals Chamber is content to allow the treatment of these issues by the Trial Chamber to stand.

27. The Trial Chamber summarized the claims of the appellant as follows:

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal

did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial Tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts, is, in any event and in itself, inherently wrong." (*Decision at Trial,* para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

1. Was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?

2. Assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?

3. In the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

1. *The power of the Security Council to invoke Chapter VII*

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that Organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).

In particular, Article 24, after declaring, in paragraph 1, that the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security", imposes on it, in paragraph 3, the obligation to report annually (or more frequently) to the General Assembly, and provides more importantly, in paragraph 2, that:

> "In discharging these duties the Security Council shall act in accordance with the Purpose and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII."

The Charter thus speaks the language of specific powers, not of absolute fiat.

29. What is the extent of the powers of the Security Council under Article 39 and the limits thereon, if any?

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the determination that there exists one of the situations justifying the use of the "exceptional powers" of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes recommendations (i.e., opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering measures to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.

The situations justifying resort to the powers provided for in Chapter VII are a "threat to the peace", a "breach of the peace" or an "act of aggression". While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

30. It is not necessary for the purposes of the present decision to examine any further the question of the limits of the discretion of the Security Council in determining the existence of a "threat to the peace", for two reasons.

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" (between the parties or, at the very least, as a "threat to the peace" of other).

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

The second reason, which is more particular to the case at hand, is that appellant has amended his position from that contained in the Brief submitted to the Trial Chamber. Appellant no longer contests the Security Council's power to determine whether the situation in the former Yugoslavia constituted a threat to

the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to [*sic*] such threats … by appropriate measures". ([Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), para. 5.1 (hereinafter "*Defence Appeal Brief*").) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. *The range of measures envisaged under Chapter VII*

31. Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action: as noted above (see para. 29) it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("Pacific Settlement of Disputes") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". (Charter, Article 39.)

A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large. In the latter case, one of course does not have to locate every measure decided by the Security Council under Chapter VII within the confines of Articles 41 and 42, or possibly Article 40. In any case, under both interpretations, the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channeling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

These powers are coercive vis-à-vis the culprit State or entity. But they are also mandatory vis-à-vis the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Article 49), in the implementation of the action or measures decided by the Security Council.

3. *The establishment of the International Tribunal as a measure under Chapter VII*

32. As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. But here again, this discretion is not unfettered; moreover, it is limited to the measures provided for in Articles 41 and 42. Indeed, in the case at hand, this last point serves as a basis for the appellant's contention of invalidity of the establishment of the International Tribunal.

In its resolution 827 (1993), the Security Council considers that "in the particular circumstances of the former Yugoslavia", the establishment of the International Tribunal "would contribute to the restoration and maintenance of peace" and indicates that, in establishing it, the Security Council was acting under Chapter VII. However, it did not specify a particular Article as a basis for this action.

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well as before this Chamber on at least three grounds:

(*a*) That the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;

(*b*) That the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;

(*c*) That the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(*a*) What article of Chapter VII serves as a basis for the establishment of a tribunal?

33. The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Article 41 and 42.

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned". They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ('before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of Article 2, paragraph 7, and the question of their mandatory or recommendatory character is subject to great controversy; all of which renders inappropriate the classification of the International Tribunal under these measures.

34. Prima facie, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force". Appellant, however, has argued before both the Trial Chamber and this Appeals Chamber, that:

> "… [I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures. (Brief

to Support the Motion [of the defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-T), para. 3.2.1 (hereinafter "*Defence Trial Brief"*).)

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. The first argument does not stand by its own language. Article 41 reads as follows:

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

It is evident that the measures set out in Article 41 are merely illustrative *examples* which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force". It is a negative definition.

That the examples to not suggest judicial measures goes some way towards the other argument that the Article does not contemplate institutional measures implemented directly by the United Nations through one of its organs but, as the given examples suggest, only action by Member States, such as economic sanctions (though possibly coordinated through an organ of the Organization). However, as mentioned above, nothing in the Article suggest the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.

Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States. It is also clear that the second sentence, starting with "These [measures]" not "Those [measures]", refers to the species mentioned in the second phrase rather than to the "genus" referred to in the first phrase of this sentence.

36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of "collective measures" that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute faute de mieux, or a "second best" for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force.

In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.

(*b*) Can the Security Council establish a subsidiary organ with judicial powers?

37. The argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable: it results from a fundamental misunderstanding of the constitutional set-up of the Charter.

Plainly, the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East (UNEF) in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards*, the International Court of Justice, in addressing practically the same objection, declared:

> "[T]he Charter does not confer judicial functions on the General Assembly … By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations." (*Effect of Awards,* at p. 61[25])

(*c*) Was the establishment of the International Tribunal an appropriate measure?

39. The third argument is directed against the directionary power of the Security Council in evaluating the appropriateness of the chosen measure and its effectiveness in achieving its objective, the restoration of peace.

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures ex post facto by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in question of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

40. For the aforementioned reasons, the Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.

4. *Was the establishment of the International Tribunal contrary to the general principle whereby courts must be "established by law"?*

41. The appellant challenges the establishment of the International Tribunal by contending that it has not been established by law. The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. It provides:

> "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Similar provisions can be found in article 6, paragraph 1, of the European Convention on Human Rights, which states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …" (European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, article 6, paragraph 1, 213 UNTS 222 (hereinafter "ECHR"))

and in article 8, paragraph 1, of the American Convention on Human Rights, which provides:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." (American Convention on Human Rights, 22 November 1969, article 8, paragraph 1, OAS Treaty Series No. 36 at 1 (hereinafter "ACHR"))

The appellant argues that the right to have a criminal charge determined by a tribunal established by law is one which forms part of international law as a "general principle of law recognized by civilized nations", one of the sources of international law in Article 38 of the Statute of the International Court of Justice. In support of this assertion, appellant emphasizes the fundamental nature of the "fair trial" or "due process" guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. The appellant asserts that they are minimum requirements in international law for the administration of criminal justice.

42. For the reasons outlined below, the appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation

which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not entail however that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law".

43. Indeed, there are three possible interpretations of the term "established by law". First, as the appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organization in a democratic society". Therefore the appellant maintains that the International Tribunal has not been "established by law". (*Defence Appeal Brief*, para. 5.4)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (See *Zand v. Austria,* App. No. 7360/76, 15 Eur. Comm'n HR Dec. & Rep. 70, at p. 80 (1979); *Piersack v. Belgium*, App. No. 8692/79, 47 Eur. Ct HR (Ser. B) at p. 12 (1981); *Crociani, Palmiotti, Tanassi and D'Ovidio v. Italy*, App. Nos. 8603/79, 8722/79, 8723/79 and 8729/79 (joined) 22 Eur. Comm'n HR Dec. & Rep. 147, at p. 219 (1981).)

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal system does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (see Charter of the United Nations, Article 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system, and more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, the appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the Charter of the United Nations, it makes decisions binding by virtue of Article 25 of the Charter.

According to the appellant, however, there must be something more for a tribunal to be "established by law". The appellant takes the position that, given the differences between the United Nations system and national division of powers, discussed above, the conclusion must be that the United Nations system is not capable of creating the International Tribunal unless there is an amendment to the Charter. We disagree. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the Charter. As set out above, para. 28-40) we are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: that body not only participated in its setting up, by electing the judges and approving the budget, but also expressed its satisfaction with and encouragement of the activities of the International Tribunal in various resolutions. (See General Assembly resolutions 48/88 (20 December 1993), 48/143 (20 December 1993), 49/10 (8 November 1994) and 49/205 (23 December 1994).)

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law" (*Decision at Trial*, para. 34). Two similar proposals to this effect were made (one by the representative of Lebanon and one by the representative of Chile); if adopted, their effect would have been prevent all ad hoc tribunals. In response, the delegate from the Philippines noted the disadvantages of using the language of "pre-established by law":

> "If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes." (See E/CN.4/SR 109. Economic and Social Council, Commission on Human Rights, Fifth Session, Summary Records, 8 June 1949, document 6.)

As noted by the Trial Chamber in its decision, there is wide agreement that, in most respects, the International Military Tribunals at Nürnberg and Tokyo gave the accused a fair trial in a procedural sense (*Decision at Trial,* at para. 34). The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness.

This concern about ad hoc tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation the phrase "established by law" contained in article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in article 14 of the International Covenant on Civil and Political Rights. (See *General Comment on Article 14,* HR comm. 43rd Sess., Official Records of the General Assembly Fifty-third Session, Suppl, No. 40 (A/43/40) (1998), para. 4, *Cariboni v. Uruguay*, HR Comm. 159/83, (ibid., Thirty-ninth Session, Suppl. No. 40) (A/39/40). A similar approach has been taken by the Inter-American Commission (see, e.g., Inter-Am CHR, Annual Report 1972, OEA/Ser. P, AG/document 305/73/Rev. 1, 14 March 1973, p. 1; ibid., 1978, OEA/Ser. P, AG/document. 409/174, 5 March 1974, pp. 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinize closely "special" or "extraordinary" criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of article 14.

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute, leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. For example, article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the Charter of the United Nations and provides all the necessary safeguards of a fair trial. It is thus "established by law".

48. The first ground of appeal, unlawful establishment of the International Tribunal, is accordingly dismissed.

…

Notes

[1]For full tests of the decisions, see *International Law Reports*, vol. 105, pp. 419-648.

[2]For earlier proceedings in this case, see 101 *ILR* 1. For the decision of the Trial Chamber in *Prosecutor v. Tadic (Protective Measures),* see below [not included in present extract].

[3]The International Tribunal for the Former Yugoslavia was established by Security Council resolution 827 (1993). The Statute of the Tribunal is reproduced in 32 *ILM* (1993), p. 1192;

[4]These articles confer jurisdiction in respect of offences allegedly committed within the territory of the former Yugoslavia since 1 January 1991. Articles 2, 3 and 5 are in the following terms:

[5]36 *ILR* 277

[6]99 *ILR* 143

[7]The texts of article 25 and rule 72(B) are set out in Judge Sidhwa's opinion [not included in present extract].

[8]34 *ILR* 281, at 297.

[9]49 *ILR* 2 at 35.

[10]94 *ILR* 596 (note). The text of the decision of the International Court of Justice in the *Lockerbie* case concerning the United States is not reproduced in full in the *International Law Reports*. The full decision of the Court in the case concerning the United Kingdom is, however, reproduced in full and is substantially identical to that delivered in the United States case. The reference made here can be found, in the United Kingdom case, at 94 *ILR* 478 at 548-9.

[11]49 *ILR* 2 at 35.

[12]In the United Kingdom case at 94 *ILR* 478, at 548-9.

[13]In the United Kingdom case at 94 *ILR* 478, at 549.

[14]In the United Kingdom case at 94 *ILR* 478, at 549.

[15]21 *ILR* 310, at 314.

[16]21 *ILR* 310, at 317-322.

[17]21 *ILR* 310 at 321.

[18]21 *ILR* 310 at 312.

[19]20 *ILR* 567 at 572.

[20]23 *ILR* 517.

[21]49 *ILR* 2 at 35

[22]49 *ILR* 2 at 35

[23]21 *ILR* 310 at 317

[24]34 *ILR* 281 at 285.

[25]21 *ILR* 310 at 321.