IN THE APPEALS CHAMBER

Before: Judge Cassese, Presiding

Judge Li

Judge Deschênes

Judge Abi-Saab

Judge Sidhwa

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 2 October 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

SEPARATE OPINION OF JUDGE SIDHWA ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. William Fenrick
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Milan Vujin
Mr. Alphons Orie
Mr. Krstan Simic

1. The majority judgement of the Court is well founded, the subject of intensive research and the product of great labour. I would very much like to sign it and give myself the honour of being a co-author, but whilst agreeing on most of the conclusions, I wish to record my separate opinion, not unmindful of the merits of the

main judgement. This I do, not to show a mirror to the sun, but because I think it is necessary that the result of separate perceptions in respect of common matters may come on the record and provide food for thought in respect of some very serious and sensitive issues that have arisen before this nascent body, recently established by the United Nations, which is trying to find expression for itself.

2. Before dealing with the main issues arising in this appeal, I feel that certain matters need to be dealt with at the outset:

First: The competency of the present appeal

Second: Certain matters concerning the following subjects, for a better understanding of the issues which are primarily civil but remain to be discussed in the criminal jurisdiction and for avoidance of repetition during the examination of the main issues:

(A) The framework of the United Nations Charter

(B) Constitutional approaches in the national field relating to judicial review,

(C) The role of the Security Council under Chapter VII,

(D) The General Assembly and the Security Council in the framework of the Charter,

(E) The position of the International Court of Justice *vis-à-vis* judicial review,

(F) The position of the International Tribunal *vis-à-vis* powers of judicial review,

A. Facts leading up to the establishment of the International Tribunal.

THE COMPETENCY OF THE APPEAL

3. I would first take up the question as regards the competence of this appeal against the decision of the Trial Chamber passed in preliminary motion.

4. The Prosecutor, in his written submissions, has challenged the competency of this appeal insofar as it relates to the grounds that the Tribunal was unlawfully established and primacy could not be granted to it, as these being matters not relating to the jurisdiction of the Tribunal, Rule 72 (B) of the Tribunal's Rules bars such appeal. During arguments, the Prosecutor also took up the position that the whole of the appeal in respect of all grounds was premature, as Article 25 permitted such filing only after the appellant was found guilty and convicted. During arguments the counsel

for the appellant urged that Rule 72 (B) of the Tribunal's Rules having been framed by the Judges themselves, should be given credence and should be treated as permitting the filing of the appeal. During arguments, in response to certain observations from some members of the Bench that the object of Rule 72 (B) was to supply the defect and expedite the appeal, the Prosecutor shifted from his original position and observed that he supported the observations, as otherwise it would entail Rule 72 (B) being struck down as *ultra vires*, which would place the appellant in the awkward position of having to wait till his conviction was recorded to have his appeal even on a straight jurisdictional question decided, which, if his plea was ultimately accepted, would have rendered the trial useless and subjected the parties to indefinitely long proceedings. As regards the appeal qua the question of unlawful establishment, I have held in para. 33 that the same can be treated as extending into the question of lack of jurisdiction. As regards the appeal qua the question of primacy, I have also held, for reasons given in para 78 that the same result follows. The third question undoubtedly relates to lack of jurisdiction. However, the question as regards whether the appeal qua all questions raised is premature, is still open.

5. I am of the view that a question as regards competency of the appeal, which is an important question of substantive law, cannot be allowed to be decided on the wishes of the parties. Out of respect for the situation created, I would like to look into the matter.

6. The law relating to appeals in most national jurisdictions is that no appeal lies unless conferred by statute. The right to appeal a decision is part of substantive law and can only be granted by the law-making body by specific enactment. Where the provision for an appeal or some form of review by a higher forum is not regulated by the statute under which an order is passed, there is usually some omnibus statute providing for appeals in such cases. The courts have no inherent powers to create appellate provisions or acquire jurisdiction where none is granted. Where the law provides for an appeal, the court may, by the adoption of reasonable and proper rules, supply deficiencies in the statutory provisions as to practice. Appellate courts have no jurisdiction over incompetent appeals other than dismiss them. It is thus clear that a tribunal or court cannot assume appellate powers under any concept of inherent jurisdiction or by expanding its jurisdiction through any amendment to its rules.

7. Statutory provisions regarding appeals do, however, provide for different types of appeals, the several categories of persons that can avail themselves of this remedy and the different kinds of remedies that can be allowed by way of relief, which provisions generally vary from jurisdiction to jurisdiction. This is an appeal against an interlocutory order passed by the Trial Chamber on a preliminary motion moved by the appellant. In this context, it is necessary to see what the Statute of the International Tribunal has to say on the question of appeals.

8. Article 25 of the Tribunal's Statute, which deals with appellate proceedings, states:

"Article 25

Appellate Proceedings

(1) The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or

(b) an error of fact which has occasioned a miscarriage of justice.

(2) The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."

Paras. (a) and (b) or sub-article (1) deal with questions relating to errors of law and fact and the parameters within which they have to be examined; the opening words of sub-article (1) deal with the types of persons entitled to the remedy; and sub-article (2) deals with the types of reliefs allowed by way of remedy.

9. I now turn to some of the Tribunal's Rules which are relevant on the subject of appeals. They are as follows:

"Rule 72

General Provisions

(A) After the initial appearance of the accused, either party may move before a Trial Chamber for appropriate relief or ruling. Such motions may be written or oral, at the discretion of the Trial Chamber.

(B) The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction."

"Rule 73

Preliminary Motions by Accused

(A) Preliminary motions by the accused shall include:

(i) objections based on lack of jurisdiction;

(ii) objections based on defects in the form of the indictment;

(iii) applications for the exclusion of evidence obtained from the accused or having belonged to him;

(iv) applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Sub-rule 82 (B);

(v) objections based on the denial of request for assignment of counsel.

(B) Any of the motions by the accused referred to in Sub-rule (A) shall be brought within sixty days after his initial appearance, and in any case before the hearing on the merits.

(C) Failure to apply within the time-limit prescribed shall constitute a waiver of the right. Upon a showing of good cause, the Trial Chamber may grant relief from the waiver."

"Rule 108

Notice of Appeal

(A) Subject to Sub-rule (B), a party seeking to appeal a judgement or sentence shall, not more than thirty days from the date on which the judgement or sentence was pronounced, file with the Registrar and serve upon the other parties a written notice of appeal, setting forth the grounds.

(B) Such delay shall be fixed at fifteen days in case of an appeal from a judgement dismissing an objection based on lack of jurisdiction or a decision rendered under Rule 77 or Rule 91."

10. The main question that arises is whether Article 25 of the Statute provides both the accused and the Prosecution the right to file appeals against the main judgement after the accused is convicted, but stifles the right of the accused to file appeals against orders passed on preliminary motions till after his conviction is recorded, but does not limit such right of the Prosecutor even though the accused may not have been convicted. This - I think - is how the Prosecutor placed his objection originally.

11. International law is not totally grounded in national concepts, though at times it borrows ideas from national jurisdictions to meet the international range of its objectives. For the most part, it seeks to keep itself free of rigid, strict and inflexible national rules and principles where they tend to be dogmatic or obstruct a fair, liberal or equitable approach to a problem. The strict rules governing appeals and the whole range of rules and procedures surrounding the system, whether substantive or procedural, as found in national systems, may be a source of material to draw from, but international bodies would accept them free from strict rigidities binding them, from which they cannot extricate themselves. International law conceives of procedures which are flexible and subject to modification and change in extreme cases, should questions of fairness and equity come into play.

12. It cannot be denied that the Security Council, which gave birth to the Tribunal, is far removed from its offspring; the umbilical cord having been severed. The Tribunal was created as an independent and impartial body, and, if the report of the Secretary-General carries any meaning, the Tribunal "would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its *judicial functions*." (Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. Document No. 5/25704 of 3rd May, 1993, hereinafter referred to as "the Secretary-General's Report" para 28, emphasis

supplied). A request, therefore, by the International Tribunal for an amendment of any part of its Statute would involve the Security Council in a more difficult exercise to see it through, than what it faced when the Statute was adopted and the mood of the members was more inclined to the measure, than what perhaps it may be today. Be that as it may, to meet such a situation and not to be involved in the judicial functions of the Tribunal, the Secretary-General provided in the Statute of the International Tribunal Article 15, granting power to the Judges to "adopt rules of procedure and evidence for the conduct of appeals...and other appropriate matters." The Judges, in their wisdom, framed Rule 72 (B), to bring the appeal of an accused forward in time if it challenged an interlocutory order dismissing an objection based on lack of jurisdiction, instead of requiring him to wait until he was convicted. As appears *ex-facie* from Article 25 of the Statute, the Prosecutor has such a right before the accused is convicted. To bring forward the accused's appeal, so that he stood on an equal footing with the Prosecutor, was no more than to bring both the accused and the Prosecutor at par. It must not be forgotten that if the said rule had not been framed, the appellant would have had to wait until his main trial was over and if he had then asserted the same ground, with others relating to the main case, and the Appeals Chamber had found his ground acceptable, the whole of the trial and the time consumed therein would have been wasted. Fairness and equity were, therefore, at the root of the amendment, when the Judges granted equal treatment to the accused in respect of this matter, and I would consider Rule 72 (B) as shortening limitation and one framed in an unoccupied field; limitation not having been provided in the Tribunal's Statute. Again, another important matter arises. If I may say with respect, the wording of Article 25 is also not very clear. The report of the Secretary-General in respect of this Article, seems to suggest that "the judgement of the Appeals Chamber affirming, reversing or revising the judgement of the Trial Chamber would be final." If one inspects Article 23 and Secretary-General's Report para 118, the word "judgement" relates to the main judgement. Was, therefore, Article 25 only intended to apply to the main judgement? There is no indication in the Secretary-General's report that Article 25 could also apply to interlocutory orders. The view of the Judges, when they drafted Rule 72 (B), seems to suggest that they assumed that Article 25 covered appeals against the main case and interlocutory matters. Rule 72 (B) implicitly accepts this position. From an overall perspective — and since Rule 72 (B) is intended to meet the requirements of fairness and equity — I would consider it as supplying a deficiency in the statutory provision as to whether appeals against interlocutory orders are permissible and would hold that Rule 72 (B) supplies the deficiency and, being a provision in an unoccupied field, is not *ultra vires* the Tribunal's Statute. I would, therefore, hold that this appeal is maintainable.

THE FRAMEWORK OF THE UNITED NATIONS CHARTER

13. Before delving into the appeal, it is necessary to understand the structural arrangements set forth in the Charter of the United Nations.

14. The Charter establishes six primary bodies at the apex called principal organs i.e., the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat. In addition, the Charter provides for the establishment of subsidiary organs as may be found

necessary in accordance with the provisions contained in the Charter; the General Assembly and the Security Council being given express rights in this respect. The Charter also permits the establishment of commissions by some of the principal organs, as may be required for the performance of their functions; the Economic and Social Council and the International Court of Justice having express powers to do so. The Charter recognises the various specialised agencies established by intergovernmental agreements that have wide international responsibilities as defined in the Charter, provided the Economic and Social Council has entered into agreements with them to bring them into working relationship with the Organisation. Furthermore, the Charter recognises regional agencies set up by Member States for dealing with matters relating to the maintenance of international peace and security, provided their activities are consistent with the purposes and principles of the Organisation, by enabling the Security Council to use such regional agencies for enforcement actions under its authority. Lastly, the Charter recognises the existence of international agencies, as in Article 48, but this perhaps is in the general context of all international bodies created outside the Charter.

15. The establishment of six principal organs of the United Nations and of the Military Staff Committee (now moribund) are the direct outcome of the Charter provisions. The establishment of the subsidiary organs and commissions created by the principal organs is the outcome of the express powers delegated to them in that respect by the Charter. The specialised agencies and regional agencies referred to in the Charter appear to be bodies created by inter-governmental or international groups or agencies, some perhaps sponsored by UN principal organs or sub-organs.

16. It is in the context of the structural arrangements set out above that the question whether a legal tribunal or court can look into the legality of its own establishment or birth, as opposed to review or revise its own orders, whether final or interlocutory, calls for examination.

CONSTITUTIONAL APPROACHES IN THE NATIONAL FIELD

RELATING TO JUDICIAL REVIEW

17. Some observations on the laws dealing with interpretation of constitutional documents, both in the national and international field, will not be out of place. In the national field, countries use a variety of approaches to constitutional questions, such as (i) whether the doctrine of parliamentary supremacy or the supremacy of the legislative body at the apex applies, or (ii) whether the acts of the legislature can be judicially reviewed or held void upon any ground, or (iii) whether any part of the judiciary can judicially review action taken by the main organs, i.e., the legislature, the executive and the judiciary. (The words "judicial review," should hereinafter be taken to mean the power of another higher judicial body or forum to approve, set aside or amend any order, as in appeal or revision, of a particular body, as opposed to the power of that particular body to set aside or amend an order passed by itself, as in simple review). Some countries openly allow their courts to judicially review legislation, even if it directly touches on any part of their constitution. Some adopt

grundnorms or rules as basic to legislation and grant powers to higher forums to judicially review legislation violating such fundamental rights.

18. In short, the question boils down to whether the constitutional document treats any organ or body of a State as supreme or sovereign, whose actions cannot be repealed, annulled or controlled by any other organ or body, or whether it permits any action of any of its organs or bodies to be judicially reviewed by any other organ, such as by a superior court or tribunal, and if so, to what extent and under what conditions. If the power of judicial review is granted, such review is possible under the parameters stated. If not, judicial review is not possible, unless it can be drawn in under more idealistic concepts, such as natural law, historical rules, positive activism, etc., which concepts otherwise are not too easily invocable or applicable. In the American jurisdiction an objection to the lawful establishment of a legal tribunal or body can only be taken by the State in *quo warranto* or other direct proceedings, but not by the individual, and that if such an objection is raised by an individual collaterally in legal proceedings, whether original or appellate, it is rejected. SSee 15 Corpus Juris 875; Ex parte Ward 173 U.S. 452 (1899)C. In the English jurisdiction, all that a court can do is to look at the procedural role as to

whether the bill has passed both Houses and received the Royal assent, but cannot enquire into the mode in which the bill was introduced, nor what was done previous to it, nor what passed in Parliament during its progress. SSee 44 Halsbury's Laws of England, p.504; British Railways Board v. Pickin, (1974), 1 All E. R. 609, (H.L.)C.

19. In the international field, the position is not too different. The constitution of any international body, by whatever name called, would govern the situation. If the constitutional document permits judicial review by any organ or body of any action taken by any other organ or body, judicial review would be available, within the parameters, if any, laid down. Where it is not so, judicial review would not be attracted. One must bear in mind the main scope and purpose of the international body, for not all govern or make laws or rules to enforce their will authoritatively or provide organs having penal or peremptory provisions of enforcement. This, however, does not mean that a non-judicial organ or body that has taken any action cannot itself review its own action. An international body in proper cases cannot be permitted to be bereft of such a power.

THE ROLE OF THE SECURITY COUNCIL

UNDER CHAPTER VII

20. The Security Council of the United Nations, as the main organ charged with the duty of maintaining and restoring peace and security within the limits of the terms contained in the Charter, has had a difficult role. Objections as regards its legal role and the scope of its authority have been raised from time to time, specially in regard to its enforcement powers and peace-keeping operations. With the end of the cold war and consequent increase in Security Council activities, the bounds of its authority in this field have been debated often. From decisions on questions well within its clear jurisdictional limits, to those falling within permissible frontiers, the Council is

alleged to have broken its banks and intruded into unchartered territory, originating controversy, undermining its respect and almost compelling certain States to renege on their duty to accept its resolutions. These features raise the question whether, under the terms of the United Nations Charter, the actions of the Security Council, taken in exercise of its Chapter VII powers, can be judicially reviewed, where such actions are outside the scope of the Council's jurisdictional boundaries, or violate the principles and purposes of the Charter or *jus cogens*?

21. The Security Council is basically not a judicial body. Its discretionary power under Article 39 to determine what constitutes the existence of a threat to the peace, breach of the peace, or acts of aggression, is not a matter which can be decided within the limits of any hidebound judicial approach. It must not be forgotten that under national laws these matters generally fall within the category of "Acts of State" (eminent domain), where public or judicial interference is treated as barred. Though States have transferred their sovereignty on these matters to the Security Council, it cannot be assumed that in delegating their authority to the Security Council the States granted full powers to the Security Council to act according to its whims or purely on capricious considerations. Thus, an objective approach to the question cannot be totally ignored, just because a legal determination of such a question does not invite a strictly juridical approach. The fact that during the San Francisco Conference, attempts to limit the Council's discretion were resisted, is no ground to hold that the decision was correct for all times to come. It is alleged that experience over the last fifty years favours a change of view. The vast variety of situations in which the Council has determined what constitutes a threat to the peace, has raised conflicting views. All exercise of discretionary power is subject to the rule of fairness and reasonableness and to the jurisdictional limits provided, or which fairly and inherently can be assumed out of the objects and purposes that call for its exercise and the surrounding circumstances that create its need. International law is not totally silent in regard to matters as to what constitutes a threat to the peace, or a breach of the peace, or an act of aggression. Even if it were, common sense and logic would supply the mutations and channel the discretion into guided parameters. To impute to the Council the levity of an open and loose discretion, just because its actions are not open to judicial review by an outside independent body, would be to provide the Council the free liberty of acting outside permissible parameters; thus shaking public confidence. One safeguard is that the Council create new mutations to provide for itself guiding parameters, so that even if there are no preliminary rules governing its application, its exercise is founded in some method. As Lord Penzance submitted in Morgan & Morgan (1869, L.R. 1P. & D. 644 at 647), "the duty of reducing its exercise to method devolves on the Court which exercises it." At least the disgruntled could say, "though this be madness, yet there is method in it" (Shakespeare).

22. But any attempt to limit the exercise of discretion in any form could destroy the very basis for which Article 39 has been created. Complex situations in the modern world have compelled the Council to broaden the category of situations that it treats as threats to peace, though it may be alleged that such situations have not presented themselves as clear cases for the exercise of discretion. Hideous violations of humanitarian law, which have left the world community aghast, have compelled Member States of the United Nations and the Security Council to find solutions. Such violations have led the Council to take action under Chapter VII on the basis of special circumstances and as action not constituting precedents. If the world

community, through its representatives, discreetly permits the Council to exercise a free and loose discretion, it hardly lies in its domain to pull up the Council for such laxity when its representatives are not committing any indiscretion. Since a string of extraordinary situations inviting an immediate response have presented themselves, inviting Chapter VII measures, the loose parameters covering the exercise of discretion, with the Council being the sole judge of when and where to act or when and where to enlarge or restrict the exercise of its jurisdiction, have come to be accepted as a reality and part of the system.

23. Even if this be accepted, the attitude of certain permanent Members of the Council to unduly frustrate the exercise of a valid action by exercise of the veto power, or of Members to either support action, where it is not permissible, or not support action, where it is truly desirable, has raised concerns as regards the wavering and uncertain exercise of political power. Where serious doubts arise as regards the action of the Council being *ultra vires,* or against the principles and purposes of the Charter, or violating the *jus cogens* rule, a speedy remedy is desirable. If it is not available, Member States would band themselves together to defy it, or, out of desperation, leave the Organisation. It is high time that the Organisation provided some effective remedy, so that the aggrieved parties may get some opportunity for a review of the Council's decision.

THE GENERAL ASSEMBLY AND THE SECURITY COUNCIL

IN THE FRAMEWORK OF THE CHARTER

24. A word about the position of the General Assembly and the Security Council in the framework of the Charter would not be out of place. The Charter of the United Nations does not provide the three arms of the State in its classical form, i.e., a judiciary, an executive and a legislature. The International Court of Justice has clearly held that the Charter of the United Nations does not invest the Organisation with the status of a State, or that its legal personality and rights and duties are the same as those of a State, or that it can in any way be treated as a "super-State," whatever that expression may mean. SSee Reparation for Injuries suffered in the Service of the United Nations, 1947 I.C.J. 174, 179.C

25. The Charter basically provides a mixed functional structure; a General Assembly with the subtle power to make recommendations and suggestions, but not to take any decisions, except in relation to the budget, a Security Council with no general executive powers, but with special powers to determine a threat to the peace, breach of the peace, or act of aggression and in that direction to recommend or direct corrective actions to restore and maintain peace and an International Court of Justice with power to decide disputes between States, where they are submitted to it by consent, and other matters which are specially provided for in the Charter and to give advisory opinions, with no direct right to review the competence of the other organs. The Charter does not expressly confer any supreme or sovereign role on any of its principal organs over any of the others, nor is there any rule or historical source to permit such an inference. In fact, the Charter permits the sharing of information and duties to strengthen internal co-operation amongst the various principal organs. For

example, although the General Assembly has vast and far-reaching powers to oversee the working of the other principal organs and sub-organs, and to make recommendations thereof to its Members or to the Security Council or to both on matters or questions touching the scope of the Charter, it has not been expressly treated as having any superior status over that of others. The Charter does not expressly lay down any hierarchical status amongst its principal organs and no principal organ can boast of any supreme status or of having any right of repealing, annulling or controlling the action of any other, other than work in co-operation with each other, in channels of mutual respect and goodwill, as expressly allowed by the Charter. Even where the General Assembly is given the power to oversee the working of other organs, the Charter uses genteel language, such as, *inter alia,* the consideration and discussion of matters, or the making or initiation of studies, or the receiving and consideration of reports, or the making of recommendations, or calling their attention to certain facts. Being the larger plenary body with an extensive range of competence and powers to oversee the working of other organs, one could treat it as "senior amongst equals", but with its powers only limited to making recommendations, the Charter even does not give to it that divinity it deserves.

26. As against this large body, the Security Council, a much smaller body, with delegated authority from its Member States, acting within a much limited and sensitive field, has been given the power of taking important decisions. Thus, what follows is that each principal organ is competent to decide the scope of its authority, within the ambit of the Charter provisions, and to determine for itself the nature of the action it can take. Each organ respects the independence of the others and refrains from interfering in their working. Nowhere has any principal organ been given the power to judicially review the action of any other principal organ or of any sub-organ created by it.

THE POSITION OF THE INTERNATIONAL COURT OF JUSTICE

VIS-À-VIS JUDICIAL REVIEW

27. Since we are faced with the issue of the scope of our power of review, it is useful to examine how the International Court of Justice has attempted to examine serious objections as regards actions of the other organs of the United Nations. The International Court of Justice is a principal organ of the United Nations. It is its judicial arm or legal organ. Article 36 (1) of its Statute provides that the jurisdiction of the Court comprises all cases which the parties may refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. As Judge Lachs stated in his separate opinion in the Lockerbie case, S1992 I.C.J. Reports 114, 138C, "the Court is the guardian of legality for the international community as a whole, both within and without the United Nations" (I.C.J. Reports 1971, p.26) and that its task is "to ensure respect for international law" SNamibia case 1949 I.C.J. Reports 16, 35C. In the event of a dispute "as to whether the Court has jurisdiction", under Article 36 (6) of its Statute, "the matter has to be settled by the decision of the Court." Though the Court is not vested with the power of judicial review or appeal over the actions of any of the other organs, but it undertakes under Article 38 of its Statute the task of collaterally examining "out of bound"

matters as are submitted to it, in accordance with international law from a strictly legal point of view. As held by Judge Weeramantry in the Lockerbie Case:

> "The interpretation of Charter provisions is primarily a matter of law, and such questions of law may in appropriate circumstances come before the Court for judicial determination. When this does occur, the court acts as guardian of the Charter and of international law for, in the international arena, there is no higher body charged with judicial functions and with the determination of questions of interpretation and application of international law. Anchored to the Charter in particular and to international law in general, the Court considers such legal matters as are properly brought before it and the fact that its judicial decision based upon the law may have political consequences is not a factor that would deflect it from discharging its duties under the Charter of the United Nations and the Statute of the Court." S1992 I.C.J. Reports 114, 166C

28. Certain observations made by the International Court of Justice, when examining requests for judicial review, also deserve mention. In the Namibia case the Court, by majority opinion, ruled in this respect:

> "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations Organs concerned . . . . . However, in the exercise of its judicial functions 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." S1971 I.C.J. Reports 16, 45C

After examining the submissions, the Court ruled that the Security Council's decisions were in conformity with the principles and purposes of the Charter and in accordance with its Articles 24 and 25 and that, therefore, they were binding on all States, which were thus under an obligation to carry them out.

29. Several of the separate and dissenting opinions in the Namibia case discussed the issue of the Court's power to review the disputed Security Council and General Assembly resolutions.

For example, Judge Ammoun in his separate opinion stated:

> "the International Court of Justice owed it to itself to discharge its own obligations by not closing its eyes to conduct infringing the principles and rights which is its duty to defend" (*ibid.*, p. 72, para.3).

Judge PetrŽn also declared in his separate opinion:

> "So long as the validity of the resolutions upon which resolution 276 (1970) is based has not been established, it is clearly impossible for the Court to pronounce on the legal consequences of resolution 276

(1970), for there can be no such legal consequences if the basic resolutions are illegal . . . . . " (*Ibid.*, p. 131).

And Judge Dillard took the position that:

"A court can hardly be expected to pronounce upon legal consequences unless the resolutions from which the legal consequences flow were themselves free of legal conclusions affecting the consequences. To say this, in no sense implies that the Court is questioning the application of the San Francisco formula with respect to the interpretation of the Charter. Furthermore, the greatest deference must be given to resolutions adopted by the organs of the United Nations . . . . . But when these organs do see fit to ask for an advisory opinion, they must expect the Court to act in strict accordance with its judicial function. This precludes it from accepting, without any enquiry whatever, a legal conclusion which itself conditions the nature and scope of the legal consequences flowing from it." (*see* op. Dillard, p. 151).

Judge Onyeama also stated:

"In exercising its functions the Court is wholly independent of the other organs of the United Nations and is in no way obliged or concerned to render a judgement or opinion which would be 'politically acceptable'. Its function is, in the words of Article 38 of the Statute, 'to decide in accordance with international law'.

. . . . . .

When . . . .decisions bear upon a case properly before the Court, a correct judgement or opinion could not be rendered without determining the validity of such decisions, the Court could not possibly avoid such a determination without abdicating its role of a judicial organ.

. . . . . .

I do not conceive it as compatible with the judicial function that the Court will proceed to state the consequences of acts whose validity is assumed, without itself testing the lawfulness of the origin of those acts." (*Ibid.*, pp. 143-144).

Judge Gros in his dissenting opinion stated:

"It used not to be the Court's habit to take for granted the premises of a legal situation the consequences of which it has been asked to state . . . . How indeed can a court deduce any obligation from a given situation without first having tested the lawfulness of the origins of that situation?" (*Ibid.*, pp. 331-332, para. 18).

30. The rule arising out of the majority opinion and the views expressed by various judges can be safely put thus: the International Court of Justice, as a principal organ of the United Nations, has no powers of judicial review or appeal over actions of any other principal organ, but where such an objection is taken, the Court, in the exercise of its judicial function, would like to appraise it, so that "in the course of its reasoning" it can determine the legal consequences that arise from the disputed action. In short, it is a step not to sit directly in judgement, but to examine the matter collaterally in the exercise of its judicial function and to see if the material presented, if taken into account, can determine unusual legal consequences arising from the disputed action. If the disputed action is found to be in conformity with the provisions of the Charter, there may be no need for interference. If not, as observed by Judge El-Kosheri in his dissenting opinion in the Lockerbie Case S1992 I.C.J. Reports 114, p. 208C, it is possible that the Court may reach a negative decision, were it to detect any violation of the Charter or departure from the Charter's purposes and principles. The observations of Judge De Castro in the Namibia case in the same connection will not be out of place:

> "The principle of 'legal-ness' —- the Court, as a legal organ, cannot co-operate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law" . S1971 I.C.J. Reports 16, 180C

31. Thus, without acting as a straight court of judicial review or appeal, the International Court of Justice, maintaining its proprieties and balances with coeval organs of equivalent power and independence, has found for itself a way to examine the matter.

THE POSITION OF THE INTERNATIONAL TRIBUNAL

VIS-À-VIS POWERS OF JUDICIAL REVIEW

32. Against the above background, the position of the International Tribunal may be examined. As opposed to the International Court of Justice, the International Tribunal is the creature of a principal organ of the United Nations, i.e., the Security Council. Since an open conflict between some of the once confederal states of the former Socialist Federal Republic of Yugoslavia involving alleged genocide, "ethnic cleansing" and serious violations of international humanitarian law constituted a threat to international peace, it was felt that an *ad-hoc* measure in the establishment of an international judicial tribunal would not only put an end to such crimes, ensure that such violations were halted and effectively redressed and bring to justice the persons who with impunity were resorting to them, but also contribute to the restoration and maintenance of peace. Having found that there was a threat to peace, the Security Council conceived the International Tribunal as a body that would advance the restoration and maintenance of international peace and security.

33. The International Tribunal was conceived as a superior Court of Record, with international stature, having original and appellate criminal jurisdiction over natural persons, with all the indicia of a fully independent, impartial and responsible legal

body of the highest integrity and with procedures ensuring a fair and expeditious trial and full respect for the rights of the accused. The International Tribunal cannot be equated with a subsidiary organ over which a principal organ normally exercises administrative and supervisory powers. Though the Tribunal was structured to "perform its functions independently of political considerations" and that "it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions" (*see* Report of the Secretary-General, para. 28), one cannot avoid the fact that administratively the Secretariat has some say in the non judicial functions and problems of the Tribunal. Nevertheless, the Tribunal is a strictly independent judicial body. The determination of all legal and factual matters is governed by rules and principles as normally available to and strictly applied by courts of law. Any judicial Tribunal operating under a statutory enactment has the inherent jurisdiction to look into objections as regards its competence to deal with matters provided for in the enactment. Should such a power be expressed therein, it does not grant anything more than express what it inherently has. As regards its competence to look into its own lawful establishment, the same must be implied or treated as one to be examined as collateral to the issue as to whether it can exercise its powers, for if its establishment were effected, it would have no ordinary jurisdiction to deal with matters provided for in the statutory enactment. The International Court of Justice in the Nottehbohm case (1953 I.C.J. Report p.119), has held that in accordance with previously established precedents, unless a convention to the contrary exists, an international Tribunal is the sole judge of its own competence and has the power to interpret the documents which regulates it. The fact that the question as regards its own establishment is tied up with a political question, is also no basis to withhold examination. Therefore, where an objection is raised as regards its own powers, the Tribunal cannot refuse to hear such a request; and should a valid objection be raised as regards its own lawful establishment, irrespective of the question whether the accused should be permitted to be heard in respect thereof, there cannot be any doubt that it would affect its own valid competence and nullify its ability to exercise any powers. There is no impartial or independent body over this Tribunal to look into such serious legal questions and the right of the accused to move the Security Council for an examination of his objections is far too remote, if not non-existent. Whilst not admitting the position, even the inter-Tribunal appeal amongst a system of rotating judges may be looked upon as not strictly impartial, where a question of lack of competence due to the Tribunal's own unlawful establishment arises.

34. The individual who is arraigned before the Tribunal, in particular, and the public, all look to this body for an explanation for all serious legal objections that may be raised, particularly as regards matters in the jurisdictional field. Being an International Tribunal at the apex of international criminal jurisdiction, it stands as an accountable body to all peoples of the world in respect of its *compétence de la compétence* and the public cannot accept silence as a guarantee of its impartiality or independence. Unlike the International Court of Justice, whose exercise of jurisdiction is by consent, this Tribunal's jurisdiction over persons is obligatory. To put it squarely, the accused has a right to be heard and the Tribunal the right to examine the matter on the principle of *compétence de la compétence.* I want to be clear that the Tribunal is not as it were looking for material to support its claim to legitimacy. What it has to decide it must decide and, even if it is against its own interests, it must do so fearlessly.

35. An unusual factor in this case is that though the decision to establish the International Tribunal was taken by the Security Council under its Chapter VII powers, the structuring of the Tribunal and its Statute was not undertaken by the Council within the confines of its closed doors, but passed to the Secretariat for full and necessary action. By Resolution 808 (1993) the Secretary-General was directed to submit for consideration by the Council within sixty days a report on all aspects of this matter, including specific proposals and, where appropriate, options for the effective and expeditious implementation of the decision to establish the Tribunal, taking into account suggestions that may be put forward by Member States. It appears that from this point onwards the matter passed totally into the hands of the Secretariat. The Secretary-General received a mass of opinions as to what the Tribunal should be from a large number of Member States (numbering over thirty three), governmental and non-governmental bodies, committees, commissions, legal bodies, jurists and legal luminaries. It also received a number of drafts of what the Tribunal's statute should be from various quarters. Taking all relevant matters into consideration, the Secretary-General presented his report to the Council within the time prescribed, with a draft of the Tribunal's Statute prepared by the Secretariat. The Secretary-General, in para. 28 of his report, clearly stated that the Tribunal was established "as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature" (Secretary-General's Report at p.28). The Security Council approved the report and the draft of the Tribunal's Statute by Resolution 827 (1993) on 25 May, 1993. Though the Council approved the draft Statute of the Tribunal and set its seal on its establishment, any appraisal of an objection as to its lawful establishment would require an examination to see whether the initial exercise of the discretion by the Council to establish the Tribunal was not a feigned exercise of power under Chapter VII and that the structuring of the Tribunal was not outside the scope of the Secretary-General's powers under Article 29 or against the purposes and principles of the Charter or *jus cogens*.

36. However, not unmindful of the Charter provisions which do not permit any principal organ or sub-organ to judicially review the action of any other, much less trench on its jurisdiction outside the limits of what may be permitted by the Charter, the need to find a balance between the limits of jurisdiction and the limits of necessity calls for a somewhat liberal but cautious approach in an environment where international law seeks new mutations to meet unusual challenges thrown up by new situations. Whatever be the position, with respect, I hold that the International Tribunal can examine the matter, not unmindful of the rule laid down by the International Court of Justice with regard to judicial review, as stated in para. 30 above, for the purposes of determining what legal consequences may arise out of the Council's and Secretariat's composite actions. Were it to find a serious flaw in its establishment, what steps the Tribunal would take, I would not like to determine now. Whether it would make a simple declaration to that effect and leave it to the Security Council of the United Nations to correct the situation, or having made such a declaration, continue as an *ad-hoc* tribunal till the said body or Organisation comes to its aid, are some of the lines of action that may be debated, but the matter can be best dealt with when it arises and I would leave the matter perennial and open.

FACTS LEADING UP TO THE ESTABLISHMENT

OF THE INTERNATIONAL TRIBUNAL

37. It is necessary to recount the facts leading up to the establishment of the International Tribunal by the Security Council so that the legal discussions that follow may be properly understood.

38. On 4th May, 1980, Marshal Tito expired. The Socialist Federal Republic of Yugoslavia started breaking up. In 1981, riots broke out in the autonomous province of Kosovo (situated within Serbia), which had an Albanian majority. In 1987 Serb nationalism erupted. Between October 1988 and February, 1989, the governments of the two autonomous provinces of Kosovo and Vojvodina and of the Republic of Montenegro resigned. In 1989, the Slovenian government amended its Constitution to give itself the right to secede from the Federation, leading to tension with Serbia. The Kosovans declared their separation from Serbia in July 1990. In the same year, the Slovenians answered a referendum on independence in the affirmative. In February 1991, Krajina, a region inhabited by Serbs in Croatia, declared its independence, leading to violent incidents. The Serbs in Krajina, held a referendum on the region's secession from Croatia and the Croats held a referendum on their independence, both of which were answered in the affirmative. Slovenia and Croatia declared their independence on 25th June, 1991, leading to brutal armed conflict between the forces of the Socialist Federal Republic of Yugoslavia on the one hand, and of Slovenia and Croatia on the other. At the request of the European Community, these two Republics suspended for three months the effective dates of their independence. Slovenia and Croatia respectively announced their decisions to become independent, upon which the Parliament of Socialist Federal Republic of Yugoslavia passed a resolution to safeguard the internal and external borders of the Federal Republic.

39. In October 1991, fighting continued in Croatia between its armed forces and that of the Socialist Federal Republic of Yugoslavia. By mid-November 1991 the city of Vukovar, which had been under siege by the Serbian forces since that summer, was captured by the Serbs.

40. On 27th November, 1991, the Federal Republic of Yugoslavia, the Yugoslav Peoples Army (JN), the Republic of Croatia and the Republic of Serbia agreed to abide by certain provisions of the Geneva Conventions of 1949 and the Additional Protocol I of 1977, including the grave breaches in the provisions of the Fourth Geneva Convention.

41. On 16th December, 1991, the European Community recognised Slovenia and Croatia as independent states with effect from 15th December, 1991. On 6th March, 1992, after an earlier declaration of independence and referendum, Bosnia-Herzegovina proclaimed itself as an independent state, which independence was recognised by the European Community and the United States of America on 7th April 1992. Immediately, armed conflict between the forces of the Socialist Federal Republic of Yugoslavia and that of Bosnia-Herzegovina erupted. On 27th April, 1992, the Republics of Serbia and Montenegro declared themselves to be a sovereign state by the name of the Federal Republic of Yugoslavia and undertook to respect the rights of the former Socialist Federal Republics that had declared independence.

42. On 22 May, 1992, the President of Bosnia Herzegovina and the Party of Democratic Action, the President of the Serbian Democratic Party (the Bosnian Serbs) and the President of the Croatian Democratic Party (the Bosnian Croats) signed an agreement binding themselves to be bound by the rules contained in common Article 3 to the Geneva Conventions of 1949 which applies to internal armed conflict.

43. On 22nd June, 1992, Bosnia-Herzegovina declared that it was in a state of war as a result of aggression carried out by the Republic of Serbia, the Republic of Montenegro, the Yugoslav Army and the terrorists of the Serbian Democratic Party.

44. From June 1991 onwards, the Serbs tried to annex the enclaves in Croatia, in which they were in a majority, to their own territory. The Croats tried to do likewise. Since the Serbs and the Croats constituted the two major minority communities in Bosnia-Herzegovina, they tried to annex territories and divide the said Republic into three independent States.

45. It is clear that the conflict, which had originally started in Slovenia, shifted to Croatia and then to Bosnia-Herzegovina. The United Nations Protection Force (UNPROFOR), which had initially been installed to shield Serb enclaves in Croatia, had its mandate enlarged to support all humanitarian actions at all locations. The UNHCR estimated 350,000 homeless in December 1991, 1,500,000 in May 1992 and 2,300,000 in July 1992. What originally had started as repression, had over a period of time, specially in Bosnia-Herzegovina, extended into crimes against humanity, mass murders, rapes and sexual assaults, mass tortures in concentration camps and pre-engineered "ethnic cleansing" of civilians.

46. The brutality of the conflict and the new horrendous dimensions in which it travelled, aroused the conscience of all nations. The United Nations conducted inquiries and received information through its own bodies and authorities. Amongst them may be mentioned the Special Rapporteur appointed by the UN Commission on Human Rights, the office of the United Nations High Commissioner for Refugees (UNHCR), the Human Rights Committee, the UNPROFOR and the UN Commission of Experts.

47. A number of Rapporteur missions were sent out by different bodies. Amongst them may be mentioned the CSCE Mission, the CSCE Moscow Human Dimension Mechanism Mission and the EC Investigating Mission into the Treatment of Muslim Women in the Former Yugoslavia.

48. Amongst the International NGO missions may be mentioned Helsinki Watch, Amnesty International London, the International Committee of the Red Cross (ICRC), *Médecins Sans Frontières*, International League for Human Rights, Union for Peace and Humanitarian Aid to Bosnia and Herzegovina and "World Campaign Save Humanity."

49. Amongst the State missions may be mentioned the War Crimes Investigation Institute, Sarajevo, the Council of Human Rights and Fundamental Freedoms, Ljubljana, the State Commission of War Crimes, Belgrade, US State Department and the Muslim Documentation Centre in Zenica.

50. Last but not the least, a host of Member States of the United Nations and other organisations had sent reports to the United Nations providing information on serious international crimes being committed in the three warring Republics of the former Yugoslavia.

51. On 13th July 1992, the Security Council pursuant to Resolution 764, drew attention to the fact that persons who had committed or ordered the commission of grave breaches of the 1949 Geneva Conventions were individually liable for such breaches. On 12th August 1992, the Security Council, by Resolution 771, called upon States and other bodies to submit firm information about the atrocities committed in the former Yugoslavia to the Secretary-General so that he could report to the Security Council on additional measures that may be necessary.

52. A word about the United Nations' own efforts to inquire into this sordid affair will not be out of place. Apart from receiving information through UNHCR, UNPROFOR and the Human Rights Committee, the said body also found it necessary to have the matter investigated through its own personnel. This accounts for the Special Rapporteur appointed by the UN Commission on Human Rights and the Commission of Experts appointed by it.

53. On 13th August, 1992, the UN Commission on Human Rights in Geneva appointed M. Tadeusz Mazoweicki, a former premier of Poland, as its Special Rapporteur to report on the state of human rights in the territory of former Yugoslavia. Mr. Mazoweicki filed more than three reports illustrating the "ethnic cleansing" through random executions, mass rapes, undue taking of hostages and destruction of homes, especially in Bosnia-Herzegovina and the UN Protected Areas, the victims of which were mainly Muslims and Croats. He also found similar violations by the Muslims and Croats in Bosnia-Herzegovina and by the Croats in Croatia. Mr. Mazoweicki was assisted by advisers Dr. Georg Mautner-Markhof and Prof. Roman Weiruszewksi.

54. On 6th October, 1992, the United Nations Security Council, pursuant to Resolution 780, established an impartial UN Commission of Experts to look into widespread violations of international humanitarian law occurring in the former Yugoslavia, particularly in Bosnia-Herzegovina, so as to provide the Secretary-General with its conclusions on such violations and grave breaches of the Geneva Conventions. The said Commission was directed to examine and analyse the information already submitted to the United Nations by Member States and other bodies, as well as other information obtained through its own efforts. On 26th October, 1992, the Secretary-General announced the appointment of Prof. Frits Kalshoven as the Chairman of the said Commission and of Prof. M. Cherif Bassiouni, William J. Fenrick, Judge Keba Mbaye and Prof. Torkel Ohsalh as its members. The said Commission submitted an interim report on 26 January 1993, which stated that serious breaches and other violations of international humanitarian law had been committed, including mass killings, "ethnic cleansing", horrid tortures, rape, pillage, destruction of civilian, cultural and religious properties and arbitrary arrests. It also noted that if an *ad hoc* international tribunal was established, the United Nations' decision would be consistent with the requirements of the time.

55. An incessant stream of reports filed by Member States with the United Nations about the continuing atrocities, placed the United Nations under great pressure. The United Nations peace efforts, snaking slowly without success, had now reached a stage where the peace process had to be supplemented by action, which meant business, and which also appeased the public conscience. Cyrus Vance and Lord Owen, the two co-chairmen of the Steering Committee of the International Conference of the Former Yugoslavia, had repeatedly advocated the setting up of an international criminal court to punish persons guilty of war crimes and breaches of humanitarian law. They had also placed humanitarian issues and human rights at the core of the peacemaking process.

56. In view of the overwhelming evidence collected by the United Nations through its own sources and agencies, and that provided to it by other international organisations, bodies and States, the Security Council, by Resolution 808 on February 22nd, 1993, finally decided to establish an International Tribunal for punishing persons responsible for violating international humanitarian law in the territory of the former Yugoslavia since 1991 and the Secretary-General was directed to put up a report, within 60 days, placing specific proposals before the Council in this respect, taking into consideration suggestions put forward by Member States in this behalf.

57. Though the decision to establish the International Tribunal was taken by the Security Council under its Chapter VII powers, the structuring of the Tribunal's Statute was not undertaken by the Council within the confines of its closed doors, but passed to the Secretariat for necessary action. It appears that from this point onwards the matter passed totally into the hands of the Secretariat under Article 29 of the Charter. The Secretary-General had already received a mass of opinions as to what the Tribunal should be from a large number of Member States numbering over thirty-three, apart from governmental and non-governmental bodies, committees, commissions, legal bodies, jurists and legal luminaries. It also received a number of drafts of what the Tribunal's Statute should be from various quarters. Taking all relevant matters into consideration it presented its report to the Council within the time prescribed, with the draft of the Tribunal's Statute prepared by it. The Security Council finally approved the report and the draft of the Tribunal's Statute by Resolution 827 (1993) passed on 25 May 1993.

THE LAWFUL ESTABLISHMENT OF THE TRIBUNAL

58. I now turn to the first of the reliefs claimed by the appellant i.e., that the International Tribunal, having not been lawfully established, lacks jurisdiction to try the appellant.

59. On behalf of the appellant it is submitted that though he does not contest the Security Council's authority to determine whether a threat to international peace and security exists or that it has the power to address itself to such threats, but it is submitted that though such a finding of threat entails a factual and political determination which cannot be measured by any fixed standard, yet any measures that the Security Council may take to address itself to such threats are limited by the powers granted by the Charter to the Security Council and by the present state of

international law. In this connection it is submitted that such powers do not authorise the Security Council, a political body, to establish an independent judicial body, invested with jurisdiction in criminal matters, for it neither has legal powers nor can justify such transference to a legal body, and that the determination of this matter is not solely a consideration of high policy or political interests, but, in the context of human rights, is also a justiciable issue, when it comes to the prosecution of individuals.

60. The basic question that arises is whether the creation of the International Tribunal by the Security Council was within the powers granted to this principal organ by the Charter. It is clear that the establishment of the International Tribunal was for the purposes of restoration and maintenance of peace. Under Article 39 of the Charter, the Security Council is alone empowered to determine the existence of any threat to the peace, breach of the peace, or act of aggression and has the authority to make recommendations, or decide what decisions should be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security. In order to prevent an aggravation of the situation, the Security Council, under Article 40, before making the recommendations or deciding upon the measures provided for in Article 39, may call upon the parties concerned to comply with certain provisional measures it deems necessary or desirable and to duly take account of failure to comply with such provisional measures. Under Article 41, the Security Council can decide what measures not involving military action can be employed to give effect to its decisions and it may call upon all Member States of the Organisation to apply such measures. Such measures may *inter alia* include, but need not be limited to, trade embargoes and severance of diplomatic relations. Should measures provided for in Article 41 be considered inadequate or prove to be inadequate, under Article 42 the Security Council can take military action as may be necessary to maintain or restore international peace and security. Under Article 24(2), in carrying out its enforcement operations, the Security Council has to act in accordance with the Purposes and Principles of the Charter and within the specific powers granted to it in Chapters VI, VII, VIII and XII.

61. It cannot be doubted that the Security Council, on the basis of overwhelming evidence, as submitted in paras 38 to 56 above, which it reviewed in several meetings over some length of time, came to the conclusion that the on-going conflict between some of the once constitutive republics of Yugoslavia constituted a threat to the peace, and the establishment of an *ad hoc* international criminal tribunal would support the restoration and maintenance of peace. A threat to the peace does not necessarily mean one relative to the States embroiled in an internal or international armed conflict, but one relative to others also, particularly adjoining States, which are likely to be, and usually are, affected. The discretion available to the Council in arriving at relevant conclusions under Article 39, being one relative to an enforcement measure, could not be measured in terms of any legal standards, other than that it had to be fair and not arbitrary or a feigned exercise of power. The decision was based on a proper appraisal of the evidence and was reasonable and fair and not arbitrary or capricious. No objection can be taken to the exercise of discretion by the Security Council in this case.

62. What stands out prominently is that the Security Council did not take any hasty action in arriving at these conclusions, unlike many other emergency situations where

speedy conclusions have been drawn. Rather, it reached its conclusions, after permitting participation of a host of views and the submission of a mass of reports from numerous bodies, both governmental and non-governmental.

63. At this stage it may be stated that the Security Council, acting under Article 42, could have ordered military action and, as a part of many of its recommendations to the military authorities, called for the setting up of *ad hoc* Courts Martial for trial and punishment of offenders, including the top echelons of the army, who had seriously violated international humanitarian law in the territory of the former Yugoslavia, so that such offenders who with impunity had or were committing such offences could be punished and others of the same ilk could be deterred and that peace could thus be restored and maintained. If this was possible, as a necessary corollary, the setting up of an *ad hoc* independent and impartial international criminal tribunal for a short period dealing with the same territory and covering similar offences committed in the said territory could be treated as the very *raison d'être* for the establishment of the present International Tribunal. Had the Security Council attempted to set up an international criminal court with general jurisdiction covering international criminal offences committed within or without the territories of its Member States, perhaps an objection could have been validly taken that the decision had no nexus with the restoration and maintenance of peace in the former Yugoslavia and that the exercise of the power was feigned in order to justify the action. But since the Tribunal to be established was of a limited nature, for a limited purpose, for a limited time, for a limited territory and for offenders who had committed offences within the territory of former Yugoslavia, the decision was valid and fair, and squarely fell under Article 41 of the Charter. The fact that the Security Council, under Article 41, could take non-military measures which could include *inter alia*, but not be limited to, economic embargoes or severance of diplomatic relations, justified the establishment of the International Tribunal. The applicability of non- military measures that can be taken under Article 41 is illustrative and not limited to those enumerated in this Article. It is urged that the establishment of the Tribunal cannot contribute to the restoration and maintenance of peace, but that it can only spoke the peace process. It is too well known that peace can only bring amnesty and those that desire peace do not have to wait for this Tribunal to be disbanded. Peace is restored when nations desire to do so and not when they desire to continue the armed conflict. The view of the Security Council that the International Tribunal would contribute to the restoration and maintenance of peace was based on opinions given and assessments made to that effect and which were well founded. Thus, the decision of the Council was also within the four corners of Article 41 of the Charter.

64. It is contended that the establishment of a judicial body is not a matter that falls within the competence of the Council under its Chapter VII powers. As stated in the prior para, the establishment of a legal body like the present Tribunal, is very much within the scope of the Council's authority under Chapter VII. Even otherwise, the Security Council could establish a subordinate organ under Article 29 if it deemed it "necessary for the performance of its functions." The Council could, therefore, establish a legal body, if it deemed it necessary for its enforcement action for the restoration and maintenance of peace. The report of the Secretary-General clearly shows that the Tribunal was established, under the umbrella of an enforcement measure under Chapter VII, as a subsidiary organ of a judicial nature within the terms of Article 29 of the Charter, which subsidiary organ would be free of all political

considerations and would not be subject to the authority or control of the Council. Under its Chapter VII powers, the Council, in respect of enforcement actions, had established a number of subsidiary organs. Reference in this regard can be made to Security Council Resolution 687 (1991) and subsequent resolutions relating to the situation between Iraq and Kuwait whereby a number of commissions were established, including the UN Compensation Commission for the Payment of Damages, by way of subsidiary organs. The General Assembly had also created a UN Administration Tribunal as a subsidiary organ, which power was approved by the International Court of Justice in case on "The Effect of Awards of Compensation Made by the United Nations Administration Tribunal" . S1954 I.C.J. Reports 47, 56-61C In this case, the International Court of Justice explicitly confirmed that a principal organ of the United Nations could create a subsidiary judicial body and held that the General Assembly in creating the Tribunal had not established "an advisory organ or a mere subordinate committee of the General Assembly" but rather had created "an independent and truly judicial body pronouncing final judgements without appeal within the limited field of its functions." SIbid at 53C Any argument, therefore, that the International Tribunal cannot function both as an independent judicial body and as a subsidiary organ of the Council must be dispelled, because the Tribunal has been granted complete independence by the Security Council, without being "subject to the authority or control of the Security Council with regards to the performance of its judicial functions" (Secretary-General's Report p.25) and the International Court of Justice in The Effect of Awards case cited above has already held that a judicial body created by a principal organ of the Untied Nations can function impartially. The precedents establish the validity of the Council's action in setting up a legal body in the nature of an international criminal tribunal as a subsidiary organ, and the decision of the Security Council to so set it up, as it found it necessary for the restoration and maintenance of international peace and security, is not open to objection.

65. A more forceful argument that has been put forward is that the International Tribunal was not "established by law", in accordance with Article 14(1) of the International Covenant on Civil and Political Rights, 1966, (hereinafter referred to as "the ICCPR"). The said provision *inter alia* states : " . . 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." A similar provision, namely, Article 6(1) of the European Convention on Human Rights, states "In the determination of his civil rights and obligations and 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." What is common between the two Articles in respect of criminal jurisdiction is that the accused is entitled (i) to a fair and public hearing by a court or tribunal which must be (ii) independent (iii) impartial and (iv) one established by law. In the Piersack Case (Judgement of 1 October 1982), the European Court of Human Rights noted that in order to resolve the issue before it, it would have to determine whether the phrase "established by law" covered the legal basis for the very existence of the tribunal, to which it found there could be no doubt that it was established under Article 98 of the Belgium Constitution. SPiersack v. Belgium, 53 Eur. Ct. H.T. (Ser A) 1982C. In the case of the Le Compte, Van Leuven and De Meyere (Judgement 23 June, 1981) the said court held that as the Court of Cassation was set up under the Constitution (Article 95), it was patently established by law. S43 Eur. Ct.H.R. (Ser A) 198C. In the Zand Case (Op. Com., 12 October, 1978) the European Commission on

Human Rights in its opinion and report observed "that the term a tribunal ‘established by law’ in Article 6(I) envisages the whole organisational set-up of the Courts, including not only the matters coming within the jurisdiction of a certain category of courts, but also the establishment of the individual courts and the determination of their local jurisdiction." It further held that "It is the object and purpose of the clause in Article 6(I) requiring that the courts shall be ‘established by law’ that the judicial organisation in a democratic society must not depend on the discretion of the executive, but that it should be regulated by law emanating from Parliament . . . . . .Article 6(I) does not require the legislature to regulate each and every detail in this field by formal Act of Parliament, if the legislature establishes at least the organisational framework for the judicial organisation." SZand v Austria 15 Eur. Comm’n H.R., Rep 70, 80, 1978C. In another case (Dec. Adm. Com. Ap. 8852/80 of 15 December, 1980), the Commission in its report approved the view stated in Zand v. Austria (supra) that the object and purpose of Clause 6(I) was that the judicial organisation in a democratic society must not depend on the discretion of the executive, but that it should be regulated by law emanating from Parliament. All these cases relate to the civil jurisdiction. However, what is required is that the establishment of the court or tribunal should not be dependant on the discretion of the executive, but should be regulated by law emanating from a legislative body, preferably a superior one, that such legislative body can delegate matters concerning the judicial organisation to another body and that the superior legislative body is not required to regulate each and every detail itself, if the law establishes at best the organisational framework of the judicial organisation.

66. But the important question is whether we are bound by the decisions of the European Court of Human Rights or of the opinions or reports of its Commission. We have not been shown any grounds that this International Tribunal in the criminal jurisdiction is bound to follow such decisions. At best they have a persuasive value. Again, what decisions should we follow as having persuasive value, if we should desire to do so? Whether of the Court or of the Commission? In respect of Article 6 (I), dealing with establishment of courts or tribunals by law, the European Court of Human Rights has been more circumspect in keeping the intent in the field of a superior body having law making powers, but the European Commission of Human Rights, whilst setting in motion to determine whether applications filed for reliefs should be admitted for hearing by the Court or dismissed, have travelled far and held that the expression "established by law" envisages the whole organisational set-up of the courts, including not only the matters coming within the jurisdiction of a certain category of courts, but also the establishment of the court concerned and the determination of its local jurisdiction. In short, the expression "established by law" has been taken as envisaging not only the legislative body at some authoritative level having powers to establish the court, but the scope of the law itself *vis-à-vis* the whole set-up of the court that stands established and its category *vis-à-vis* any other. With profound respect, I would treat the following views of both the European Court of Human Rights and of its Commission with respect and as being a source for guidance, namely, that the courts be established by bodies at some authoritative level having powers to legislate and that the laws establishing such courts should be not discriminatory as to affect a fair trial.

67. I may now state my own view with regard to the expression "established by law." *Ex-facie* it refers to the competent person or body at the apex which at any moment of

time stands validly installed or constituted and has power and authority to legislate or make laws. In several States, constitutions permit dissolution of legislative bodies and their temporary replacements by single individuals, such as by their Presidents or Governors. During such emergencies, such persons are automatically vested with powers to legislate. The ICCPR was intended to provide for a mechanism which all Member States could follow and adopt into their own legal systems. The protections embodied in the Conventions stated above are intended for national jurisdictions. Thus any concept that the law making body must only be a legislative body or an assembly of persons having legislative powers, cannot be accepted on a fair reading of the Covenant. Moreover, all legislatures are political bodies and legislation is the outcome of executive will. Do the legislatures therefore *ipso facto* become tainted? Again, the real power behind a democratic process is public opinion. If that is not there, no legislature by itself can ensure legislation conforming to democratic standards. What may be seen is whether the people have a right to vote and can participate in the affairs of government through fair nominations or election. For any given situation, the mode of installation of the single individual or the legislative body at some authoritative level may throw some light on the matter, but unless there is a flaw that has seriously affected their legal installation or constitution, a presumption of regularity to their holding of office and exercise of powers would follow. Perhaps what may be also relevant is whether the legislation establishing the court or tribunal is not discriminatory as affecting a fair trial.

68. There is no objection before us that the Statute of the International Tribunal does not provide a fair and public hearing to the appellant or that the Tribunal is neither independent nor impartial. What is objected to is that it is not competently established, having been constituted by a political body i.e. the Security Council, in its discretion.

69. The Security Council is not a political body in the same manner in which a legislative body in power may be so characterised, for the members of the latter may be bound to a political party and be compelled to support the policies of that party in all matters throughout their tenure, till the party is in power, but the members of the Council are not so united, other than impartially to serve the purposes and principles of the Charter, subject sometimes to the interests of the States whom they represent, which is rare. In the case of the Council, the only thing that can be examined is whether the Council was installed through the democratic legal mechanism of the Charter and not through other extraneous means. The Charter provides a unique constitution which binds all States, which the States have accepted voluntarily. The presence of the permanent members and the election of the non-permanent members to the Security Council, is another unusual feature which all States have accepted. If all members of the Council are legally and duly installed, a presumption of regularity to its constitution and exercise of powers would automatically follow, unless it is shown to the contrary. The Council does not become "political" simply because its members represent States. In fact, all members of important principal organs are representatives of States, but all such organs do not become "political." What is to be seen is the nature of the action taken and whether any misuse of powers, privileges or discretion can be objected to as falling outside the purposes and principles of the Charter. Here it is not suggested that the Council was illegally constituted. Further, the Council did not act arbitrarily, but with a sense of purpose and care and impartiality. The mere assertion that it was political, because the interest of States were allegedly involved, is neither here nor there. Democratically elected legislative

bodies can also be termed political. The mere assertion that the Security Council was a political body because in two cases it established judicial tribunals, but in other similar cases it did not, does not lead to any such conclusion. Consistency of action is no hallmark of a democratic process. The right whether and when to establish a limited judicial tribunal to cover a limited territory and how many to meet such situations, is the sole privilege of a legislative body. The fact that it desires to establish one or two to cover certain specific areas, but not another for a different specific area, for certain special reasons, though the situation in the latter may be similar to that in the former, is no ground to hold that the legislature has ceased to be or to act as a democratic body. A political will, if that be what guides all bodies, invariably serves varying needs and necessities and its decisions need not always be consistent. The fact that the Security Council did not feel the necessity to establish more than two tribunals, does not show it was under the clutches of any political domination. The submission of the counsel for the appellant that the International Tribunal was thus not established by law, if I may say so with respect, is ill founded and must be rejected.

70. Another argument which has been advanced is that the Security Council is only obliged to deal with or take action against States, but since the establishment of the International Tribunal deals with individuals, its establishment suffers from an inherent flaw and the Tribunal must be treated as unlawfully established. Criminal law basically deals with individuals. From the individual, to the family, the tribe and the State, all rules and norms laid down have placed the individual as the basis of its attention and the subject of its censure. With the development of human rights and humanitarian law, international organisations dealing with States have placed the States as the subject of their attention and direction. With serious violations of international humanitarian law, international organisations and States have both attempted to prevent such violations by conventions and State practices, involving States to censure and punish individuals liable for the breaches. It is true that the United Nations deals as far as possible with States, but the Charter also shows that it deals with individuals through States. Most of the objects of the International Economic and Social Co-operation, as provided in Chapter IX of the Charter, of the International Trusteeship System, as stated in Chapter XII, and the declarations regarding Non-Self-Governing Territories, as enumerated in Chapter XI, all point to the interest of individuals, to be served directly through the States concerned or through specialised or international agencies or the Trusteeship Council. The creation of regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such bodies and their activities are consistent with the purposes and principles of the Charter, is also permitted under Chapter VIII. The Organisation, therefore, is concerned with individuals and deals with their interests through States and ancillary bodies. The creation, therefore, by the Security Council, for and on behalf of the Member States, by virtue of its delegated authority under Article 24, of a subsidiary organ of a judicial nature, whose working would impinge on individuals, would not be without jurisdiction. The object of the Organisation is to change the whole quality of life, to grant the individual all human rights, to ensure his protection, to advance his welfare and to ensure maintenance of peace and security, all through the agency of Member Sates and allied bodies sponsored or recognised by it. The Security Council has acted on behalf of the States in establishing the International

Tribunal for punishing persons guilty of gross international crimes and thus no inherent vice appears in its action.

71. But even if it is to be assumed that the Security Council had no express authority to impinge on individuals, it is clear that in this case the Council had the implied power to act on individuals on behalf of the States, to establish a tribunal which would deal with natural persons, in the fulfilment of its primary responsibility to maintain international peace and security. The theory of implied powers permits international organisations to have these powers, in addition to those explicitly stipulated in their constituent instruments. Such powers are implied when they are necessary or essential for the fulfilment of the tasks or purposes of the organisation or for the performance of its functions or for the exercise of powers expressly granted. The International Court of Justice has on several occasions recognised that international organisations have implied powers to take measures necessary to fulfil their functions. In this connection, the following cases may be cited with advantage, namely: the case for Reparation for Injuries Suffered in the Service of the United Nations (1949 ICJ Reports 174, p. 177-79) and the case of the International Status of South West Africa (1950 ICJ Reports 128, at 136-37). Behind the concept of implied powers is the correlation of necessity to bring them into effect. Implied powers can, therefore, be brought in where it can be shown that they were necessary or essential to the Security Council for the performance of its functions as outlined in the Charter. In short, that it was essential for the discharge of its functions. The opinion of the International Court of Justice in the case of the International Status of South West Africa (supra) indicates that the existence of an implied power does not depend on the exercise of the power as the only way, or even the best way, of accomplishing the functions of the organisation. What is required is a concrete link between the implied power and the functions of the organisation. The implied powers jurisprudence clearly suggests that the Security Council could, by creating the International Tribunal, act indirectly on individuals, if it was necessary for the proper performance of its functions. Since the Security Council had found a threat to the peace posed by the conflict in the former Yugoslavia, because of serious violations of international humanitarian law, it found it necessary to act on individuals through the agency of the International Tribunal to suppress these violations. Even otherwise, the character of international humanitarian law imposes a duty to suppress violation through proper action it may take on individuals. It is now openly recognised that there are acts of omission or commission for which international law imposes criminal responsibility on individuals, for which punishment can be imposed. The International Military Tribunal at Nürnberg stated "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." STrial of the Major War Criminals Before the International Military Tribunal Nürnberg, 14 November 1945 - 1 October 1946, Official Document 223, (1947)C. At this stage it is important to note that the potential accused in the former Yugoslavia were on notice, through the language of the 1949 Geneva Conventions and the fact that the Security Council had previously demanded the cessation of violations of international humanitarian law and had noted the responsibility of individuals for such breaches and had warned that they could be held individually responsible for violations thereof. Taking all circumstances into consideration, I do not think that this objection of the appellant has any merit. I would therefore reject the same.

72. I may now deal with another objection. It is stated that the International Tribunal should not have been granted power to retrospectively punish crimes, and such law is not now countenanced. In fact States now enact constitutional legislation banning such legislation in the criminal jurisdiction. It is submitted that the competence of the Tribunal suffers from such grant of retrospective jurisdiction. It is true that States now prevent such legislation in the criminal jurisdiction, but where there is no such constitutional bar, States go out of their way to enact such retroactive laws in the criminal jurisdiction. A law can be enforced from a retrospective date or to impinge on matters that have taken place earlier. Article 1 of the Statute clearly states that "the International Tribunal shall have power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." In the Nürnberg Trials such a plea was raised and rejected, because the Charter authorised trials of offences which had taken place earlier. The decision of the Nürnberg Trial is now history and with time has now become international customary law. As stated in the earlier paragraph, all "would-be" accused were on notice, through Resolutions of the Security Council, to refrain from committing such crimes. If they chose to do so, they cannot complain of a statute that now pursues their heinous action. The Nürnberg Trials were the outcome of the London Agreement of 1945, which can be termed the law of the victors against the vanquished, but the Statute of the International Tribunal is the result of the Security Council action taken on behalf of the Member States, in respect of which there can be no grievance. This objection therefore is rejected.

73. It is also contended that the International Tribunal could only have been established by an international treaty amongst the Member States, or at least by the General Assembly by an amendment to the Charter. It is true that the treaty approach appears to be one of the ways of establishing a judicial body, but the alternative way found by the Security Council, as the delegate of all the sovereign Member States, to establish such a tribunal under its Chapter VII powers, cannot be treated as illegal. It is true that the step may have not met the views of some of the Member States, but no general assault was lodged against the measure by any substantial number of members when the Security Council took its decision on 22nd February, 1993, or later after the Statute was approved. In fact the General Assembly was not even moved for a recommendation to raise an objection to the establishment of the Tribunal. The action being grounded in urgent necessity and being within the scope of enforcement action, grants a cover of validity to the establishment of the Tribunal. The other suggestion that the Tribunal could have been established by the General Assembly, I am afraid the same would have called for the amendment of the Charter, a more difficult objective to achieve than the purpose for which it was required. Both the submissions, therefore, have no weight and must be rejected.

74. I have no doubt that in creating the International Tribunal, the Security Council acted in accordance with the purposes and principles of the Charter and the rule of *jus cogens*. By establishing the International Tribunal, the Security Council established a judicial body of international repute, totally competent and impartial, for the purpose of solving a core fundamental humanitarian issue, i.e., the flagrant violation of basic norms of international humanitarian law, a project for which it must be commended. The creation of the International Tribunal was a reasonable and necessary step in the light of the threat to the peace, which was identified also by the Security Council. For

all these reasons, I would reject the submission of the appellant's counsel that the International Tribunal was not lawfully constituted. In this view of the matter, the two Resolutions of the Security Council, being legal and proper, must be allowed to stand unhindered. No further declaration or action is required from this Tribunal.

75. For the reasons set forth above, I disagree with the Trial Chamber's view that this Tribunal does not have the authority to assess the legality of its own establishment by the Security Council. The Tribunal is different from other subsidiary organs created by the principal organs of the United Nations because it is not subject to control with respect to the performance of its judicial functions. Rather, it is an independent body which has inherent jurisdiction to examine its competence. If the Tribunal was illegally established, its jurisdiction would have been invalid. To ensure that the Tribunal does not exercise an invalid jurisdiction, I have been compelled to examine the matter collaterally.

76. Although the Trial Chamber did not believe it had the authority to review the Security Council's creation of the Tribunal, it nonetheless made some comments on the defence's assertions on this matter. I agree with the Trial Chamber that the Security Council's actions in creating the Tribunal were clearly not arbitrary and that, due to the nature of the conflict, the creation of the Tribunal was an appropriate measure for restoring a lasting peace to the region. As set out in detail above, I also agree with the Trial Chamber's reasoned rejection of the appellant's arguments on establishment of the Tribunal via treaty or by the United Nations General Assembly, the United Nations' authority to act on individuals and the Security Council's authority and ability to create an impartial judicial body. Finally, for the reasons discussed above, I believe that the appellant's contention that the accused's right to be tried by a tribunal established by law required the Tribunal to have been established by a democratically elected legislature should be rejected.

THE QUESTION OF PRIMACY

77. Now I come to the question of primacy. In the written submissions filed by the appellant, the appellant has contested the power of the Security Council, even if the establishment of the International Tribunal be treated as within its legal powers, to vest the Tribunal with jurisdiction of a generally primary nature over domestic jurisdiction. It is submitted that the Tribunal being of an *ad hoc* character, is an inferior legal tribunal compared to domestic judicial organs and that the Security Council failed to resolve the fundamental right of the appellant to be tried by a tribunal established by law. It is asserted that the International Tribunal could not have been given primacy over domestic jurisdiction, if the case against the appellant in the domestic jurisdiction could have been prosecuted diligently and the said Tribunal was impartial and independent and otherwise not designed to shield him from international responsibility. It is further contended that the acceptance of the jurisdiction of the International Tribunal by the Federal Republic of Germany and the Republic of Bosnia-Herzegovina is only relevant if those states could have waived their sovereign rights without violating the international rights enjoyed by the appellant which were otherwise available to him in international law. It is submitted that the said States concerned could not have waived the appellant's rights which were

vesting in him under international law. It is lastly contended that the Trial Chamber should have denied its competence to exercise primacy while the accused was in the custody of the judicial authorities in the Federal Republic of Germany and the said authorities were adequately meeting the obligations under international law. The appellant contests the Trial Court's order.

78. An important matter first requires to be sorted out before the plea that the International Tribunal could not have been granted primacy over national courts is taken up. Initially the appellant took up this objection before the Trial Chamber as an independent ground of attack. The Trial Chamber in its judgement, dealt with this plea under the main heading "I: The Establishment of the International Tribunal", under which under sub-heading "A" it dealt with "Legitimacy of Creation" and under sub-heading "B" it dealt with "Primacy of the Tribunal." It then took up under main heading "II: Grave Breaches of the Geneva Convention." In the concluding disposition, however, it dismissed the motion insofar as it related to primacy jurisdiction and subject matter jurisdiction under Articles 2, 3 and 5, but decided it was incompetent insofar as it challenged the establishment of the International Tribunal. The inclusion of arguments relating to primacy under main heading "I" may be due to inadvertence, or perhaps the counsel for the appellant argued it under this head. In the written brief submitted to the Appeals Chamber, the appellant has dealt with this objection under a two pronged attack. First, that the Security Council could not have granted primacy to the Tribunal and second, that the Trial Chamber should have denied its competence to exercise primary jurisdiction over the appellant. Due to the first ground, the Prosecutor has raised the objection that the appeal qua primacy is incompetent under Rule 72 (B), as it does not relate to lack of jurisdiction. It is clear that the plea of primacy is being raised on two grounds and not on the sole ground that the Security Council could not grant primacy to the Tribunal. I have already held in para. 33 above that the International Tribunal is competent to inquire into the facts as regards its lawful establishment, because if it should find that the Tribunal is not lawfully established, it would affect its validity as a legal body to do justice and also to exercise powers granted to it by the Statute. The matter ultimately comes down to lack of jurisdiction. In these circumstances, I would treat this objection as also one extending to lack of jurisdiction. Since the challenge is on two grounds I do not think that any technical objection should stand in the way of the same being heard on alternate grounds. I would, therefore, deal with the matter on that basis and would reject the Prosecutor's plea that the appeal is incompetent.

79. Before I take up the arguments, an examination of Articles 9 and 10 of the Tribunal's Statute are relevant in this respect. The same are reproduced below:

"Article 9

Concurrent Jurisdiction

> (1) The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

(2) The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

"Article 10

Non-bis-in-idem

(1) No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

(2) A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterised as an ordinary crime: or

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

(3) In . . . . . "

80. Rules 8, 9 and 10 of the Tribunal's Rules of Procedure and Evidence are also relevant in this respect and are reproduced below:

"Rule 8

Request for Information

Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 29 of the Statute."

"Rule 9

Prosecutor's Request for Deferral

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

(i) the act being investigated or which is the subject of those proceedings is characterised as an ordinary crime;

(ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused form international criminal responsibility, or the case is not diligently prosecuted; or

(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal."

"Rule 10

Formal Request for Deferral

(A) If it appears to the Trial Chamber seized of a proposal for deferral that, on any of the grounds specified in Rule 9, deferral is appropriate, the Trial Chamber may issue a formal request to the State concerned that its court defer to the competence of the Tribunal.

(B) A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Tribunal.

(C) Where deferral to the Tribunal has been requested by a Trial Chamber, any subsequent trial shall be held before the other Trial Chamber."

81. A review of the above provisions shows that (i) both the International Tribunal and the national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991; (ii) the International Tribunal has primacy over national courts in this respect, but not *vice versa*, iii) where it appears that in investigations or criminal proceedings instituted in national courts, the act being investigated or which is the subject of those proceedings is characterised as an ordinary crime, or there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted, or what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal, the International Tribunal may request the State concerned that its court defer to the competence of the Tribunal, but the national court cannot so request for a deferral; and (iv) the International Tribunal is not mandatorily bound to enforce primacy in all cases, for it can permit the national courts to judge the accused for themselves.

82. As regards cases decided by national courts, the right of the International Tribunal to retry the accused and claim competence for itself is also there, but since the appellant's case does not fall in this category, I need not discuss the scope of the relevant law in this respect.

83. At the root of primacy is a demand for justice at the international level by all States which constitutes the first step towards implementation of international judicial competence. The rule enhances the role of the Prosecutor in giving him a right to move for transfer of competence and to the International Tribunal the option whether to exercise its discretion to secure competence for itself. The rule obliges States to accede to and accept requests for deferral on the ground of suspension of their sovereign rights to try the accused themselves and compels States to accept the fact that certain domestic crimes are really international in character and endanger international peace and that such international crimes should be tried by an international tribunal, that being an appropriate and competent legal body duly established for this purpose by law. The rule cuts national borders to bring to justice persons guilty of serious international crimes, as they concern all States and require to be dealt with for the benefit of all civilised nations. Last but not least, the rule recognises the right of all nations to ensure the prevention of such violations by establishing international criminal tribunals appropriately empowered to deal with these matters, or else international crimes would be dealt with as ordinary crimes and the guilty would not be adequately punished.

84. I would turn now to the arguments. Before examining the matter, it is necessary to refer to certain provisions of the Charter of the United Nations which are relevant in this respect. Under Article 2(1) of the Charter, the United Nations Organisation is based on the principle of the sovereign equality of all its Members. Under Article 24(1), the Member States, to ensure prompt and effective action by the United Nations, have conferred on the Security Council primary responsibility for the maintenance of international peace and security and have to that effect agreed that the Security Council in carrying out its duties under this responsibility will be deemed to be acting on their behalf. Under Article 25, the Member States have agreed to accept and carry out the decisions of the Security Council in accordance with Chapter VII. Under Article 2(2), all the Member States, in order to ensure for themselves the rights and benefits resulting from membership, have agreed to fulfil in good faith the obligations assumed by them in accordance with the Charter.

85. The right of a State to try its own nationals or persons within its jurisdiction who have committed serious offences, whether within the territories of that State or without, is a sovereign right. Where the offences are committed outside its territories, the State has a right to enact laws making the offences triable within its own jurisdiction.

86. The first question that arises is whether the Security Council could have given primacy of jurisdiction to the International Tribunal. It cannot be denied that under Article 24(1) of the Charter, Member States transferred their sovereign rights to the Security Council when it took Chapter VII proceedings on their behalf to establish the Tribunal and agreed to be bound by the Council's decisions. In the instant case the transfer of sovereign rights included the rights which States had in respect of trial of accused persons for serious offences against international humanitarian law which they may have committed and for which they were liable within their respective jurisdictions. In view of Article 2(7) of the Charter, the intrusion of the United Nations in matters affecting the sovereign rights of Member States is legal and permissible, if the matters pertain to Chapter VII proceedings. Under Article 39, the Security Council is the sole judge of the existence of any threat to the peace, breach of

peace or act of aggression and solely responsible for making recommendations and deciding what matters should be taken in accordance with Articles 41 and 42 to maintain and restore international peace and security. The fact that the Security Council in its discretion did find the existence of a threat to the peace in respect of the situation in the former Yugoslavia and set up the International Tribunal with the limited purpose of dealing with serious violations of international humanitarian law committed in those territories from 1 January, 1991, suspended the sovereign rights of all Member States of the United Nations to try persons over whom primacy was granted to the International Tribunal. The Security Council was thus competent to grant primacy to the International Tribunal and I would hold accordingly.

87. It must not be forgotten that whilst Article 2(1) prohibits the Organisation from interfering in matters which are within the domestic jurisdiction of States, this principle is not applicable when the Security Council adopts enforcement measures under Chapter VII. At best what can be prevented in such a situation is a disrespect for human rights and norms. Certain articles of the International Covenant on Civil and Political Rights (1966), the European Convention on Human Rights and of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984) contain certain important provisions which are binding on all States, from which they cannot derogate even in times of the gravest emergency, and one would imagine that such of them that ensure a fair trial and protection of the rights of the accused bound the Security Council to ensure their non-violation in the Statute of the International Tribunal which they drafted. Other than this, the appellant was not entitled to any other guarantees arising out of the suspension of State sovereignty because of primacy being conferred on the International Tribunal.

88. The right to try an accused and to define and establish offences for which he can be tried and punished is that of the State. If a State desires to challenge the forfeiture or suspension of its sovereign right, it alone has the right to press such a claim; for the individual has none. SSee Israel v Eichmann, 36 I.L.R. 5 Z 62 - (1961)C. The right to certain important protections flowing out of human rights and humanitarian laws out of the developments that have taken place in international law over the last few decades, is that of the accused. If certain sovereign rights of Member States stood suspended by the Security Council's action in establishing an international criminal tribunal and granting it primacy over domestic courts, the rights of the accused, as stated above, did not stand suspended, who could claim their protection.

89. This brings me to the question whether the Security Council, in drafting the Statute of the International Tribunal, ensured the protection of the appellant's rights flowing out of human rights and norms. One distinct violation has been referred to by the appellant in respect of his objection as regards the illegality of the Tribunal's establishment. That has been answered against him. Otherwise, none else has been referred. The Statute of the Tribunal grants all protections possible to the appellant. In this respect, observations made by me in paras 33 and 68 are relevant and may be referred to. So no important rights of the appellant to human rights or norms stand violated. Assuming, though not admitting, that the appellant has any such rights available by way of representation or appeal that he can make or prefer in this respect before any international regional body created for the purpose of protection of human rights, they are *non esse*, because of the original and appellate jurisdictions granted to the International Tribunal, where the appellant can urge such claims and because the

said International Tribunal supersedes such other regional bodies on the basis of its having special subject matter competence over criminal matters.

90. Another argument pressed is that the States of Germany and Bosnia-Herzegovina were competent to try the appellant, that both had jurisdiction to try the appellant for the same serious violations for which the appellant is being sought to be tried by this Tribunal, that the appellant was at trial in the State of Germany and that that State was meeting its obligations to try him fairly and not using the proceedings to shield him in any way. It is true that the appellant, at the time the request for deferral was made, was not being tried by the German authorities, but was the subject of investigation. The reference to the appellant being tried appears to be an inadvertent error. However, the position remains that the appellant did not object to the Tribunal's claim for primacy when the request for deferral was being debated. The German authorities acceded to the Tribunal's request. As far as Bosnia-Herzegovina is concerned, which also has the right to try the appellant for the relevant international crimes, as they were committed within its territories, it also did not file a caveat contesting the Tribunal's claim to primacy. Even otherwise, the appellant is not a citizen or national of Bosnia-Herzegovina and can hardly claim protection under the flag of that State. Both States have no objection to the International Tribunal trying the appellant. Both have not objected to the suspension of their sovereign rights to try the appellant arising out of the Council's action in granting primacy to the Tribunal. The appellant has no *locus standi* to plead for these States. The objection, therefore, has no force and must be rejected.

91. As regards the plea that as a result of the illegal competence of the International Tribunal to prosecute persons for violation of international humanitarian law, such persons will be denied the right to be tried by their national courts, whether in the general jurisdiction or by transfer to some special jurisdiction, it is of no relevance here, as the rule of *jus de non evocando* is relative to national jurisdictions. This rule compels States to ensure that an accused be tried by the regularly established courts and not by special tribunals set up for that purpose. Where such special courts are set up validly by superior legislatures and the law is not discriminatory such as to deny the accused a fair trial, the validity of such special courts may not perhaps come under cloud. Whatever be the situation, the establishment of an international criminal tribunal to which States have granted rights of primacy and thus surrendered their sovereign rights to try certain types of accused for certain designated offences, which would normally fall within their jurisdictions, the *jus de non evocando* rule becomes *non esse*.

92. As regards the objection that the Trial Chamber wrongly exercised jurisdiction in acceding to the Prosecutor's request to claim primacy, nothing has been pleaded that has not already been dealt with and rejected. It does not appear that the discretion exercised by the Trial Chamber was arbitrary or unfair. This objection, therefore, has no force.

93. To conclude, I would hold that the Security Council was competent to grant primacy to the International Tribunal. This being a question of law, the claim for estoppel is rejected. There is no estoppel against law.

94. For the reasons set forth above, I agree with the Trial Chamber's view that the appellant does not have standing to raise the sovereign rights of States — especially States who have not objected to the suspension of such rights — with respect to primacy of jurisdiction. In addition, I would point out that Article 2 (7) of the United Nations Charter would prevent the claim of domestic jurisdiction against Security Council enforcement action under Chapter VII and that the principle of *jus de non evocando* is not applicable where States have given up their sovereign right to try certain offences to the Tribunal.

LACK OF SUBJECT-MATTER JURISDICTION

95. In the brief submitted by the appellant it is stated that he desires to challenge the subject-matter jurisdiction of the International Criminal Tribunal in respect of the following acts:-

wilful killing - Article 2 (a) of the Statute;

torture or inhumane treatment - Article 2 (b) of the Statute,

wilfully causing great suffering or serious injury to body or health - Article 2 (c)

of the Statute

murder, cruel treatment and torture as breaches of Common Article 3 (1) (a)

of the Geneva Conventions - Article 3 of the Statute

murder - Article 5 (a) of the Statute

torture - Article 5 (f) of the Statute

rape - Article 5 (g) of the Statute, and

inhumane acts - Article 5 (i) of the Statute

committed during the period 27th May 1992 and 3rd August 1992.

96. On behalf of the appellant it is contended that Article 2 (a), (b) and (c) of the Statute relate to common Article 2 of the Geneva Conventions of 1949 and covers only offences committed in international conflicts. It is next contended that violations of Article 3 of the Statute are only within the jurisdiction of the International Tribunal if the identical prohibitions of the 1907 Hague Convention Regulations have been violated, *casu quo* identical crimes of Article 6 (b) of the Nüremburg Charter have been committed. It is submitted that Article 5 (a), (f), (g) and (i) of the Statute relate to crimes committed in armed conflict, whether international or internal in character. It is, however, submitted that an armed conflict, whether international or internal, did not exist at any relevant time in respect of the place where the appellant is alleged to

have committed the offences. In this connection it is urged that the argument that no armed conflict existed at any relevant time or place, is not only valid with regard to the offences under Article 5 of the Statute but at least implicitly and subsidiarily also in relation to offences under Articles 2 and 3 of the Statute. It is contended that the International Criminal Tribunal did not have subject-matter jurisdiction under Article 2 (a) (b) and (c) of the Statute, nor under Article 3 of the Statute, nor under Article 5 (a), (f), (g) and (i) of the Statute to try the accused for the indicted acts.

97. It may be stated here that the Trial Chamber, in its judgement, concluded that Article 2, 3 and 5 each applied to both international and internal armed conflicts and it concluded that it had jurisdiction, regardless of the nature of the conflict, and that it did not have to decide whether the conflict was internal or international.

98. The facts leading up to the establishment of the International Tribunal have already been stated earlier. Certain resolutions especially relating to subject-matter jurisdiction were not incorporated in those facts. It is therefore, necessary when dealing with this subject to refer to those resolutions and I do so accordingly.

99. By Resolution 764 (1992) of 13th July 1992, the Security Council reaffirmed that all parties to the conflict were bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12th August 1949, and that persons who had committed or had ordered the commission of grave breaches of the Conventions were individually responsible in respect of such breaches. By Resolution 771 (1992) of 13th August 1992, the Security Council expressed grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and condemned violations of the same, including those involved in the practice of "ethnic cleansing", and demanded that all parties to the conflict and others concerned desist from all breaches of international humanitarian law. By Resolution 780 (1992) of 6th October 1992, the Security Council requested the Secretary-General to establish an impartial Commission of Experts, to provide him with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia. On 26th October 1992, the Secretary-General announced the appointment of the Chairman and members of the Commission of Experts. By letter dated 9th February 1993, the Secretary-General submitted to the President of the Security Council an interim report of the Commission of Experts which concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia and that should the Security Council or other competent organ of the United Nations decide to establish an *ad hoc* International Tribunal, such a decision would be consistent with the direction of its work. It was against this background that Resolution 808 (1993) of 22nd February, 1993, was passed wherein the Security Council expressed once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and determined that the situation constituted a threat to international peace and security and stated that it was determined to put an end to such crimes and to take effective measures to take to justice the persons who were responsible for them. Against this background, the Security Council decided to establish an international tribunal so that it could contribute to the restoration and maintenance of peace. The Secretary-General, after taking into consideration a host of

reports submitted by Member States, other governments, commissions, rapporteurs, law societies, non-governmental and other bodies, jurists, etc., ultimately put up a Report on 25th May 1993, before the Security Council. The report referred to the earlier Resolutions and steps taken as stated above. Pursuant to this report, the Security Council by Resolution 827 (1993) of 25th May, 1993, approved the report of the Secretary-General, decided to establish the International Tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to that end adopted the Statute of the International Tribunal, annexed to the Secretary-General's report. By Resolution 820 (1993) of 17th April 1993, the Security Council once again condemned violations of international humanitarian law, including in particular the practice of ethnic cleansing that was going on in the former Yugoslavia.

VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

AS BASIS FOR THE OFFENCES

100. At this stage, it may be mentioned that the report submitted by the Secretary-General, in respect of offences proposed in Articles 2 to 5 of the Tribunal's draft Statute, referred to the basis on which he had structured the offences in order to give competence *rationae materiae* to the International Tribunal. This is what he stated in this respect in paras. 33 to 35:-

> 33. According to paragraph 1 of resolution 808 (1993), the International Tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.
>
> 34. In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.
>
> 35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land

> and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."

101. From the above, it is apparent that from various resolutions passed from July 1992 onwards up to 25th May, 1993, the thinking or opinion was that the International Tribunal was intended to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This being the thinking or opinion of the members of the Security Council all along and this being also the view of the Secretary-General, constitutes the first foundation insofar as it pertains to the structuring of the offences. Thus, what is clear is that the offences had to constitute serious violations of international humanitarian law.

102. At this stage, it may be stated that references in the various resolutions of the Security Council to the conflict being international or internal, were not definitive. It cannot be therefore stated with certainty that the Security Council treated the conflict as international as legally decisive of that situation.

103. This is what the Statute of the International Tribunal says about international humanitarian law. The preamble to the Statute states:-

"Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, 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 (hereinafter referred to as the "International Tribunal") shall function in accordance with the provisions of the present Statute."

Article 1 states:-

"Article 1

Competence of the International Tribunal

> The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."

Article 9 states that the Tribunal and the national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law. The rule of *non-bis-in-idem,* covered by Article 10, again refers to serious violations of international humanitarian law. Article 16, which deals with the Prosecutor's powers, also states that he shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law. What is therefore within the jurisdiction of the International Tribunal are serious violations of international humanitarian law.

SECRETARY-GENERAL'S TREATMENT OF EACH OF OFFENCES

104. Now I turn to the Secretary-General's treatment of each of the offences. With regard to Article 2 of the International Tribunal's Statute, i.e. "Grave breaches of the Geneva Conventions of 1949", the Secretary-General reported in paras. 37 to 39 of his report as follows:-

> "37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war.
>
> 38. Each Convention contains a provision listing the particularly serious violations that qualify as "grave breaches" or war crimes. Persons committing or ordering grave breaches are subject to trial and punishment. The lists of grave breaches contained in the Geneva Conventions are reproduced in the article which follows.
>
> 39. The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law."

105. With regard to Article 3 of the International Tribunal's Statute i.e., "Violations of the laws or customs of war", this is what the Secretary-General stated in paras. 41 to 43 of his report:-

> "41. The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.
>
> 42. The Nürnberg Tribunal recognised that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognised by all civilised nations and were regarded as being declaratory of the laws and customs of war. The Nürnberg Tribunal also recognised that war crimes defined in article 6(b) of the Nürnberg Charter were already recognised as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.
>
> 43. The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the Hague Regulations also recognise that the right of belligerents to conduct warfare is not unlimited and that resort to

> certain methods of waging war is prohibited under the rules of land warfare."

106. I need not discuss the comments made in the Secretary-General's report regarding what he stated about "Genocide", as the appellant has not been indicted under Article 4.

107. With regard to Article 5 i.e., the "Crimes against humanity", this is what the Secretary-General stated in paras. 47 to 49 of his report:-

> "47. Crimes against humanity were first recognised in the Charter and Judgement of the Nürnberg Tribunal as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.
>
> 48. Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution."

108. From the above it is apparent that from various resolutions passed from July 1992 onwards till the report of the Secretary-General was presented on 25th May 1993, the thinking or opinion amongst the members of the Security Council was clear that an international criminal tribunal was to be established to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. However, when the report was presented by the Secretary-General on 25 May 1993, he clarified a number of matters, which he explained in paras. 33 to 35 of his report. For instance, he stated that international humanitarian law existed in both the form of conventional law and customary law and that while there was international customary law which was not laid down in conventions, some of the major conventional humanitarian law had become part of customary international law. It is, therefore, clear that he regarded some of the conventional humanitarian law or perhaps some provisions thereof as yet not a part of customary international law. Since he wanted to make sure that the rule of *nullum crimen sine lege* did not obstruct the working of the International Tribunal, he wanted to ensure that only international humanitarian law, which was beyond any doubt a part of customary law, should alone constitute the basis for the offences which he had provided in the draft of the Tribunal's Statute. This was necessary in order to show that the Tribunal was to prosecute offences which had previously stood established, that violators could therefore be deemed to have knowledge thereof and the creation of the Tribunal was only an enforcement measure to bring them to book and nothing else. He also made it clear that since the offences had been structured out of that part of international humanitarian law which constituted international customary law, any charge that the Security Council was legislating new laws would not hold good. The

Secretary-General, in subsequent paragraphs of his report, then dealt with the basis on which each of the offences referred to in the draft Statute of the International Tribunal, such as Articles 2 to 5, had been structured. This was necessary as the tribunal to be established was not one of general international jurisdiction with powers to decide an open range of criminal offences, but a special tribunal with limited territorial, temporal and subject matter jurisdictions. What were the specific features of each of the offences and the basis on which they were structured, therefore, were spelt out. These features added a new dimension to the thinking or opinion of the members of the Security Council. On the basis of the earlier thinking or opinion and the new representations that were made by the Secretary-General, the members of the Security Council took a decision. These representations, therefore, constitute the second foundation insofar as it pertains to the structuring of the offences. They, therefore, have a strong bearing, when it comes to the interpretation of any of these offences.

RULES AS TO INTERPRETATION OF CONSTITUTION OF AN INTERNATIONAL BODY

109. In the field of international law, any organisation or body created by a treaty or some form of enactment must examine its own constitution to appraise or assess what the whole or any part thereof means and not first look to extraneous sources to come to any conclusion. The constitution or its relevant part should be examined in good faith in accordance with the ordinary meaning in the context in which it appears and in the light of its objects and purposes. If there appears some confusion, any prior agreements or instruments between the parties, or, as in this particular case, the report of the Secretary-General and the debate of the members of the Security Council thereon, can be examined. This brings to the fore what the Secretary-General represented to the members of the Security Council by presenting his views and the draft of the Statute and what the members, on the basis of that representation, debated, when they adopted that draft. If any serious ambiguity still remains, reference to rules relating to interpretation of international statutes or other material can be resorted to. A tribunal having international criminal jurisdiction should be careful not to convert itself into a free or general advisory body. It’s enunciation of the law must be on a case to case basis and limited to the lis before it. A matter which should normally be decided on the basis of law and evidence, should not be foreclosed by an enunciation of law by a superior tribunal which may have the effect of pre-empting the rights of the parties to have the matter properly appraised by the lower chamber. The International Court of Justice, by Article 96 of the United Nations’ Charter, has an advisory capacity. Civil and criminal courts basically have none, unless it is directed by law or is directly relevant to a particular matter in a case, which it would do only in a lis and that too after the parties were given a proper opportunity to produce evidence in the matter, if they proposed to do so.

ARTICLE 2 OF THE STATUTE

110. I would now examine Article 2 of the Statute as it stands. It clearly refers to the four Geneva Conventions of 12 August, 1949, the grave breaches of the said Conventions as listed is paras. (a) to (h) and the said breaches as being committed against persons or property protected under the provisions of the relevant Conventions. The expression "grave breaches" can be treated as used in the general or generic sense i.e., serious breaches, but there are serious breaches to be found in common Article 3 of the Geneva Conventions and some which may be found in the other provisions of the said Conventions. But only one provision in each of the four Geneva Conventions refers to "grave breaches" (Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention and Article 147 of the Fourth Convention). In respect of the "grave breaches", the Conventions provide that all States to the Conventions shall enact national legislation to provide penal sanctions against persons committing or ordering to be committed such offences, and to punish them for the same and to hand over such persons to another State making such a demand. As regards violations of the other provisions of the Conventions, the Conventions only provide that all States shall take measures to suppress them. It is, therefore, clear that the list of offences referred to in paras. (a) to (h) under Article 2 of the Statute has no relevancy with serious or grave breaches, as used in the general sense, but "grave breaches" in the technical sense or context as stated in the relevant articles of the Conventions. If we examine the offences under paras. (a) to (h), it is clear that they fall under one or more of the Articles in the Conventions enumerating the category of "grave breaches." Article 2 is not self contained. Its meaning only becomes clear by reference to the Conventions. This is a case of legislation by reference. The offences, therefore, listed under Article 2 are those that specifically fall under and are treated as "grave breaches" in the Geneva Conventions of 1949 and are those that can be committed only in an international armed conflict. This is the interpretation on a straight evaluation of the Article.

111. To test the above appraisal, I may turn to what happened in the Security Council. The report of the Secretary-General clearly states that the Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. He then mentions that each Convention contains a provision listing the particularly serious violations that qualify as "grave breaches" or war crimes and that the lists of grave breaches contained in the Geneva Conventions have been reproduced in the article (Article 2) he has drafted. He concludes that earlier on several occasions also the Security Council had reaffirmed that persons who committed or ordered the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia were individually responsible for such breaches as serious violations of international humanitarian law. It is clear from these representations that Article 2 was structured on the basis that the four Geneva Conventions constituted the core of the customary law applicable in international armed conflicts and that the grave breaches which constituted the particularly serious violations of war crimes, obviously related to offences in the field of international armed conflict. It is, therefore, not proper to interpret Article 2 of the Statute outside the scope of the Secretary-General’s report and the decision of the members of the Security Council, or to look for any other hypothesis to hold otherwise.

112. I would, therefore, hold that article 2 of the International Tribunal’s Statute covers offences which are treated as "grave breaches" in the 1949 Geneva

Conventions, provided they are perpetrated against persons or property protected by the said Conventions, and that these offences are those that are committed in an international armed conflict.

ARTICLE 3 OF THE STATUTE

113. I now examine Article 3 of the Statute as it stands. It speaks of violations of "the laws or customs of war." Both are included i.e., the laws of war and the customs of war and the two are used in contradistinction to each other by the conjunction "or" in between. Thus, two sources are intended, the laws of war and the customs of war as prevailing at the international level. What are the laws of war? They are no more than rules and regulations setting forth the norms constituting the modes, methods and conduct of warfare and prohibitions connected therewith. They would include (a) treaties, conventions, agreements, declarations and protocols (b) constitutions and statutes of international war crimes tribunals and (c) decisions of international judicial tribunals. The 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land and the Regulations annexed to it, the four Geneva Conventions of 1949 and the two Additional Protocols I and II, the decision of the Nürnberg and Tokyo Tribunals and a host of international declarations, treaties, conventions and rules entered into by States (most of which are listed in the book "Documents on the Laws of War" by Adam Roberts and Richard Guelff) all constitute laws of war. I would exclude national manuals of military law, because they do not have an international character, although they may have a function in providing evidence of the law.

114. The customs of war are those which arise out of State practices extending over a period of time, coupled with *opinio juris.* Where a certain practice followed by a number of States in the international community over long user or a period of time has established a status as to be regarded by them as legally obligatory or binding, an international custom develops. Though this is the normal interpretation, State practices may consist of treaties, decisions of international and national courts, national legislation, diplomatic correspondence, practice of international organisations (I.L.C. Year Book, 1950, II, pp. 368-372), policy statements, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to the armed forces, etc., and comments by governments on drafts of the International Law Commission. SBrownlie Principles of Public International Law, 4th Ed, p. 5C.

115. Abrupt development of customary law is not unusual. In the field of international human rights law, convention and custom have sometimes sprung up almost instantaneously, leading to almost overlapping developments in conventional and customary law.

116. The distinction between laws of war and customs of war is the thin end of a wedge. A good part of the conventional laws of war contain customary law, but not all of customary law is embodied in conventional law. Likewise, a good part of the conventional laws of war is treated as customary international law, but not all. Here, I think, the dichotomy arises. If States are parties to certain conventions dealing with laws of war, they are bound both favourably and unfavourably to the same, and should they be in armed conflict, it should matter little whether the conventions have

reached the customary threshold, for they are bound by the conventions and, having knowledge of them, the rule of *nullum crimen sine lege* should not prevail. Thus, since both laws of war and customs of war are covered, not jointly but severally, the question that the laws of war must be reinforced by custom, or that customs of war must be embodied in conventions, does not arise. Both, however, must cover violations of international humanitarian law, that being the grund norm under Article 1 of the Statute.

117. Article 3 of the Statute lists five offences under paras. (a) to (e), with the condition that "such violations shall include, but not be limited to" the same. The list is therefore illustrative and not limited to the five offences stated. It is clear, therefore, that the 1907 Hague Regulations, the 1949 Geneva Conventions with Additional Protocols I and II, the 1945 Charter of the International Military Tribunal 1945, apart from other conventions, constitute laws of war and that war crimes embodied therein, if they constitute serious violations of international humanitarian law, become offences liable to punishment under Article 3 of the Statute. Likewise, the 1907 Hague Regulations, the 1949 Geneva Conventions with Additional Protocols I and II and the instances given in the decision of the Nürnberg Tribunal, on the authoritative pronouncement of the Secretary-General as contained in para. 44 of his report, constitute, apart from others, the customs of war. There is an overlapping between Articles 2 and 3 of the Statute qua the "grave breaches." Since Article 2 of the Statute specifically deals with the "grave breaches", Article 3 thereof must be taken to cover all other serious violations of the 1949 Geneva Conventions and the Additional Protocols apart from the "grave breaches." Thus, Article 3 of the Statute covers *inter alia* war crimes embodied in the 1949 Geneva Conventions and the two Protocols, excluding the "grave breaches" but including all others, such as Common Article 3 thereof, if they constitute serious violations of international humanitarian law. Article 3 would, therefore, cover both international and internal armed conflicts.

118. To test the above appraisal, I would now examine what happened in the Security Council. The report of the Secretary-General stated that the 1907 Hague Conventions (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprised a second important area of conventional humanitarian international law which had become part of the body of international customary law. He mentioned that the Nürnberg Tribunal recognised that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognised by all civilised nations and were regarded as being declaratory of the laws and customs of war. The Nürnberg Tribunal also recognised that war crimes defined in Article 6 (b) of the Nürnberg Charter were also recognised as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable. The Secretary-General stated that the Hague Regulations covered aspects of international humanitarian law which were also covered by the 1949 Geneva Conventions, that the Hague Regulations also recognised that the rights of belligerents to conduct warfare were not unlimited and that resort to certain methods of waging war were prohibited under the rules of land warfare. In paragraph 44 of the report, the Secretary-General concluded that the rules of customary law contained in the Hague Regulations, as interpreted and applied by the Nürnberg Tribunal, provided the basis for Article 3 of the Statute, that he had proposed in the draft. However, when one examines Article 3 of the draft Statute, one finds that it reads "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:" after which paras. (a) to (e) follow, listing certain offences which are contained in the Hague Regulations. The wording of Article 3 of the Statute clearly shows that the article is illustrative but not limited to the five offences listed thereunder and that it is vaster in range than the basis laid down in paragraph 44 of the report. Earlier, the Secretary-General had referred to the fact that the Hague Regulations covered aspects of international humanitarian law which were also covered by the 1949 Geneva Conventions, which had become the core of the customary law applicable in international armed conflicts. The final representation in para. 44 of the report that the Hague Regulations, constituting rules of customary law, as interpreted and applied by the Nürnberg Tribunal, would provide the basis for Article 3 of the Statute of the International Tribunal, was therefore confusing. In the present case, some of the constitutive States of the former Socialist Federal Republic of Yugoslavia had amongst themselves or with secessionist groups entered into agreements agreeing to abide by certain provisions of the Geneva Conventions. These agreements could be used both in favour or against the contracting parties. Such of the Geneva Conventions which the parties agreed to abide by, were thus binding on them, custom notwithstanding. In view of this position, in the debate on the said draft, the member of the Security Council representing France drew the attention of the Council to the fact that "the expression laws or customs of war used in Article 3 of the Statute cover(ed) specifically ..... all the obligations that flow(ed) from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed." The member representing the United States Government also stated that she thought that it was "understood that the laws or customs of war referred to in Article 3 includ(ed) all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocols to these Conventions" and that this interpretative statement expressing a clarification was shared by other members of the Council. The member representing the United Kingdom, also whilst referring to Articles 2 to 5 of the Statute, drew attention to the fact that the reference to the laws or customs of war in Article 3 "was broad enough to include applicable international conventions and that Article 5 of the Statute covered acts committed in time of armed conflict." In these circumstances, in view of interpretative statements of three of the permanent members of the Security Council and absence of protest from the others, the adoption of the Statute must be deemed as taking into consideration the views of all the members, namely, that Article 3 of the Statute had an expanded meaning to also include all humanitarian law agreements in force in the territory of the former Yugoslavia and all applicable international conventions. It may be stated at this stage that the Socialist Federal Republic of Yugoslavia had in 1950 ratified the 1949 Geneva Conventions and in 1979 the two Protocols and had amended its Code of Criminal Procedure to incorporate all the serious offences mentioned in these treaties and after it became the Federal Republic of Yugoslavia had retained the said Code. Likewise, the State of Bosnia-Herzegovina in December 1992 had also declared it had acceded to the Geneva Conventions and the two Additional Protocols and adopted, with certain changes, the Criminal Code of the Federal Republic of Yugoslavia. It is therefore clear that when the members of the Security Council approved Article 3 of the Statute, the basis therefore was not only the Hague Regulations, as interpreted and applied by the Nürnberg Tribunal, but also all international conventions that were then applicable as laws of war and binding the belligerents or insurgents engaged in the

conflict in the former Yugoslavia. In these circumstances, the violations of international humanitarian law arising out of humanitarian law agreements that fell in the category of laws of war and were binding on the parties, such as the Geneva Conventions of 1949 and its two Protocols, including common Article 3 thereof, and those under the Hague Regulations, including the five listed under Article 3 of the Statute, all become applicable. Considering that the "grave breaches" are specially covered by Article 2 of the Tribunal's Statute, the remaining breaches in the Geneva Conventions of 1949 and its two Additional Protocols would be covered by Article 3. Article 3 of the Statute in the said light now becomes clear and free from the ambiguity in which it would have been in if only the view of the Secretary-General had been allowed to prevail.

ARTICLE 5 OF THE STATUTE

119. This does not require any discussion as crimes against humanity can be the subject of an international or internal armed conflict.

SUMMATION

120. I disagree with the Trial Chamber's conclusion that Article 2 of the Tribunal's Statute, which provides for the punishment of grave breaches of the Geneva Conventions, applies regardless of the nature of the conflict at issue. For the reasons explained above, I am of the view that Article 2 applies only with respect to offences committed during the course of an international armed conflict. I believe that Article 3 of the Tribunal's Statute, which provides that the Tribunal may try persons for violations of the laws or customs of war and provides a non-exclusive list of such laws and customs, encompasses all the applicable laws of war and customs of war that apply in both internal and international armed conflicts. Finally, I agree with the Trial Chamber's decision that Article 5 of the Tribunal's Statute gives the Tribunal jurisdiction over crimes against humanity committed in internal or international armed conflicts.

THE TRIBUNAL'S PRACTICE AND PROCEDURE

121. A matter on which I would like to comment is the method adopted by the Trial Chamber when dealing with the preliminary motion. On 22nd June, 1995, the preliminary motion was filed by the appellant. It was accompanied by no documents. On 7th July, 1995, the Prosecutor filed his reply thereto, with supporting documents on the 7th and 10th July, 1995. On 25th July, 1995, the preliminary motion was taken up by the Trial Chamber. At that stage, the accused's counsel had conceded in his brief that the armed conflict in the former Yugoslavia was an internal armed conflict and not an international armed conflict and that as all the offences for which the accused had been indicted were required to be committed in an international armed conflict, the charges against him should be dropped. The Trial Chamber than asked

counsel for the accused how it should deal with questions of fact i.e., how it should take judicial notice of dates, facts, the withdrawal of the Yugoslav Army and its non withdrawal, or facts that may make all the difference between a clearly international conflict and one that was internal, or should they defer this whole issue until there was evidence (if there was going to be evidence) before the Chamber concerning those facts. The learned counsel for the accused replied by stating that he agreed that it was hard to understand how the Chamber could act without establishing facts, but he said he would explain this later why some dates were of vital importance. He then stated he was relying on facts which were public and which could be culled from known public documents, which were not disputed. Pointing to the Prosecutor's intent to prove a report of Mr. Gow, the counsel for the accused stated that he could discuss with the Prosecutor that if he produced that report, he could also produce one on the facts too. The counsel reiterated that he was not ready then to say he was going to do that, but this option he would consider. On behalf of the prosecution it was asserted that they had sufficient documentary material to prove their case and much of the documentary material was such from which valid presumptions could be drawn as regards the facts which were required to be proved by them. This was countered for the accused that they had a whole lot of material - particularly opinions - published all over the world which were public knowledge, which they did not have to produce. In sporadic discussions on this point, nothing material developed. The Trial Chamber, in its judgement, referred to the great volume of material filed before it, but found that little of that material was such that judicial notice could be taken of it in the form of evidence, nor had it been tendered as evidence and, therefore, it desisted from giving a finding regulating the nature of the armed conflict in question. The first thing that the Trial Chamber should have done was to formally enquire from the accused whether he would be leading any evidence, oral or documentary. Had the appellant said "yes", the Trial Chamber should have enquired whether he would be leading oral evidence in particular. If the answer was still in the affirmative, the Trial Chamber should have considered whether it was appropriate for the motion to proceed, considering that the matter was a mixed question of law and fact, which could be dealt with along with the main case. Had he replied in the negative, the Trial Chamber should have called upon both the contesting parties to submit a statement of facts, with particulars as to how and by which documents they stood proved, and to admit or deny such facts and documents and to get such documents exhibited on which there was no dispute. At this stage it would have become known, after objections were recorded by either side, which facts were admitted and which documents could have been exhibited as proved or retained for presumptive proof and which had to be rejected. A mass of documents lodged by either side do not by themselves prove relevant facts involved in a case. Some may be proof only as regards their existence; some may be proof of their contents; some may have some presumptions attaching to them and support certain assumptions; and some may have no value. All these questions and answers should have been taken on the record formally. Only then the motion should have been allowed to proceed. It was not proper for the Trial Chamber to have proceeded with the motion before these preliminaries had been attended to. The Trial Chamber erred in not adopting this minimal procedure which it should have adopted for an orderly and legal disposal of the case. To record that no documents were tendered by the parties in the judgement is not sufficient, till all this was formerly put on the record in the form of questions and answers.

122. I now revert to what transpired before the Appeals Chamber. Before this Chamber, the appellant took up the position that no armed conflict, whether international or internal, took place at the places or in the village where the offences were alleged to have taken place. I enquired from the learned counsel for the appellant how he could raise such an issue before us in arguments alone, when the objection was a mixed one of law and facts, on which evidence would have to be led by him. I enquired whether he would not like to elect whether to drop the motion, subject to his being given the right to raise the matter before the Trial Chamber, after leading evidence there. At this stage, in the confusion of discussion, the learned counsel did not agree to exercise such an option, but proceeded on the ground that what was required to be dealt with by us were facts relative to whether an armed conflict had occurred, as this related to jurisdiction, and if the same were proved then he could later prove before the Trial Chamber whether the offence in fact had occurred in the village where the appellant was alleged to have committed the offences. At this stage, the Appeals Chamber permitted the counsel for the appellant to proceed and to give it the sources of his information so that it could compare those sources and decide whether or not it could take judicial notice of those facts or it could look into them itself. Here I must confess I made a mistake and did not get my dissent recorded. The learned counsel for the appellant then gave certain oral facts, referred to the report of the Commission of Experts (in particular covering the area of Opstina in Prijedor) and urged that no "armed conflict" as such i.e. committed in execution of or in connection with violations of the laws of armed conflict or genocide, had occurred. The Appeals Chamber then drew the attention of the learned counsel for the appellant to certain references in the report of the Commission of Enquiry to armed conflict in the town of Prijedor on 30th May 1992, and to the broad definition of armed conflict contained in common Article 3 of the Geneva Convention. The Prosecutor drew the attention of the Court to the fact that a large array of facts could be proved from documents from which presumptions could be drawn, to which counsel for the appellant expressed some concern and the matter then got lost in other discussions. Even assuming, for the sake of argument, that unrestricted powers permitted the Trial Chamber to be lax on conventional procedures, but some modicum of legal procedure grounded in method and logic should have been adopted by it. As they have not done so, I cannot draw the necessary conclusions of presumptions even from the Prosecutor’s documents, leave aside from the appellant’s, who has lodged none. I am therefore inclined to remand the case to the Trial Chamber for adopting the procedure as stated in para 121 above, or some other modicum of fair procedure, and then deciding this preliminary matter. Since the appellant has presented a *volte face* here by retracting from his earlier admission that the armed conflict was internal, the Trial Chamber shall also decide whether the accused can in law retract from such an admission. In short, by dealing with the appeal without ensuring that proper safeguards are adopted by the Trial Chamber before it draws its conclusions, whatever they may be, I would be validating confusion and encouraging procedural disarray. In such a situation, I would not like to hazard an opinion on a mixed question of law and fact, which legally is otherwise not permitted. On the Trial Chamber’s own showing, no facts were proved nor documents tendered in evidence. What conclusions can I draw? Should I turn to the Prosecutor’s documents alone to draw conclusions? Should I pre-empt the duty of the Trial Chamber and dislodge the appellant of first getting his matter attended there? The preliminary motion qua lack of jurisdiction requires to be remanded to the Trial Chamber for proper disposal and I hold accordingly. I would also hold that any observations made by me as to whether the armed conflict was international or

internal, should, out of respect for the appellant's objection, be treated as not binding the Trial Chamber, so that the appellant can get a fair hearing. The Trial Chamber should decide the motion within a month.

123. The power of remand is an integral part of the appellate system, just as is the power to affirm, reverse or revise a decision of a lower court. Remand is usually resorted to to compel lower courts to enforce the law or some of its essential requirements, so very neccessary for the establishment and compliance of the law and for a fair and proper legal disposal of the case. It compels the lower court to attend to an essential matter which it has overlooked and enables the accused to raise his objections again before the lower court, and to have the matter attended to by the appellate court also, if its scope is still open. The power of remand is contained in Rule 117(c) of the Tribunal's Rules of Procedure; which permits the Appeals Chamber to order a retrial. If a case can be remanded for a whole retrial, it can be remanded for a part. In many cases, implied powers have been assumed by international organisations, where it is neccessary or essential for the fufilment of its task or the performance of its functions. The basis for such assumption has already been given by me in para. 71 above. This Appeals Chamber, therefore, can also treat the power of remand as implied within its jurisdiction; the same being necessary and essential for the fulfilment of its task and the performance of its functions.

CONCLUSIONS

124. For the foregoing reasons, I am of the opinion:-

1. That the International Tribunal cannot review the action of the Security Council in establishing the Tribunal. To this extent, the decision of the Trial Chamber is affirmed. But I also hold that the International Tribunal can collaterally examine the legality of its own establishment in order to see whether it is not invalidly constituted as to render the exercise of its powers without jurisdiction. To this extent, the views of the Trial Chamber may be treated as revised.

2. The International Tribunal was established in conformity with the United Nations Charter and its establishment is in conformity with its purposes and principles. To this extent the views and the decision of the Trial Chamber are affirmed.

3. That the Security Council had the power to grant primacy to the International Tribunal over national courts. To this extent the views and the decision of the Trial Chamber are affirmed.

and

4. That Article 2 of the Tribunal's Statute relates to offences which are identified as "grave breaches" of the 1949 Geneva Conventions and that these offences are those that are committed in an international armed conflict; that Article 3 of the Tribunals Statute covers both

> conventional laws of war (including the 1949 Geneva Conventions and its Additional Protocols I and II, including Common Article 3 thereof, and the Hague Regulations) and customs of war; that Article 5 thereof covers crimes against humanity committed in international and internal armed conflicts; that the views of the Trial Chamber in respect of the scope of the offences referred to in Articles 2 and 3 may be treated as revised; that the decision of the Trial Chamber on Articles 2, 3 and 5 is set aside; and that the appellant's preliminary motion *qua* lack of subject matter jurisdiction, subject to the above observations as regards the scope of Articles 2, 3 and 5 of the Statute, be and is hereby remanded to the Trial Chamber for proper disposal. The Trial Chamber should adopt and record the procedure stated in para. 121 above, or some modicum of fair procedure. I would also direct the Trial Chamber to decide whether the appellant can be bound to his earlier admission that the armed conflict was internal, or whether he can retract it. I would also hold that any observations made by me as to whether the armed conflict in the former Yugoslavia was international or internal, should, out of respect for the appellant's motion, be treated as not binding the Trial Chamber, so that the appellant can get a fair hearing thereon.

125. The appeal attacking the lawful establishment of this Tribunal and the grant to it of primacy stand dismissed. The appeal qua lack of subject matter jurisdiction is remanded to the Trial Chamber, as stated above.

Signed: Judge Rustam S. Sidhwa

2nd October 1995

Date