Before: Judge McDonald, Presiding

Judge Stephen

Judge Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision: 10 August 1995

PROSECUTOR

v.

DUSKO TADIC A/K/A "DULE"

DECISION ON THE DEFENCE MOTION ON JURISDICTION

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. William Fenrick
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. A.M.M. Orie
Mr. Milan Vujin
Mr. Krstan Simic

DECISION

On 23 June 1995 the Defence filed a preliminary motion, pursuant to Rule 73 (A) (i) of the Rules of Procedure and Evidence ("the Rules") which provides for objections based on lack of jurisdiction, seeking dismissal of all of the charges against the accused. The Defence motion challenges the powers of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal") to try the accused under three heads: the alleged improper establishment of the International Tribunal; the improper grant of primacy to the International Tribunal; and challenges to the subject-matter jurisdiction of the International Tribunal. The Prosecutor contends that none of these points is valid and

that the International Tribunal has jurisdiction over the accused as charged. The Government of the United States of America has submitted a brief as *amicus curiae.*

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

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

HEREBY ISSUES ITS DECISION.

REASONS FOR DECISION

I. The Establishment of the International Tribunal

A. Legitimacy of creation

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

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

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

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

5. The Trial Chamber has heard out the Defence in its submissions involving judicial review of the actions of the Security Council. However, this International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.

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

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

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

The powers of the Security Council to discharge its primary responsibility for the maintenance of international peace and security are set out in Chapters VI, VII, VIII and XII of the Charter. The International Tribunal was established under Chapter VII. The Security Council has broad discretion in exercising its authority under Chapter VII and there are few limits on the exercise of that power. As indicated by the *travaux préparatoires*:

> Wide freedom of judgment is left as regards the moment [the Security Council] may choose to intervene and the means to be applied, with sole reserve that it should act 'in accordance with the purposes and principles of the [United Nations].'

(*See* Statement of the Rapporteur of Committee III/3, Doc. 134, III/3/3, 11 U.N.C.I.O. Docs. 785 (1945).)

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

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

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

10. The Defence relies on, or at least refers to, what has been said by the International Court of Justice ("the Court") in three cases: Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (Advisory Opinion of 20 July) (the "*Expenses Advisory Opinion"*), Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 45 (Advisory Opinion of 21 June) (the "*Namibia Advisory Opinion"*)

and Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 176 (Provisional Measures Order of 14 April) (the "*Lockerbie* decision"). In the first of these, the *Expenses Advisory Opinion*, the Court specifically stated that, unlike the legal system of some States, there exists no procedure for determining the validity of acts of organs of the United Nations. It referred to proposals at the time of drafting of the Charter that such a power should be given to the Court and to the rejection of those proposals.

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

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

> the determination under Article 39 of the existence of any threat to the peace . . . is one entirely within the discretion of the Council. . . . the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. . . . Once [such a determination is] taken the door is opened to the various decisions the Council may make under that Chapter.

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

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

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

One commentator interprets this provision to mean that the Security Council "cannot, in principle, act arbitrarily and unfettered by any restraints." (D. W. Bowett, *The Law of International Institutions* 33 (1982).) Another commentator has taken the position that although the Security Council has broad discretion in the field of international peace and security, it cannot "act arbitrarily or use the existence of a threat to the peace as a basis for action which . . . is for collateral and independent purposes, such as the overthrow of a government or the partition of a State." (Ian Brownlie, The

Decisions of Political Organs of the United Nations and the Rule of Law, *in Essays in Honour of Wang Tieya* 95 (1992).)

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

16. Although it is not for this Trial Chamber to judge the reasonableness of the acts of the Security Council, it is without doubt that, with respect to the former Yugoslavia, the Security Council did not act arbitrarily. To the contrary, the Security Council's establishment of the International Tribunal represents its informed judgement, after great deliberation, that violations of international humanitarian law were occurring in the former Yugoslavia and that such violations created a threat to the peace. One commentator has noted the "careful, incremental approach" of the Security Council to the situation in the former Yugoslavia and described the establishment of the International Tribunal as a protracted, four-step process involving: "(1) condemnation; (2) publication; (3) investigation; and (4) punishment." (James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 Am. J. Int'l L. 639, 640-42 (1993).) First, with its resolution 764, adopted on 13 July 1992, the Security Council stressed that "persons who commit or order the commission of grave breaches of the [1949 Geneva] Conventions are *individually responsible* in respect of such breaches". Second, the Security Council publicized this condemnation by adopting, on 12 August 1992, resolution 771, which called upon States and other bodies to submit "substantiated information" to the Secretary-General, who would report to the Security Council "recommending additional measures that might be appropriate". Third, by resolution 780 of 6 October 1992, the Security Council established the Commission of Experts to investigate these violations of international humanitarian law. The Security Council in due course received the report of the Commission of Experts, which concluded that grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including wilful killing, "ethnic cleansing," mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. (*See* Interim Report of the Commission of Experts, U.N. Doc. S/25274 (26 January 1993).) Finally, on 22 February 1993, by resolution 808, the Security Council decided that an international tribunal should be established and directed the Secretary-General to submit specific proposals for the implementation of that decision. On 25 May 1993, in resolution 827, the Security Council adopted the draft Statute and thus established the International Tribunal.

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

judicial review to determine whether, in relation to an exercise by the Security Council of powers under Chapter VII, those limits have been exceeded.

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

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

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

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

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

22. When, in resolution 827, the Security Council stated that it was "convinced" that, in the "particular circumstances of the former Yugoslavia", the establishment of the International Tribunal would contribute to the restoration and maintenance of peace, the course it took was novel only in the means adopted but not in the object sought to be attained. The Security Council has on a number of occasions addressed humanitarian law issues in the context of threats to the peace, has called upon States to comply with obligations imposed by humanitarian law and has on occasion taken steps to ensure such compliance. It has done so, for example, in relation to Southern Rhodesia in 1965 and 1966, South Africa in 1977, Lebanon on a number of occasions

in the 1980's, Iran and Iraq in 1987, Iraq again in 1991, Haiti and Somalia in 1993 and, of course, Rwanda in 1994. In the last of these, the establishment of the Rwanda Tribunal by the Security Council followed its finding that the conflict there involved violations of humanitarian law and was a threat to the peace.

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

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

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

The validity of the decision of the Security Council to establish the International Tribunal rests on its finding that the events in the former Yugoslavia constituted a threat to the peace. This finding is necessarily fact-based and raises political, non-justiciable issues. As noted by Judge Weeramantry, such a decision "entails a factual and political judgement and not a legal one". (The *Lockerbie* decision at 176.) A commentator has agreed, saying that "a threat to international peace and security is not a fixed standard which can be easily and automatically applied". (David L. Johnson, *Note, Sanctions and South Africa*, 19 Harv. Int l L. J. 887, 901 (1978).) The factual and political nature of an Article 39 determination by the Security Council makes it inherently inappropriate for any review by this Trial Chamber.

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

26. Article 41 of the Charter provides:

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

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

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

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

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

30. The Security Council discussions on the situation in the former Yugoslavia suggest two ways in which the International Tribunal would help in the restoring and maintaining of peace. First, several States expressed the view that the creation of the International Tribunal would deter further violations of international humanitarian law. (*See* Provisional Verbatim Record, U.N. SCOR, 48th Sess., 3175th mtg. at 8, 22, U.N. Doc. S/PV.3175 (22 February 1993); Provisional Verbatim Record, U.N. SCOR, 48th Sess., 3217th mtg. at 12, 19, U.N. Doc. S/PV.3217 (25 May 1993).)

31. Second, States took the position that the establishment of the International Tribunal would assist in the restoration of peace in the region. At the Security Council meeting on resolution 808, Hungary, in supporting the establishment of the

International Tribunal, explained how the International Tribunal would be helpful in this regard:

> The way the international community deals with questions relating to the events in the former Yugoslavia will leave a profound mark on the future of that part of Europe, and beyond. It will make either easier or more painful, or even impossible, the healing of the psychological wounds the conflict has inflicted upon peoples who for centuries have lived together in harmony and good-neighbourliness, regardless of what we may hear today from certain parties to the conflict. We cannot forget that the peoples, the ethnic communities and the national minorities of Central and Eastern Europe are watching us and following our work with close attention.
>
> (Provisional Verbatim Record of 22 February 1993, *supra*, at 19-20.)

Slovenia also indicated its conviction that:

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

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

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

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

32. Then it is said that international law requires that criminal courts be independent and impartial and that no court created by a political body such as the Security

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

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

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

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

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

(*Effect of Awards* case at 56-61.) If the General Assembly has the authority to create a subsidiary judicial body, then surely the Security Council can create such a body in the exercise of its wide discretion to act under Chapter VII.

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

37. Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter. In particular, that was achieved, in the case of action by the Security Council under Chapter VII, by Article 2(7) of the Charter and its reference to the application of enforcement measures under Chapter VII. The same observation applies to the contention that there is some vice involved in the conferring of primacy upon this Tribunal. That is no more than a means by which the Security Council seeks to give effect to the powers conferred upon it by Chapter VII. In any event, it is by no means clear that an individual defendant has standing to raise this point.

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

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

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

B. Primacy of the International Tribunal

41. The Trial Chamber deals next with the Defence argument that the primacy jurisdiction conferred upon the International Tribunal by Article 9 (2) finds no basis in international law because the national courts of Bosnia and Herzegovina or, alternatively, of the entity known as the Bosnian Serb Republic, have primary jurisdiction to try the accused. This argument in effect again challenges the legality of the action of the Security Council in establishing the International Tribunal: the answer to this has already been provided above. The Trial Chamber is not entitled to engage in an exercise involving the review of a resolution passed by the Security Council. In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from that State. (*See* Israel v. Eichmann, 36 I.L.R. 5, 62 (1961).) In this regard, it is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused - Bosnia and Herzegovia and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction. As to the entity known as the Bosnian Serb Republic, similarly, the accused as an individual, has no *locus standi*, for the reasons given above, to raise the issue of this entity's sovereignty rights should it have been endowed with all the attributes of statehood.

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

43. As to the invocation of *jus de non evocando*, which has been dealt with above, nothing more need be said except that the Defence has in no way established that the principle is so universal in application that it amounts to a peremptory norm of

international law which cannot be breached in any event. Therefore the Trial Chamber proposes to speak no more of it.

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

II. Subject-Matter Jurisdiction

45. The Trial Chamber must turn now to what are truly matters of jurisdiction. The Defence contends that the charges laid against the accused do not fall within the subject-matter jurisdiction of this Tribunal and it is necessary accordingly to examine the limits of that jurisdiction.

A. Article 2 : Grave Breaches of the Geneva Convention of 1949

46. The Statute of the International Tribunal confers jurisdiction by Articles 1 to 8 and supplements, and in one respect qualifies, that jurisdiction in Articles 9 and 10. However it is essentially Articles 1, 2, 3 and 5 with which this motion is concerned.

47. Article 1 does no more than confer power to prosecute for serious violations of international humanitarian law and confines that power, spatially, to breaches committed in the territory of the former Yugoslavia and, temporally, to the period since 1991. It further requires that the power thus conferred be exercised in accordance with the provisions of the Statute.

48. Article 2 confers subject-matter jurisdiction to prosecute in respect of grave breaches of the Geneva Conventions and identifies those breaches by the phrase, "namely the following acts against persons or property protected under the provisions of the relevant Geneva Conventions." There then follows an enumeration of acts, culled from the four Conventions and, with very slight variations, repeating and in effect consolidating, the terms of the grave breaches provisions to be found in varying form in each of those Conventions.

49. The Article has been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of "persons or property protected." In the present case it is not contended that the alleged victims in the several charges were not protected persons; in any event that will be a matter for evidence in due course.

50. What is contended is that for Article 2 to have any application there must exist a state of international conflict and that none in fact existed at any relevant time or place. However, the requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.

51. The Report of the Secretary-General, (U.N. Doc. S/25704 (3 May 1993)) (the "Report") makes it clear, in paragraph 34, that it was intended that the rules of international law that were to be applied should be "beyond any doubt part of customary law", so that problems of non-adherence of particular States to any international Convention should not arise. Hence, no doubt, the specific reference to the law of the Geneva Conventions in Article 2 since, as the Report states in paragraph 35, that law applicable in armed conflict has beyond doubt become part of customary law. But there is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things. It simply confers subject matter jurisdiction to prosecute what, if one were concerned with the Conventions, would indeed be grave breaches of those Conventions, but which are, in the present context, simple enactments of the Statute.

52. When what is in issue is what the Geneva Conventions contemplate in the case of grave breaches, namely their prosecution before a national court and not before an international tribunal, it is natural enough that there should be a requirement of internationality; a nation might well view with concern, as an unacceptable infringement of sovereignty, the action of a foreign court in trying an accused for grave breaches committed in a conflict internal to that nation. Such considerations do not apply to the International Tribunal, any more than do the references in the Conventions to High Contracting Parties and much else in the Conventions; all these are simply inapplicable to the International Tribunal. They do not apply because the International Tribunal is not in fact, applying conventional international law but, rather, customary international law, as the Secretary-General makes clear in his Report, and is doing so by virtue of the mandate conferred upon it by the Security Council. In the case of what are commonly referred to as "grave breaches", this conventional law has become customary law, though some of it may well have been conventional law before being written into the predecessors of the present Geneva Conventions.

53. It follows that the element of internationality forms no jurisdictional criterion of the offences created by Article 2 of the Statute of the International Tribunal. If it did, there are clear indications in the great volume of material before the Trial Chamber that the acts alleged in the indictment were in fact committed in the course of an international armed conflict. However, little of this material is such that judicial notice can be taken of it and none of it is in the form of, nor has it been tendered as, evidence. In these circumstances the Trial Chamber makes no finding regarding the nature of the armed conflict in question.

54. As a submission alternative to its principal submission that there was here an international armed conflict, the Prosecutor contended that certain agreements entered into were, in any event, such that they operated, pursuant to common Article 3 of the 1949 Geneva Conventions ("common Article 3"), "to bring into force, by means of special agreements", those provisions of the Conventions relating to serious breaches.

55. Those agreements, entered into under the auspices of the International Committee of the Red Cross on 22 and 23 May and on 1 October 1992, were accompanied by a programme of action agreed upon on 27 August 1992.

56. That these agreements had the effect contended for by the Prosecutor was contested by the Defence. In view of the conclusion of the Trial Chamber that Article 2 of our Statute expressly and directly confers jurisdiction to prosecute in respect of the commission of the acts enumerated in that Article, it is also unnecessary to express any conclusion regarding this alternative submission.

B. Article 3: Violations of the Laws or Customs of War

57. The Defence contends that the accused may not be tried for violations of laws or customs of war under Article 3 of the Statute because that article is based on the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the regulations thereto of 18 October 1907 ("Hague Convention"), and the 1977 Protocol I, which apply only to an international conflict, and that none, in fact, existed at any relevant time or place. The Prosecutor responds by asserting that the term "laws or customs of war" in Article 3 applies to both international and internal conflict and that the International Tribunal may apply the minimum standards of common Article 3 which are applicable to both international and internal armed conflicts. Since the Prosecutor seemingly does not seek to import Protocol I into Article 3 of the Statute, the Trial Chamber does not address that issue.

58. Having considered the position of the parties, the Trial Chamber finds that the character of the conflict, whether international or internal, does not affect the subject-matter jurisdiction of the International Tribunal under Article 3 to try persons who are charged with violations of laws or customs of war.

59. The interpretation of the scope of Article 2 of the Statute is applicable to the view of the Trial Chamber of its subject matter jurisdiction under Article 3. Contrary to the position of the Defence, nothing in the words of Article 3 expressly requires the existence of an international conflict. Indeed, with respect to Article 3, unlike Article 2, there is no mention of any convention. Article 3 simply provides that the International Tribunal "shall have the power to prosecute persons violating the laws or customs of war". A list of prohibitory acts are then set forth in the Article. It is clear that the list is illustrative and not exhaustive, for the list is preceded with the phrase, "such violations shall include, but not be limited to . . ."

60. The competence of the International Tribunal extends to serious violations of international humanitarian law that are a part of customary law. International humanitarian law includes international rules designed to solve humanitarian problems arising from international or non-international armed conflicts. (*See Commentary on the Additional Protocols of 8 June 1977*, at p. XXVII (ICRC 1987).)

Even though the acts enumerated in Article 3 are from the Hague Convention, the term "laws or customs of war" should not be limited to international conflicts. Laws or customs of war include prohibitions of acts committed both in international and internal armed conflicts. Indeed, common Article 3 is clear evidence that customary international law limits the conduct of hostilities in internal armed conflicts. However, unlike contracting parties to treaties, the International Tribunal is not called upon to apply conventional law but instead is mandated to apply customary international law. Therefore, the element of internationality forms no jurisdictional criterion even if the Hague Convention was originally envisaged by the Contracting Parties to apply to international conflicts.

61. Violations of the laws or customs of war are commonly referred to as "war crimes". They can be defined as crimes committed by any person in violation of recognized obligations under rules derived from conventional or customary law applicable to the parties to the conflict. (*See* L.C. Green, *The Contemporary Law of Armed Conflict* 276 (1993), ("war crimes are violations of the laws and customs of the law of armed conflict and are punishable whether committed by combatants or civilians, including the nationals of neutral states"). *See also*, C.H. Bassiouni, *A Draft International Criminal Code And Draft Statute For An International Criminal Tribunal* 130 (1987) ("[w]ar crimes consist of conduct (acts or omissions) which is prohibited by the rules of international law applicable in armed conflict, conventions to which the parties to the conflict are Parties, and the recognized principles and rules of international law of armed conflict").)

62. In Article 6 (b) of the Charter of the International Military Tribunal at Nuremberg, war crimes are defined as:

> [V]iolations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destructions of cities, towns, or villages, or devastation not justified by military necessity.

63. Although the Statute of the International Military Tribunal limited its competence to the international armed conflict of World War II, historically laws or customs of war have not been limited by the nature of the conflict they regulate. The Lieber Code, broadly recognized as the most famous early example of a national manual outlining the laws of war for the use of armed forces, and one of the first attempts to codify the laws of land warfare, was drafted to regulate the conduct of the United States armed forces during the American Civil War. *(The Lieber Code, Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War*, General Orders No. 100, Washington, D.C. (24 April 1863), *reprinted in* L. Friedman (ed.) I *A Documentary History* 158 (1972).) This Code, based on what Lieber regarded as the generally accepted law of his day, was used as the model for other manuals and greatly inspired later developments of the laws of war. Indeed, the drafters of the first proposal for a codification of the "laws or customs of war on land" in The Hague, relied heavily on the "Declaration of Brussels

of 1874", which in turn, was strongly influenced by the Lieber Code. (*See* F. Kalshoven, *Constraints on the Waging of War* 13 (1987).) It is also an established principle of customary international law that the laws of war might become applicable to non-international armed conflicts of a certain intensity through the doctrine of "recognition of belligerency". (*See*, for example, *1956 United States Army Field Manual*, which stipulated that "the customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents", para. 11a.) Further, even in internal conflict situations where the recognition of belligerency was explicitly withheld, it has been recognized that some fundamental rules of the law of war would nevertheless apply, regardless of non-recognition of belligerency. *(See* A. Cassese "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflict", in *Current Problems of International Law* 313 (Cassese, ed. 1975).) Additionally, under the International Law Commission's *Draft Code on Crimes Against The Peace and Security of Mankind*, the notion of "exceptionally serious war crimes", is defined to include certain conduct and no differentiation is made with respect to whether committed in the course of an international or non-international armed conflict. Members of the Security Council are also of the opinion that the term "laws or customs" is not limited to international armed conflicts. *(See* Statements of U.S., U.K. and French representatives to the Security Council following the adoption of resolution 827, U.N. Doc. S/PV.3217, 15 (May 25, 1993).)

64. The Trial Chamber concludes that Article 3 of the Statute provides a non-exhaustive list of acts which fit within the rubric of "laws or customs of war". The offences that it may consider are not limited to those contained in the Hague Convention and may arise during an armed conflict regardless of whether it is international or internal.

65. The Prosecutor affirmatively contends that the minimum standards contained in common Article 3 are incorporated in Article 3 of the Statute. The Trial Chamber finds that it has subject-matter jurisdiction under Article 3 because violations of laws or customs of war are a part of customary international law over which it has competence regardless of whether the conflict is international or national. However, the Trial Chamber considers that it is necessary to respond to the specific assertion by the Prosecutor that laws or customs of war include the obligations imposed by common Article 3. The Trial Chamber finds that common Article 3 imposes obligations that are within the subject-matter jurisdiction of Article 3 of the Statute because those obligations are a part of customary international law. Further, the Trial Chamber finds that violations of these prohibitions can be enforced against individuals. Imposing criminal responsibility upon individuals for these violations does not violate the principle of *nullum crimen sine lege.*

66. Common Article 3 prohibits the following acts when committed against persons taking no active part in the hostilities:

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.

67. For the reasons discussed herein, the acts proscribed by common Article 3 constitute criminal offences under international law. The fact that common Article 3 is part of customary international law was definitively decided by the International Court of Justice in the *Nicaragua* case (Military and Paramilitary Activities (Nicar. v. U.S.)), 1986 I.C.J. 4 (Merits Judgement of 27 June 1986) in which the Court, applying customary international law, determined that the rules contained in common Article 3 constitute a "minimum yardstick" applicable in both international and non-international armed conflicts, thus finding that these prohibitions are part of customary international law. As early as 1958 the view was already held that common Article 3:

> . . . merely demands respect for certain rules, which were already recognised as essential in all civilised countries, and embodied in the municipal law of the states in question, long before the Convention was signed. . . . no government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.
>
> *(Commentary on the Geneva Conventions of 12 August 1949: [No.] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 36 (Pictet ed., 1958).)

A more recent commentator notes that ". . . the norms stated in Article 3(1)(a)-(c) are of such an elementary, ethical character, and echo so many provisions in other humanitarian and human rights treaties, that they must be regarded as embodying minimum standards of customary law also applicable to non-international armed conflicts." (Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 35 (1991).) The customary status of common Article 3 is further supported by statements made by representatives to the Security Council following the adoption of resolution 827 adopting the Statute of the International Tribunal. The United States representative explicitly stated that she considered Article 3 of the Statute to include common Article 3 of the 1949 Geneva Conventions, and representatives from the United Kingdom and France made similar statements. (UN Doc. S/PV.3217 (25 May 1993), paras. 11, 15 and 19.)

68. The fact that acts proscribed by common Article 3 constitute criminal offences under international law is also evident from the fact that the acts within common

Article 3 are criminal in nature. They are similar in content to acts prohibited by the grave breaches provisions, which clearly entail individual criminal liability. In addition, the type of acts listed in common Article 3 have been found in the past to result in individual criminal liability. For example, Article 44 of the Lieber Code *supra* provided for the prohibition, criminal responsibility and punishment of persons committing acts which are of the type that would today fall within common Article 3. In addition, there have been national trials for individuals charged with violations similar to common Article 3. *(See* Jordan Paust, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 Vanderbilt Journal of Transnational Law 1, 25 (1978).)

69. The customary international law doctrine of recognition of belligerency allows for the application to internal conflicts of the laws applicable to international armed conflict, thus ensuring that even in a non-international conflict individuals can be held criminally responsible for violations of the laws and customs of war. Additionally, some national military manuals and laws emphasise the criminal nature of acts within common Article 3. For example, the United States Army regards violations of common Article 3 as encompassed by the notion of war crimes, thus empowering it to prosecute captured military personnel for war crimes if they were accused of breaches of common Article 3. The German Military Manual describes violations of common Article 3 as "grave breaches of international humanitarian law," implying that violations of common Article 3 could form the basis for individual criminal responsibility. *(See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l. L. 554, 564-65 (1995).) Further, the criminal nature of the acts within common Article 3 is evident from the language of common Article 3 itself, which is clearly prohibitory and addresses fundamental offences such as murder and torture which are prohibited in all States:

> Therefore, no person who has committed such acts . . . could claim in good faith that he/she did not understand that the acts were prohibited. And the principle *nullum crimen* is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed.
>
> *(Id*. at 566.)

70. The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability. This is evident from the use of the Fourth Hague Convention and the 1929 Geneva Prisoners of War Convention as the basis for prosecutions and convictions at Nuremberg, despite the fact that neither convention contain any reference to penal prosecution or individual liability for breaches.

71. A further indication that the acts proscribed by common Article 3 constitute criminal offences under international law is that, assuming *arguendo* that there is no clear obligation to punish or extradite violators of non-grave breach provisions of the Geneva Conventions, such as common Article 3, all States have the right to punish those violators. Therefore, individuals can be prosecuted for the violations of the acts

listed and thus prosecution by the International Tribunal based on primacy does not violate the *ex post facto* prohibition. In addition, in the *Nicaragua* case, the Court recognised the applicability of common Article 1 of the Geneva Conventions to non-international armed conflicts. The requirement in common Article 1 that all Contracting Parties must respect and ensure respect for the Conventions may entail resort to penal measures.

72. In his Report, the Secretary-General states that "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". (UN Doc. S/25704, para. 34.) Article 15(1) of the ICCPR contains the prohibition against *nullum crimen sine lege*, and provides in relevant part that "[n]o one shall be held guilty of any criminal offence on account of an act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed". As is demonstrated from the above, common Article 3 is beyond doubt part of customary international law, therefore the principle of *nullum crimen sine lege* is not violated by incorporating the prohibitory norms of common Article 3 in Article 3 of the Statute of the International Tribunal.

73. Additional support for the finding that there is no violation of the principle of *nullum crimen sine lege* is that by incorporating the prohibitory norms of common Article 3 into its national law, the former Yugoslavia has criminalized these offences. (*See* Art. 125 of the Criminal Code of the former Yugoslavia, which provides that the prohibition of war crimes against the civilian population applies to situations of "war, armed conflict or occupation," irrespective of the nature of the conflict, thus implying that situations of non-international armed conflict could be covered.)

74. For these reasons, the Trial Chamber finds that the character of the conflict, whether international or internal, does not affect the subject-matter jurisdiction of the Tribunal under Article 3. The term "laws or customs of war", applies to international and internal armed conflicts. The minimum standards of common Article 3 apply to the conflict in the former Yugoslavia and the accused's prosecution for those offences does not violate the principle of *nullum crimen sine lege.*

C. Article 5: Crimes Against Humanity

75. Crimes against humanity have been described by the Secretary-General in his Report (at paragraph 48) as those inhumane acts of a very serious nature committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The Statute then defines the jurisdiction of the International Tribunal over crimes against humanity in Article 5 of the Statute as follows:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
> (b) extermination;

(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

76. There is no question but that crimes against humanity form part of customary international law. They found expression in Article 6(c) of the Nuremberg Charter of 8 August 1945, Article II(1)(c) of Law No. 10 of the Control Council for Germany of 20 December 1945 and Article 5(c) of the Tokyo Charter of 26 April 1946, three major documents promulgated in the aftermath of World War II.

77. The Defence claims that "the Tribunal only has jurisdiction under Article 5 of the Statute if it involves crimes that have been committed in the execution of or in connection with an international armed conflict." It purports to find authority for this proposition requiring the existence of an armed conflict of an international nature in the Nuremberg Charter which, in its definition of crimes against humanity, spoke of inhumane acts committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal . . ." and in the affirmation given to the principles of international law recognised by the Charter of the Nuremberg Tribunal and Judgement of the Tribunal in General Assembly resolution 95(1) of 1948. The Defence further contends that the broadening of the scope of Article 5 to crimes when committed in armed conflicts of an internal character offends the *nullum crimen* principle.

78. The Trial Chamber does not agree. The nexus in the Nuremberg Charter between crimes against humanity and the other two categories, crimes against peace and war crimes, was peculiar to the context of the Nuremberg Tribunal established specifically "for the just and prompt trial and punishment of the major war criminals of the European Axis countries." (*Nuremburg Charter,* Article 1). As some of the crimes perpetrated by Nazi Germany were of such a heinous nature as to shock the conscience of mankind, it was decided to include crimes against humanity in order to enable the International Military Tribunal to try the major war criminals for the barbarous acts committed against German Jews, amongst others, who, as German nationals, were outside the protection of the laws of warfare which only prohibited violations involving the adversary or enemy populations. (*See* Antonio Cassese, *International Law in a Divided World* para. 169 (1986).)

79. That no nexus is required in customary international law between crimes against humanity and crimes against peace or war crimes is strongly evidenced by subsequent case law. The military tribunal established under Control Council Law No. 10 stated in the *Einsatzgruppen* case that:

> Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty . . . The International Military Tribunal, operating under the London Charter, declared that the Charter's provisions limited the Tribunal to consider only those crimes against humanity which

> were committed in the execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law.
>
> (4 Trials of War Criminals 499).

80. Further, the Special Rapporteur of the International Law Commission had this to say:

> First linked to a state of belligerency . . . the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes . . . Crimes against humanity may be committed in time of war or in time of peace; war crimes can only be committed in time of war.
>
> (Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, [1989] 2 Yearbook of ILC, U.N. Doc., A/N/CN. 4/SER. A/1986/Add. 1).

81. Finally, this view that crimes against humanity are autonomous is confirmed by the opus classicus on international law, Oppenheim's International Law, where special reference is made to the fact that crimes against humanity "are now generally regarded as a self-contained category, without the need for any formal link with war crimes . . ." (R. Jennings and A. Watts, 1 *Oppenheim's International Law* 966 (1992)).

82. Even were it arguable that a nexus is required between crimes against humanity and war crimes, the element of internationality certainly forms no jurisidictional criterion because, as has been shown above, war crimes are prohibited under customary international law in armed conflicts both of an international and internal nature.

83. In conclusion, the Trial Chamber emphasises that the definition of Article 5 is in fact more restrictive than the general definition of crimes against humanity recognised by customary international law. The inclusion of the nexus with armed conflict in the article imposes a limitation on the jurisdiction of the International Tribunal and certainly can in no way offend the *nullum crimen* principle so as to bar the International Tribunal from trying the crimes enumerated therein. Because the language of Article 5 is clear, the crimes against humanity to be tried in the International Tribunal must have a nexus with an armed conflict, be it international or internal.

DISPOSITION

The foregoing deals with the several objections to jurisdiction proper raised by the Defence as well as with the other objections not properly relating to jurisdiction but which instead put in issue the lawful creation and competence of the International Tribunal.

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence, and

PURSUANT TO RULE 72

HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal

HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal.

Gabrielle Kirk McDonald
Presiding Judge

Dated this tenth day of August 1995
At The Hague
The Netherlands