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SCSL - 2003 - 11 - PT

(3277 - 3296)

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN - SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, QC, President
Judge Emmanuel O. Ayoola
Judge Gelaga King
Judge Renate Winter

Registrar: Mr Robin Vincent

Date filed: 20 January 2004

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL - 2003 - 11 - PT

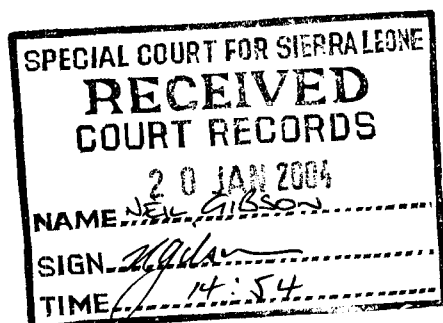
**PROSECUTION RULE 72(G)(ii) RESPONSE TO THE DEFENCE
PRELIMINARY MOTION ON LACK OF JURISDICTION: ILLEGAL
DELEGATION OF POWERS BY THE UNITED NATIONS**

Office of the Prosecutor:

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SPECIAL COURT FOR SIERRA LEONE
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I. INTRODUCTION

1. On 14 November 2003, a preliminary motion was filed on behalf of the Accused Moinina Fofana (the “**Accused**”) entitled “Preliminary Defence Motion on the Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations” (the “**Preliminary Motion**”).¹ On 21 November 2003 the Prosecution filed a response thereto (the “**Prosecution Response**”),² and on 30 November 2003 the Defence filed a reply to the Prosecution response (the “**Defence Reply**”).³ On 3 December 2003, the Trial Chamber, acting pursuant to Rule 72(E) of the Rules of Procedure and Evidence (the “**Rules**”) referred the Preliminary Motion to the Appeals Chamber.
2. On 6 January 2004, pursuant to Rule 72(G)(i), the Defence filed a document entitled “Additional Submissions Pertaining to the Preliminary Motion Based on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations” (the “**Defence Rule**”).

¹ Registry Page (“RP”) 1055-1073.

² RP 2166-2450.

³ RP 2942-2952.

72(G)(i) Submissions").⁴ Pursuant to Rule 72(G)(ii) of the Rules, the Prosecution files this response thereto.

3. The Preliminary Motion argues essentially that the Special Court lacks jurisdiction on the grounds that the conclusion by the United Nations of the Special Court Agreement was an unlawful exercise of the powers of the United Nations, in that it involved an unlawful "delegation" of the powers of the Security Council.
4. The Prosecution relies on the arguments and authorities set out in the Prosecution Response, which are not repeated in the present filing. The present document sets out additional arguments in response to the Defence Reply and the Defence Rule 72(G)(i) Submissions. For the reasons given in the Prosecution Response and the reasons set out below, the Preliminary Motion should be dismissed.

II. ARGUMENT

5. Following the filing of the Defence Reply and the Defence Rule 72(G)(i) Submissions, it appears that many of the arguments and submissions made in the Prosecution Response are not contested by the Defence. The issue in dispute in relation to the Preliminary Motion is now a very narrow one.
6. The Defence does not contest that the United Nations has the power to enter into agreements,⁵ that the Secretary-General can represent the United Nations and conclude agreements on its behalf,⁶ that the Security Council has wide discretionary powers to determine how to respond to threats to peace and security,⁷ that the Security Council has the power to establish international criminal tribunals (as it did in the case of the ICTY and ICTR), that the power of the United Nations to enter into the Special Court agreement derives from the powers of the Security Council under the United Nations Charter (the "**Charter**"), and not the powers of the Secretary-General,⁸ that in relation to the establishment of the Special Court the Security

⁴ RP 3076-3119.

⁵ Defence Reply, para. 2.

⁶ Defence Reply, para. 2.

⁷ Defence Reply, para. 2.

⁸ Defence Rule 72(G)(i) Submissions, paras. 3 and 4.

Council was acting to restore peace,⁹ and that the type of powers that the Security Council can confer on a subsidiary organ of the United Nations (such as the ICTY or ICTR) may also be conferred on a body external to the United Nations. One such body is the Special Court for Sierra Leone.¹⁰

7. There is still some lack of common ground between the Prosecution and the Defence in respect of the question whether, in relation to the establishment of the Special Court, the Security Council was or was not acting under Chapter VII of the Charter. The Defence maintains that the Security Council was acting under Chapter VII.¹¹ The Prosecution relies in this respect on its submissions in paragraphs 8-11 of the Prosecution Response. However, it is now unnecessary for this question to be decided by the Appeals Chamber, since it is common ground between the Prosecution and the Defence that the question is irrelevant for the purposes of the Preliminary Motion.¹² The Defence maintains that whether or not the Security Council was acting under Chapter VII, the same alleged conditions and limitations on the exercise of the Security Council's powers would apply.¹³ The Prosecution similarly submits that its own arguments in no way depend on whether or not the Security Council was acting under Chapter VII. Accordingly, it is unnecessary to address this issue further.
8. Given all of the matters above that are either not in dispute, or are no longer relevant, on what basis does the Defence claim that the conclusion of the Special Court Agreement was an unlawful exercise of the powers of the United Nations? Essentially, the Defence argument consists of one very narrow point. The Defence contends that when acting in relation to the establishment of the Special Court, the Security Council was required under the Charter to retain the power to terminate or amend the Special Court Agreement unilaterally. The Defence argues that the

⁹ Defence Rule 72(G)(i) Submissions, para. 4.

¹⁰ Defence Rule 72(G)(i) Submissions, para. 14; Defence Reply, para. 2.

¹¹ Defence Rule 72(G)(i) Submissions, paras. 6-12. However, in making this argument, the Defence Rule 72(G)(i) Submissions appear to contradict directly the submissions made in the Defence Reply. The Defence Reply stated (at para. 2) that the Defence was in "full agreement" that "in general Article 24(1) of the Charter can provide a direct basis for action [by the Security Council]". The Defence Rule 72(G)(i) Submissions state on the other hand (at para. 9) that "If Article 24(1) in itself provided a legal basis for action, Article 24(2) would be without legal effect and would be redundant. ... this interpretation of Article 24 is unacceptable."

¹² Defence Rule 72(G)(i) Submissions, para. 12: "... the question of the exact legal basis for the establishment of the Special Court is of no relevance for the point before the Appeals Chamber".

¹³ Defence Rule 72(G)(i) Submissions, paras. 8 and 11.

Security Council did not do this, because pursuant to Articles 22 and 23 of the Special Court Agreement, that Agreement can only be amended or terminated by the United Nations with the consent of Sierra Leone.¹⁴ In other words, what the Defence argument boils down to is a submission that Articles 22 and 23 of the Special Court Agreement are *ultra vires* the powers of the Security Council, and therefore “unconstitutional” under the law of the Charter, because they impermissibly fetter the power of the Security Council to amend or terminate the Special Court Statute.

9. The Prosecution submits that this argument must be rejected for the reasons given below. However, even if the Defence argument were to succeed, this would not mean that the entire Special Court Agreement is void on grounds of inconsistency with the Charter and that the Special Court therefore lacks jurisdiction. Even if it were the case that Articles 22 and 23 of the Special Court Agreement were unconstitutional for the reason asserted by the Defence, the Prosecution submits that the appropriate remedy would be to declare Articles 22 and 23 to be invalid and to sever them from the Special Court Agreement. The rest of the Special Court Agreement would then still stand. However, in the Prosecution’s submission it is unnecessary to consider this issue further, since these provisions are not invalid.
10. The basis of the Defence argument that Articles 22 and 23 are invalid is the Defence proposition that where the Security Council delegates its powers to a body external to the United Nations, “it must at all times retain control over the exercise of the delegated authority in regard to threats to peace and security”.¹⁵ According to the Defence, “the delegation of responsibilities with regard to the maintenance of peace and security to subsidiary organs is conditional on the power of the delegating organ to revoke that delegation in order to maintain ultimate control”.¹⁶
11. According to the Defence, because of Articles 22 and 23 of the Special Court Agreement, the Security Council has “set up an independent legal person over which

¹⁴ Defence Reply, para. 10. However, again the argument in the Defence Rule 72(G)(i) Submissions that the Security Council was required to retain the power to amend or terminate the Special Court Agreement appears to be contradicted by the argument in the Defence Reply (at para. 7) that “The situation may have been different if the Special Court had been set up by agreement involving a wider group of concerned states”.

¹⁵ Defence Rule 72(G)(i) Submissions, para. 3. See also Defence Reply, para. 4.

¹⁶ Defence Rule 72(G)(i) Submissions, para. 13.

it exercises no control”, and the Defence claims that the Security Council had no power to do this.¹⁷

12. However, the Defence also freely concedes that the alleged requirement that the Security Council retains control does not mean, in a case where it establishes an international criminal tribunal that the Security Council can interfere with the judicial functions of the tribunal, as that would violate the principle of judicial independence. The only control which the Defence claims that the Security Council was required to retain over the Special Court is the power to amend or terminate its Statute.¹⁸
13. The Defence reaches the conclusion that the Security Council was required to retain the power to amend or terminate the Special Court Statute essentially by the following train of reasoning:
 - (1) The Defence considers that the Security Council has “powers with regard to the prosecution of suspects of international crimes if that were necessary for the maintenance of peace and security”.¹⁹ The Defence argument is essentially that the Security Council has “delegated” its powers to prosecute suspects of international crimes to the Special Court.
 - (2) Because Articles 22 and 23 of the Special Court Agreement provide that the Agreement cannot be amended or terminated unilaterally by the United Nations, the Security Council has deprived itself of the ability to “re-assume” its powers to prosecute such war crimes by amending or terminating the Special Court Agreement.²⁰ The Defence says that “It is in this respect that the United Nations has delegated its powers without maintaining control”.²¹
 - (3) From this, the Defence concludes that as a result of entering into the Special Court Agreement, the Security Council is no longer able to exercise responsibility “with regard to the maintenance of peace and security in Sierra

¹⁷ Defence Rule 72(G)(i) Submissions, para. 3. See also Defence Reply, para. 7, complaining that the defect is that the Special Court is beyond the Security Council’s “influence or control”.

¹⁸ Preliminary Motion, para. 10.

¹⁹ Defence Rule 72(G)(i) Submissions, para. 22.

²⁰ Defence Rule 72(G)(i) Submissions, para. 22. See also Preliminary Motion, para. 10; Defence Reply, para.

9.

²¹ Defence Reply, para. 9.

Leone” (at least to the extent that this responsibility has been delegated to the Special Court).²² This is said to be inconsistent with Article 24(1) of the Charter, which provides that the Security Council has “primary responsibility for the maintenance of international peace and security”.

14. The Prosecution submits that it is unnecessary for the purposes of disposing of the Preliminary Motion to consider the legal principles governing the ability of the Security Council to delegate its powers. This is because in the Prosecution’s submission there simply has been no delegation by the Security Council of its powers to the Special Court.
15. The Defence argument rests on a fallacious assumption that the Security Council itself has a power to prosecute “suspects of international crimes if that were necessary for the maintenance of peace and security”,²³ and that this power of the Security Council has been conferred on, or “delegated to” the Special Court. Thus, according to the Defence argument, if the Special Court Agreement were terminated, this power to prosecute suspects of international crimes that was previously exercised by the Special Court would be “re-assumed” by the Security Council. This assumption is quite erroneous. The power of the Special Court to prosecute and try alleged perpetrators of international crimes is a *judicial* power. The Security Council does not have any judicial powers. The powers of the Special Court therefore cannot have been “delegated” to it by the Security Council, since the Security Council had no such powers to delegate. Similarly, if the Special Court were terminated, the judicial powers that it exercises would not be “re-assumed” by the Security Council, since these are powers that the Security Council cannot exercise. As the Appeals Chamber of the ICTY said in the *Tadic Jurisdiction Appeal Decision*:

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

... The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has

²² Defence Rule 72(G)(i) Submissions, paras. 21-22.

²³ See paragraph 13(1) above.

delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.”²⁴

16. As Judge Sidhwa added in a separate opinion in that case:

“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.* ... [O]ne 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.”²⁵

17. The Defence argument contains a second fallacious assumption, namely that prosecuting and trying international crimes constitutes an exercise of responsibility for the maintenance of international peace and security. This is also not correct. The Special Court has no responsibility for the maintenance of international peace and security. The sole function of the Special Court is to investigate, prosecute and try suspected perpetrators of international crimes in accordance with its Statute. The Special Court is required to discharge this mandate faithfully, without even considering whether or not its work is contributing to international peace and security. It was the role of the Security Council, and not the Special Court, to determine whether the establishment of the Court was an appropriate measure for restoring peace and security. The Security Council determined that it was. As the Appeals Chamber of the ICTY put it, the Security Council called for the establishment of the Special Court “as an instrument for the exercise of *its own* principal function of maintenance of peace and security”.²⁶ In other words, it is the Security Council and not the Special Court that is exercising responsibility for the maintenance of peace and security. The Special Court was established as an instrument for the exercise by

²⁴ *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 October 1995 (“*Tadic Jurisdiction Appeal Decision*”), paras. 37-38 (emphasis added).

²⁵ *Tadic Jurisdiction Appeal Decision, Separate Opinion of Judge Sidhwa*, para. 33 (emphasis added).

²⁶ See paragraph 15 above.

the Security Council of the Security Council's *own* responsibility. The Special Court was not itself given or "delegated" any such responsibility. Given that the Special Court has no independent responsibility for the maintenance of international peace and security, and given that it is simply carrying out a specific mandate that the Security Council has itself called upon it to exercise, there can be no basis for the fanciful suggestion that the Special Court "may use [its] powers to attain national ends that are not necessarily similar to the purposes of the United Nations".²⁷

18. Once it is established that the Special Court is not exercising "delegated" powers of the Security Council, the only remaining question is as follows. Where the Security Council, in the exercise of its responsibility for the maintenance of peace and security, takes some measure, is the Security Council required at all times to retain the power to amend or terminate that measure unilaterally? Admittedly, the Prosecution is aware of no authority on this precise question, but submits that the answer for the purposes of the present circumstances is obvious.
19. The Special Court is merely an instrument in the exercise of that function by the Security Council. Furthermore, the provision that the treaty cannot be unilaterally amended or terminated by the United Nations is essential to its effectiveness in maintaining peace and security, since without such a provision, neither of the parties would have agreed to the treaty. The Security Council has not thereby delegated any of its functions in respect of the maintenance of international peace and security to the Special Court.
20. As noted above, the Security Council has wide discretionary powers to determine how to respond to threats to peace and security.²⁸ There is no reason in principle why, in the exercise of that discretion, the Security Council cannot call for the United Nations to enter into an agreement for the implementation of certain measures, and to agree that these measures cannot be unilaterally terminated by the United Nations without the consent of the other parties to the treaty. The Prosecution submits that this is certainly the case in relation to the Special Court.

²⁷ Defence Rule 72(G)(i) Submissions, para. 13. See also Defence Reply, para. 4.
²⁸ See paragraph 6 above.

21. In further answer to the Defence's submission, the Prosecution argues, in the alternative, that the United Nations retains substantial and far less blunt and unwieldy forms of control over the non-judicial operations of the court. This control begins with the establishment of the Court and remains potent throughout the Court's operation. In sum, it is simply untrue that the Security Council has either relinquished the ability to amend or terminate the Special Court Agreement or, moreover, that the Security Council lacks additional and more nuanced methods of retaining appropriate control over the Court's operations.

22. The UN retains a panoply of other mechanisms of oversight and control of the non-judicial functioning of the Special Court under the Special Court Agreement.

(1) Article 7 of the Special Court Agreement provides that,

interested states will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee.

(2) Article 12(2) of the Special Court Agreement provides that,

[p]rivileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

(3) Article 2(1) of the Special Court Agreement provides that a second trial chamber of the Special Court shall be "created if, after the passage of at least six months for the commencement of the functioning of the Special Court, the Secretary-General or the President of the Special Court so request." Article 2(2)(a) provides that two of the three judges in the Trial Chamber shall be "appointed by the Secretary-General." Article 2(2)(b) provides that "in the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (a) above." Article 2(2)(c) provides that three of the

five judges in the Appeals Chamber shall be “appointed by the Secretary-General.” Article 2(4) provides that judges “shall be eligible for reappointment.”

(4) Article 3 of the Agreement provides that “[t]he Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor The Prosecutor shall be eligible for reappointment.”

(5) Article 4 provides that “[t]he Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar The Registrar shall be a staff member of the United Nations. . . . He or she . . . shall be eligible for reappointment.”

(6) Article 1(3) of the Statute of the Special Court (which is an Annex to the Special Court Agreement) provides that, concerning any transgressions by peacekeepers and related personnel (as defined in article 1(2)), “[i]n the event that the sending state is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.”

(7) Article 25 of the Special Court Statute provides that “[t]he President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.”

(8) Article 6 of the Special Court Agreement provides that,


the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court [T]he Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first three years of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Special Court.

III. CONCLUSION

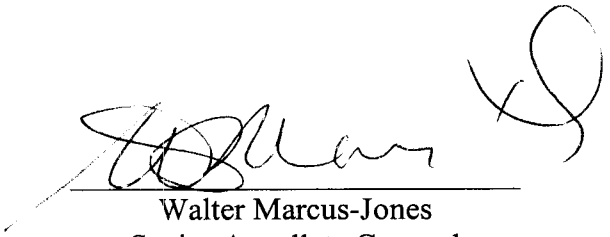
23. The Court should therefore dismiss the Preliminary Motion in its entirety.

Freetown, 20 January 2004.

For the Prosecution,



Desmond de Silva, QC
Deputy Prosecutor



Walter Marcus-Jones
Senior Appellate Counsel



Abdul Tejan-Cole
Appellate Counsel

PROSECUTION INDEX OF AUTHORITIES

1. Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, App. Ch., 2 October 1995 (“**Tadic Jurisdiction Appeal Decision**”), paras. 37-38.
2. Tadic Jurisdiction Appeal Decision, Separate Opinion of Judge Sidhwa, para. 33

ANNEX 1

Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, App. Ch., 2 October 1995 (“**Tadic Jurisdiction Appeal Decision**”), paras. 37-38.

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"

**DECISION ON THE DEFENCE MOTION FOR
INTERLOCUTORY APPEAL ON JURISDICTION**

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor

Mr. Grant Niemann

Mr. Alan Tieger

Mr. Michael Keegan

Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff

Mr. Alphons Orié

Mr. Milan Vujin

Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

severance of diplomatic relations." (United Nations Charter, art. 41.)

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

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

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

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

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

(b) Can The Security Council Establish A Subsidiary Organ With Judicial Powers?

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

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

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

and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

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

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

(c) Was The Establishment Of The International Tribunal An Appropriate Measure?

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

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

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

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

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

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

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.)

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, which states: "

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]" (European Convention for the Protection of Human

ANNEX 2

Tadic Jurisdiction Appeal Decision, Separate Opinion of Judge Sidhwa, para. 33

3295

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

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Mr. Milan Vujin

Mr. Alphons Orié

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

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 *Nottebohm* 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