121

2124

SCSL - 2003 - 07 - PT
(2124 - 2227)

SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

THE PROSECUTOR

-v-

MORRIS KALLON

CASE NO. SCSL-2003-07-PT

DEFENCE AUTHORITIES FOR 'PRELIMINARY MOTION BASED ON LACK OF JURISDICTION (LAWFULNESS OF THE COURT"S ESTABLISHMENT'

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1. **Please find attached Defence Authorities for 'Preliminary Motion Based on Lack of Jurisdiction (Lawfulness of the Court's Establishment'.**

2. **These authorities are filed in advance of oral argument before the Appeals Chamber on Defence Preliminary Motions scheduled for 3rd and 4th November 2003.**

3. **It was not possible to send the authorities by FAX to the Special Court as they were too voluminous. Accordingly, they were sent by courier to the Court. Unfortunately, the person to whom they were sent was on leave when the authorities arrived at the Court and they were therefore not filed until today.**

Steven Powles

STEVEN POWLES

28th October 2003

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
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29 OCT 2003
NAME Neil Gibson
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TIME 10:35

SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

THE PROSECUTOR

-agianst-

MORRIS KALLON

CASE NO. SCSL-2003-07-PT

DEFENCE AUTHORITIES FOR PRELIMINARY MOTION BASED ON LACK OF JURISDICTION (LAWFULNESS OF THE COURT'S ESTABLISHMENT)

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1. UN Security Council Resolution 827, 25 May 1993 (establishing ICTY)
2. Ireland's Department of Foreign Affairs: Twenty-third Amendment of the Constitution Bill, 2001
3. Statement to the Dail by Irish Minister of Foreign Affairs on Twenty-third Amendment of Constitution Bill, April 2001.
4. Ireland's Progress Report to Council of Europe on ICC.
5. Netherland's Progress Report to Council of Europe on ICC.
6. Czech Republic's Progress Report to Council of Europe on ICC.
7. Azerbaijan's Progress Report to Council of Europe on ICC.
8. Moldova's Progress Report to Council of Europe on ICC.
9. Portugal's Progress Report to Council of Europe on ICC.
10. Slovenia's Progress Report to Council of Europe on ICC.
11. *Prosecutor v Dusko Tadic* 'Decision On the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995, ICTY Appeals Chamber.
12. Hyde Introduces Anti-ICC Amendment to Defence Appropriations (28 November 2001).

2126

Peace Resource Center

United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. res. 827, 48 U.N. SCOR at _, U.N. Doc. S/RES/827 (1992).

Adopted by the Security Council at its 3217th meeting, on 25 May 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Noting in this regard the recommendation by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia for the establishment of such a tribunal (S/25221),

Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,

2127

Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25274),

Acting under Chapter VII of the Charter of the United Nations,

1. *Approves* the report of the Secretary-General;

2. *Decides* hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;

3. *Requests* the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;

4. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;

5. *Urges* States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

6. *Decides* that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;

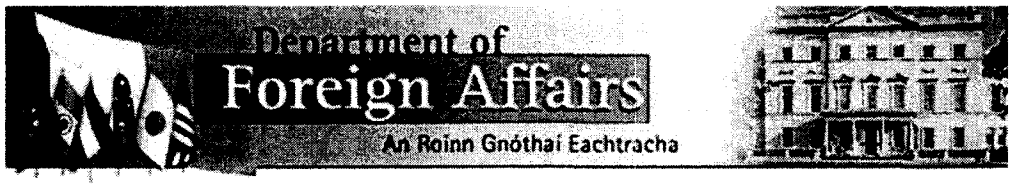
7. *Decides also* that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law;

8. *Requests* the Secretary-General to implement urgently the present resolution and in particular to make practical arrangements for the effective functioning of the International Tribunal at the earliest time and to report periodically to the Council;

9. *Decides* to remain actively seized of the matter.

2128

2129



Policies HUMAN RIGHTS

The Twenty-third Amendment of the Constitution Bill, 2001

Rome Statute of the International Criminal Court

Introduction

The Rome Statute of the International Criminal Court was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome on 17 July 1998. The Statute provides for the establishment of a permanent International Criminal Court, in relationship with the United Nations system, with jurisdiction over persons for the most serious crimes of concern to the international community, namely genocide, crimes against humanity, war crimes and the crime of aggression.

The Rome Statute is an international agreement which will enter into force approximately two months after 60 states have become party to it. Ireland signed the Statute on 7 October 1998. By the deadline for signature of 31 December 2000, 139 states had signed the Statute and by 24 April 2001, 29 had ratified it or acceded to it.

Ireland and the European Union

The establishment of a permanent International Criminal Court is something which Ireland has advocated for many years and the Government took an active part in the United Nations Diplomatic Conference of Plenipotentiaries in Rome at which the Statute was adopted. The Government has also participated and continues to participate in the Preparatory Commission, whose task it is to prepare proposals for practical arrangements for the establishment and coming into operation of the Court.

The European Union is a strong supporter of the early establishment of the International Criminal Court. In pursuit of this objective, it led international efforts to encourage as many States as possible to sign the Rome Statute before the 31 December 2000 deadline for signature and has undertaken to assist countries associated with the Union to ratify or accede to the Statute.

The Statute

The Statute is a substantial document consisting of 13 Parts and 128 Articles. The Statute deals with the establishment of the Court, its jurisdiction and the general principles of criminal law to be applied. It sets out the composition of the Court and its administration, the procedures for investigation, prosecution and trial, the penalties which can be imposed on conviction, and provides for appeals. The procedures under the Statute guarantee respect for the rights of the accused and will ensure that due process will be observed. There is an obligation on the States Parties to cooperate with the Court, and provision is also made for the enforcement of the judgements of the Court and for the carrying out of sentences. The Statute, furthermore, provides for an Assembly of States Parties and for the financing of the Court.

Crimes within the Jurisdiction of the Court

2130

Article 5 of the Statute sets out that "the most serious crimes of concern to the international community" namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression are within the jurisdiction of the Court. The Court will exercise jurisdiction over genocide, crimes against humanity and war crimes committed after the date on which the Statute enters into force. The Court will, however, not exercise jurisdiction over the crime of aggression

until a provision is adopted by the States Parties defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. A review conference is to be held seven years after the entry into force of the Statute and a provision governing the crime of aggression may be adopted at this Conference.

The definitions of genocide, crimes against humanity and war crimes contained in the Statute codify existing international law.

The definition of genocide is identical to that contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It involves the following acts when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group: killing or causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures to prevent births within the group or forcibly transferring children of the group to another group.

The concept of crimes against humanity also embraces particularly serious violations of human rights - violations such as murder, extermination, slavery, forcible transfer of population, unlawful imprisonment, torture, sexual violence, persecution of a group, enforced disappearance and apartheid - when committed as part of a widespread or systematic attack directed against the civilian population. Crimes against humanity can be committed in time both of war and of peace.

War crimes include grave breaches of the four Geneva Conventions of 1949 which provide for the care of wounded and sick members of the armed forces, the treatment of prisoners of war and the protection of civilians in time of armed conflict. Further examples of war crimes, for the purpose of the Rome Statute, include attacks during armed conflict against civilians, and against humanitarian and peacekeeping missions, attacks directed against religious, educational and cultural buildings, pillaging, rape, sexual slavery and enforced prostitution and the use of child soldiers.

The Amendment of the Constitution and Ratification

Because submission to the jurisdiction of the International Criminal Court would entail a partial transfer to the Court of the sovereign power of the State to administer criminal justice, it is necessary to amend the Constitution prior to ratification. To this end, the Twenty-third Amendment of the Constitution Bill, 2001 was published in March of this year. The Bill was passed by the Dáil on April 12th, and by the Seanad on May 2nd. It is intended to put the proposed amendment to the people in a referendum in early summer. The proposed amendment provides as follows:

> The State may ratify the Rome Statute of the International Criminal Court done at Rome on the 17th day of July, 1998.

If adopted, this amendment will become Article 29.9 of the Constitution.

2131

Apart from an amendment of the Constitution, it is also necessary to enact legislation to give effect to the Statute in Irish law before the State ratifies the Statute.

Further Information

Further information on the Rome Statute of the International Criminal Court is available on the website of the United Nations at www.un.org/law/icc

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POLICIES | General Principles | Anglo Irish | Irish Aid | European Union | Human Rights

DEPARTMENT OF FOREIGN AFFAIRS, 80 St. Stephen's Green, Dublin 2. Tel +353 1 4780822

International Criminal Court:
Statement to the Dáil by the Minister for Foreign Affairs, Mr. Brian Cowen T.D., on the 23rd Amendment to the Constitution Bill
April 2001

I am pleased to have the opportunity to open the debate on the Second Stage of the Twenty-third Amendment of the Constitution Bill, 2001. The purpose of the Bill is to enable Ireland to ratify the Rome Statute of the International Criminal Court done at Rome on the 17th day of July, 1998. The Statute provides for the establishment of a permanent International Criminal Court, in relationship with the United Nations system, with jurisdiction over persons in respect of genocide, crimes against humanity, war crimes and the crime of aggression. The Statute of the Court is an international agreement which will enter into force approximately two months after 60 states have become party to it. Ireland signed the Statute on 7 October 1998. To date 139 states have signed the Statute and 29 have ratified it or acceded to it.

The establishment of a permanent International Criminal Court is something which Ireland has advocated for many years and the Government took an active part in the United Nations Diplomatic Conference of Plenipotentiaries in Rome at which the Statute was adopted. The Government has also participated and continues to participate in the Preparatory Commission, whose task it is to prepare proposals for practical arrangements for the establishment and coming into operation of the Court.

The European Union is a strong supporter of the early establishment of the International Criminal Court. In pursuit of this objective, it led international efforts to encourage as many States as possible to sign the Rome Statute before the 31 December 2000 deadline for signature and has undertaken to assist countries associated with the Union to ratify or accede to the Statute. By ratifying the Statute, we will again signal Ireland's ongoing commitment to the Court.

Over the past one hundred years, great progress has been made in the fields of human rights and international humanitarian law. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and, in Europe, the European Convention on Human Rights all provide guarantees of respect for human rights, including during time of armed conflict. There have also been significant developments in international humanitarian law, that is, the rules specifically intended to protect persons in time of armed conflict. The four Geneva Conventions of 1947 deal with the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Treatment of Prisoners of War and the Protection of Civilian Persons in Time of War, while the two Protocols thereto, adopted in 1977, relate to the Protection of Victims of International Armed Conflicts and of Non-International Armed

Conflicts respectively. It is clearly accepted that even in a time of war, there are basic rules that must be observed. However, repeated violations of these rules highlight a significant flaw in their operation: the lack of an adequate enforcement mechanism.

This may be appropriately illustrated by the Convention on the Prevention and Punishment of the Crime of Genocide which was adopted in 1948. Article 6 of the Convention allows for trial by the courts of the State where an act of genocide occurs or by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." When the UN General Assembly adopted this Convention in 1948, it also invited the International Law Commission to "study the desirability and possibility of establishing a judicial organ for the trial of persons charged with genocide." This was found to be both desirable and possible and a draft Statute was prepared in 1951 and revised in 1953. However it was not until 1989, in response to a request by Trinidad and Tobago, that the General Assembly asked the International Law Commission to resume work on a Statute for an international criminal court. In 1994 the International Law Commission submitted its draft Statute to the General Assembly. From then on swift progress was made. The General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court to consider major substantive issues arising from the draft and this Committee met twice in 1995. After considering the Committee's Report, the General Assembly created the Preparatory Committee on the Establishment of an International Criminal Court to draw up a draft text for submission to a diplomatic conference. The Preparatory Committee held its final session and completed the drafting of the text in March and April of 1998. The United Nations Diplomatic Conference on the Establishment of an International Criminal Court was held in Rome from 15 June to 17 July 1998, and the result was the Statute which we now seek to ratify.

The Rome Statute of the International Criminal Court is the culmination of fifty years of work on the matter. During this period genocide, crimes against humanity, war crimes and the crime of aggression have repeatedly been perpetrated in various parts of the world, despite the existence of instruments of international law outlawing such acts. The existence of international agreements for the prevention and punishment of such crimes provides little comfort for the victims if the perpetrators of such acts never face trial. However, it has often been difficult to bring such persons to trial. They may enjoy immunity as a result of their official capacity. Furthermore, the political will may not exist to bring them to trial or the institutions of the state may have collapsed completely. The establishment of the International Criminal Court is an attempt to solve these problems.

Having determined that the situations in the former Yugoslavia and Rwanda in the early 1990s constituted a threat to international peace and security, the United Nations Security Council, acting under Chapter VII of the UN Charter, set up two tribunals to ensure that the perpetrators of the atrocities committed at that time should not escape punishment.

The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have made great progress, but their jurisdiction is limited to the particular geographical areas concerned and is subject to certain time constraints. The International Criminal Court, once established, will have much broader jurisdiction. In addition, the creation of ad hoc tribunals is always open to criticism. The setting up of tribunals for some circumstances and not for others will always be questioned. Those standing trial will question the independence of the tribunal and claim to be the victims of "victors' justice." Ad hoc tribunals can have little deterrent effect because nobody can ever be certain that such a tribunal will in fact be established. Furthermore, there is invariably a delay between the commission of the crimes and the establishment of the tribunal. All of these difficulties inherent in ad hoc tribunals are addressed by the establishment of a permanent international criminal court. The Rome Statute of the International Criminal Court provides for a permanent independent institution within the United Nations system. It should not be possible for any State to interfere with the Court in the execution of its function and it will be difficult for those who will still cry "victors' justice" to claim any legitimacy.

The Statute adopted at the Conference of Plenipotentiaries in Rome is a comprehensive document consisting of 13 Parts and 128 Articles. The Statute deals with the establishment of the Court, its jurisdiction and the general principles of criminal law to be applied. It sets out the composition of the Court and its administration, the procedures for investigation, prosecution and trial, the penalties which can be imposed on conviction, and provides for appeals. There is an obligation on the States Parties to cooperate with the Court, and provision is also made for the enforcement of the judgements of the Court and for the carrying out of sentences. The Statute furthermore provides for an Assembly of States Parties and for the financing of the Court.

Article 5 of the Statute sets out that "the most serious crimes of concern to the international community" namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression are within the jurisdiction of the Court. The Court will exercise jurisdiction over genocide, crimes against humanity and war crimes committed after the date on which Statute enters into force. The Court will, however, not exercise jurisdiction over the crime of aggression until a provision is adopted by the States Parties defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. A review conference is to be held seven years after the entry into force of the Statute and a provision governing the crime of aggression may be adopted at this Conference.

The definitions of genocide, crimes against humanity and war crimes contained in the Statute codify existing international law.

The definition of genocide is identical to that contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It involves the following acts when committed with the intent to destroy, in whole or in part, a national, ethnical, racial

or religious group: killing or causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures to prevent birth within the group or forcibly transferring children of the group to another group.

The concept of crimes against humanity also embraces particularly serious violations of human rights - violations such as murder, extermination, slavery, forcible transfer of population, unlawful imprisonment, torture, sexual violence, persecution of a group, enforced disappearance and apartheid - when committed as part of a widespread or systematic attack directed against the civilian population. Crimes against humanity can be committed both in time of war and of peace.

War crimes include grave breaches of the Geneva Conventions of 1949. Further examples of war crimes, for the purpose of the Rome Statute, include attacks during armed conflict against civilians, and against humanitarian and peacekeeping missions, attacks which will cause widespread, long-term and severe damage to the environment, attacks directed against religious, educational and cultural buildings, pillaging, rape, sexual slavery and enforced prostitution and the use of child soldiers.

I think all will agree that it is not pleasant to think and speak about such crimes. For those of us lucky enough not to have experienced such horrific circumstances, it is difficult to imagine what it must be like for the victims of such crimes. Yet, over the last ten years we have witnessed the commission of these crimes in different parts of the world with shocking frequency. It is our duty to do all within our power to ensure that such crimes are not committed again and that when they are, those responsible are punished. It would be unrealistic to believe that the creation of a Court would entirely prevent the occurrence of such events in the future. The Court will undoubtedly have a deterrent effect, but there will always be individuals and governments who will carry out such horrific crimes. The difference will be that they can no longer confidently expect to escape punishment.

Once established, the Court will sit at The Hague in the Netherlands. In addition to the Court, an Assembly of States Parties will be established when the Statute comes into force. This Assembly will consist of one representative from each State Party. The Assembly will elect 18 full-time judges who will be "persons of high moral character, impartiality and integrity" and possess the qualifications required in their respective States for appointment to the highest judicial offices. As is to be expected, the judges will be independent in the performance of their functions. There may not be more than one judge of the same nationality, and in selecting judges, the States Parties will take into account the need for the membership of the Court to represent the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges.

There will also be an independent Office of the Prosecutor and the Prosecutor, like the judges, will be elected by the Assembly of States Parties by secret ballot.

A situation in which a crime appears to have been committed may be referred to the Prosecutor of the Court by a State Party or by the Security Council of the United Nations acting under Chapter VII of the UN Charter or the Prosecutor may initiate an investigation. Where a State Party has referred a situation to the Prosecutor or the Prosecutor has initiated the investigation, the Court may exercise its jurisdiction if the State on the territory of which the alleged crime was committed is a Party to the Statute or if the person accused of the crime is a national of a State Party. States Parties are obliged to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction.

The Statute contains numerous provisions governing the conduct of a trial and the rights of an accused which will ensure that due process will be observed.

The Court will be complementary to national legal systems. The primary obligation to investigate crimes covered by the Statute and to prosecute the perpetrators will remain with the States Parties. Only where the State Party in question is unwilling or unable genuinely to investigate the crimes alleged or to prosecute the accused person may the Court exercise its jurisdiction. In this way, the Court provides an additional means of administering justice where serious international crimes are committed, without in any way detracting from existing domestic structures which States may have already put in place.

In addition to its function in electing judges and the Prosecutor, the Assembly of States Parties will also be responsible for the budget of the Court and will provide management oversight to the President of the Court, the Prosecutor and the Registrar regarding the administration of the Court. Draft Rules of Procedure and Evidence were adopted by the Preparatory Commission for the Court in June of last year. These provide further detail on the way the Court will function. It is envisaged that the Assembly will adopt these Rules and the Financial Rules and Regulations. The Court will be funded by contributions from States Parties and by the United Nations and may also accept voluntary contributions.

As is clear from the description I have just given, the Rome Statute is an extensive document which creates a substantial new international institution with the power to administer justice where very serious crimes have been committed. Article 34.1 of our Constitution provides that "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution..." I have been advised by the Attorney General that the Rome Statute of the International Criminal Court provides

for the administration of justice outside the terms of this constitutional provision and that, consequently, an amendment of the Constitution is needed before the State may ratify the Statute. It is therefore proposed to amend the Constitution by the addition of a new section 9 to Article 29 of the Constitution allowing the State to ratify the Rome Statute of the International Criminal Court. This provision will read as follows:

The State may ratify the Rome Statute of the International Criminal Court done at Rome on the 17th day of July, 1998.

An amendment of the Constitution must always be undertaken with care. Our Constitution is our basic law, the foundation on which our State is built: Bunreacht na hÉireann. For this reason, when amending the Constitution, the effect should be considered of the proposed amendment on the Constitution as a whole. The amendment proposed in this Bill will complement existing provisions of the Constitution. Under the heading "International Relations," Article 29 begins by affirming Ireland's "devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality," continues by affirming our "adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination" and then states that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."

By ratifying the Rome Statute and participating in the International Criminal Court we will demonstrate our belief in the principles set out at the beginning of Article 29 of the Constitution. The Rome Statute will bring into being a permanent Court based on the idea of international justice and morality and with the power to enforce generally recognised principles of international law in the furtherance of peace.

We adopted our Constitution, containing as it does, this devotion to peace and justice only a few years before one of the most destructive wars the world has ever seen. During that war genocide, crimes against humanity, war crimes and the crime of aggression were all carried out. The efforts made in the intervening period were not sufficient to prevent the re-occurrence of such terrible crimes. We hope that the establishment of the International Criminal Court will change this pattern. This Court will have the power to enforce the principles by which we promised to conduct our international relations over 60 years ago. I am, therefore, proposing that we amend our Constitution to enable us to ratify the Rome Statute as soon as possible.

I hope I have succeeded in demonstrating the importance of the Rome Statute of the International Criminal Court. As even recent conflicts have shown, the existence of laws prohibiting genocide, crimes against humanity and war crimes are of little use if there is no method of ensuring that persons who commit such crimes are brought to trial. The

International Criminal Court will at last provide a permanent and independent enforcement mechanism. By amending our Constitution as proposed in this Bill, we will take the first and most important step towards ratification of the Rome Statute and the ultimate establishment of the International Criminal Court.

2139

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 9 August 2001

Consult/ICC (2001) 16

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

LES IMPLICATIONS POUR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE DE LA RATIFICATION DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

PROGRESS REPORT BY IRELAND

Submission
on progress made by Ireland in ratification and implementation
of the Rome Statute of the International Criminal Court

Irish legislation implementing the Rome Statute is in its early stages, and therefore no draft legislation is available at this time. However, consideration has been given to the three issues identified by the Council of Europe in its e-mail of 26 June. Ireland's position on these issues is as follows:

a) Cooperation between the ICC and States Parties to the Rome Statute.

(i) Surrender of Irish nationals to the ICC.

It is proposed that legislation implementing the Rome Statute will be based on Irish legislation relating to the International Criminal Tribunals for Rwanda and the former Yugoslavia, which allows for the transfer of Irish nationals to the custody of those tribunals. It is not envisaged, therefore, that the transfer of Irish nationals to the ICC will be an issue for Ireland.

(ii) Surrender of nationals of another State Party to the Rome Statute

It is envisaged that nationals of another State Party will be surrendered to the ICC, on the request of the Court.

(iii) Surrender of nationals of a State not a party to the Rome Statute.

Consideration is currently being given to whether implementing legislation will provide for the surrender of a national of a State not a party to the Rome Statute to the ICC.

b) Constitutional Issues

i) Ratification

In order for Ireland to ratify the Rome Statute it was necessary to amend the Constitution of Ireland, primarily because it was considered that certain provisions of the Constitution - those relating to the State's sovereign power to administer criminal justice, and those conferring emergency powers on Parliament during a time of war- could conflict with the State's duties under the Rome Statute.

In the spring of 2001, a Bill to amend the Constitution was passed by both Houses of Parliament. This proposed Amendment read:
" The State may ratify the Rome Statute of the International Criminal Court done at Rome on the 17th day of July, 1998"

On 7 June 2001, in compliance with the requirements of the Constitution, the proposal was submitted by referendum to the decision of the people, and was approved by a majority of voters.

The amendment will be signed into law by the President of Ireland shortly.

ii) Immunity

Under the Constitution of Ireland, immunity is only conferred on the President in respect of acts done in the exercise and performance of the powers and functions of his or her office. While it is not likely that these functions would include the commission of crimes under the jurisdiction of the ICC, the recent amendment to the Constitution would prevent any claim of immunity in respect of such crimes. The immunity conferred on Members of Parliament by the Constitution is of a much more limited nature, and would not conflict with any provision of the Rome Statute.

The issue of whether Ireland would grant immunity to a Head of State or Government accused of a crime under the Rome Statute, where that person's State is not a party to the Rome Statute, will require an in-depth study of the customary international law relating to Head of State immunity, as Ireland has no case law or legislation relating to Head of State immunity in criminal cases.

c) Substantive Criminal Law Issues

It is envisaged that ratification of the Rome Statute will require the creation of a number of new offences in Irish law, mostly as a result of the provisions of Article 7 (crimes against humanity) and Article 8 (war crimes) of the Statute, which cover a wider range of acts than current Irish law.

Other crimes defined in the Statute are already offences under Irish law, including those crimes covered by legislation implementing the Geneva Conventions of 1949 and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.

Department of Foreign Affairs of Ireland
July, 2001

2142

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 19 July 2001

Consult/ICC (2001) 21

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

LES IMPLICATIONS POUR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE DE LA RATIFICATION DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

PROGRESS REPORT BY THE NETHERLANDS AND APPENDIX

1. General

In order to enable the government to proceed to the ratification of an international treaty, the Dutch Constitution requires that a Bill of approval be accepted by both houses of parliament, i.e. the House of Representatives and the Senate of the States General. Normally, the ratification and necessary implementation of a treaty are combined in one bill, but in case of the ICC Statute, the two were separated for both political and practical reasons.

2. Ratification

According to the Dutch Constitution, the ratification of a treaty with provisions conflicting with the Constitution is possible without amending the Constitution, under the condition that both houses of parliament accept the Bill of approval with a qualified, two-third majority. Although this procedure has been in existence for quite some time, it had never been applied completely before. In order to judge whether it was necessary to follow that specific procedure, several aspects of the Statute and its consequences, some of which had already been the subject of discussion in relation to the establishment of a Scottish Court in the Netherlands, were studied in detail.

The main issues at stake were:

a) whether the establishment of a court not belonging to the Dutch judiciary would be in conflict with the Constitution; this was considered not to be the case for article 92 of the Constitution allows for the judiciary power to be transferred to an international organization;

b) whether the articles 15 of the Constitution and 5(4) of the ECHR would require that the *habeas corpus* court be a national, i.e. a Dutch court; this was considered not to be the case, and since article 59 and 60 of the the ICC Statute introduce a procedure which is in substance in conformity with *habeas corpus* norms, the ICC could be acceptable as a *habeas corpus* court as well;

c) whether the *ius de non evocando* (the right to be judged by the court provided by law) as laid down in article 17 of the Constitution would require that, on Dutch soil, there be a Dutch court available; in the light of the above, this was considered not to be the case either;

d) whether or not the fact that article 122 of the Constitution states that pardon is granted by "royal decree" (i.e. by the Minister of Justice, after approval by the Head of State), would conflict with the article 110 of the ICC Statute; this was considered not to be the case for article 92 of the Constitution also allows that this administrative power be transferred to an international organization;

e) whether or not the constitutional immunity of politicians for their spoken and written communications in and between parliamentary meetings and commissions (article 71 of the Constitution) would conflict with article 27 of the ICC Statute; since the immunity granted is not absolute (there is a system of internal administrative sanctions), but criminal sanctions are excluded entirely, the constitutionality of the ICC Statute in this respect was considered doubtful;

f) whether or not the constitutional immunity of the Head of State (article 42 of the Constitution) would conflict with article 27 of the ICC Statute; this was not entirely clear since, within the internal constitutional order of the Netherlands, the Head of State *as such* has no independent powers. Every single act of the Head of State is covered by ministerial responsibility, so he or she is legally unable to commit any of the Statute's offences. Since however this distinction between the Head of State in its official capacity and the Head of State as a private person is unknown to international law, and the ICC provides that every individual, irrespective of his capacity, can be prosecuted before the ICC, it was considered that there may be doubts about the constitutionality of the ICC Statute.

As a result of these considerations, the government decided that, it was to be preferred to ask for the Bill of approval to be accepted by qualified majority. Although most of the issues did indeed give rise to debate in parliament, the House of Representatives accepted the Bill without voting in March 2001, the Senate in July. Since, during Spring 2001, the parliaments of the partners of the Netherlands in the Kingdom, the Netherlands Antilles and Aruba, have both successfully completed their procedures for the approval as well, the Kingdom of the Netherlands were able to ratify the ICC Statute at 17 July 2001.

3. Implementation

In order to realise the implementation of the ICC Statute, the Dutch government has chosen to follow two parallel tracks: one to introduce powers and procedures for the cooperation with the International Criminal Court, and one to incorporate the Statute's offences, as far as necessary, in Dutch law. The main reasons for this approach were the different nature of the two aspects of the implementation, and the fact that it seemed to be the most certain method to avoid that the cooperation legislation, which seems to be paramount for the practical functioning of the ICC, be delayed by the possibly much more complex legislation on crimes and jurisdiction. Besides, it made it possible that the Statute's obligations on cooperation be implemented in one bill for the entire Kingdom, whereas the implementation of the crimes can still be dealt with separately by the Netherlands, the Netherlands Antilles and Aruba, in accordance with the Statute of the Kingdom.

A bill on cooperation with the ICC, with detailed powers and procedures to enable all forms of cooperation required under Part 9 of the Statute, including the surrender of all persons wanted by the ICC, other forms of legal assistance, and the execution of sentences imposed by the ICC, has meanwhile been drafted. It also contains provisions on transit and other forms of cooperation related to the position of the Netherlands as the ICC's host state. After having been approved by the cabinet, the bill has been sent to the Kingdom Council of State. Depending on its advice, it is the intention that this bill, which will apply to the entire Kingdom, be proposed to parliament before the end of September 2001. Parallel to this bill, a bill has been drafted which will amend the Netherlands' Criminal Code, Code of Criminal Procedure and Pardon Act, in order to enable the prosecution under Dutch law of offences against the administration of justice of the ICC, as referred to in article 70 of the Statute.

The second track of implementing legislation, the criminalisation of those offences not yet included in substantive criminal law, will only cover the "Kingdom in Europe". The Netherlands Antilles and Aruba will take care of the criminalisations within their respective legal orders. At this moment, most crimes from the ICC Statute already exist under Dutch law. As far as war crimes ("breaches of laws and customs of war in international or internal conflict") are concerned, the criminalisation under Dutch law is based upon universal jurisdiction; the same is the case for torture. As far as genocide is concerned, Dutch legislation is based upon the principles of active and passive personality (Dutch suspect or Dutch victim). Dutch legislation does not know a criminalisation of "crimes against humanity" as such. Since crimes against humanity usually are qualified common offences, their commission in the Netherlands will be covered by Dutch law; their commission outside the standard Dutch jurisdiction can however not be prosecuted under Dutch law. In order to fill this "criminalisation gap", it is the intention that a new Act is prepared that will incorporate all core crimes from the ICC Statute; to what they extent they should be brought under universal jurisdiction is still a matter of consideration. The bill containing the draft of this Act is planned to be sent to the Council of State by the beginning of autumn, and it is the government's intention to propose the bill to the House of Representatives before the end of 2001.

2146

Appendix I

Constitution of the Netherlands

Article 15

1. Except for the case laid down by or pursuant to an act of parliament, no one may be deprived of his liberty.
2. Anyone who has been deprived of his liberty otherwise than by order of a court may request a court to order his release. In such a case he shall be heard by the court within a period to be laid down in an act of parliament. The court shall order his immediate release if it considers the deprivation of liberty to be unlawful.
3. The trial of a person who has been deprived of his liberty pending trial shall take place within a reasonable time.
4. A person who has been lawfully deprived of his liberty may be restricted in the exercise of fundamental rights in so far as this exercise is incompatible with the deprivation of liberty.

Article 17

No one may be prevented against his will from being heard by the courts to which he is entitled to apply under an act of parliament.

Article 42

1. The Government shall comprise the King and the Ministers.
2. The King is immune; the Ministers are responsible.

Article 71

Members of the States General, Ministers, Under-Secretaries of State and other persons taking part in deliberations may not be prosecuted or otherwise held liable in law for anything they say during the meetings of the States General or of its committees or for anything they submit to them in writing.

Article 91

1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by act of parliament.
2. The manner in which approval shall be granted shall be laid down in an act of parliament, which may provide for tacit approval.
3. Any provisions of a treaty that conflict with the Constitution or which lead tot conflicts with it can be approved by the Chambers of the States General only with at least a two-thirds majority of the votes cast.

2147

Article 92

Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91, paragraph 3.

Article 122

1. Pardon shall be granted by royal decree upon the advice of a court designated by act of parliament and with due regard to regulations to be laid down by or pursuant to an act parliament.
2. Amnesty shall be granted by or pursuant tot an act of parliament.

2148

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 16 July 2001

Consult/ICC (2001) 10

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

LES IMPLICATIONS POUR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE DE LA RATIFICATION DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

PROGRESS REPORT BY THE CZECH REPUBLIC

The Czech Republic signed the Rome Statute on 13 April 1999. Immediately afterwards an ad hoc group composed of experts from the Ministry of Justice and the Ministry of Foreign Affairs was created. The target of this group was to identify and analyse legal obstacles of the ratification of the Rome Statute and eventually initiate relevant legislative measures. The work of the ad hoc group resulted in two legislative proposals:

a) amendment of the Constitution of the Czech Republic – article 112a[1]
b) amendment of the Penal Procedure Code – article 375 paragraph 2

The existing wording of the Constitution is, in a certain way, in contradiction to the personal jurisdiction of the ICC. The Constitution provides for unlimited criminal unaccountability of the constitutional figures, even after the termination of the office to which such unaccountability is related. The other problem is the extradition of Czech citizens, which is forbidden by the Constitution. Finally, there is a problem of unrestricted right of the President of the Czech Republic to give pardon for any criminal offence. Article 112a of the Constitution shall introduce all necessary changes required to comply with the Statute.

Article 375 paragraph 2 of the Penal Procedure Code is intended to allow co-operation of the Czech Republic with the ICC on the same basis as in relation to a foreign state.

Both proposals had already been approved by the government at the beginning of last year, but in May 2000 the Parliament of the Czech Republic rejected them. The reason was the fact that the above-mentioned articles had been submitted to the Parliament as part of a broad range of amendments, which concerned many different subjects.

Since May 2000 much progress has been made as regards the ratification and implementation of the Rome Statute. Article 375 paragraph 2 of the Penal Procedure Code has been included into a new amendment, which has already been passed by the Parliament as an independent proposal in the autumn of this year. According to the governmental ruling of 3 January 2001 this amendment of the Constitution shall be submitted to the Parliament together with the proposal for the ratification of the Rome Statute.

As we have informed you already last year there are no obstacles of the ratification of the Rome Statute with regard to substantive criminal law.

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[1] "Crimes, where ratified and promulgated international treaty provides for the jurisdiction of an international criminal court, and where the Czech Republic is bound; a) neither the special conditions provided for the prosecution of deputy, senator, the President, of the Republic, and judge of the Constitutional Court, nor the right of deputy, senator, and judge of the Constitutional Court to refuse to witness on facts that he gathered in connection with his seat or function shall apply; b) the President of the Republic may neither use his right to forgive or to relieve any imposed penalty not to order not to initiate any prosecution, and when initiated, not to continue with the prosecution or to proceed in a similar way by granting an amnesty; d) the Czech Republic shall release for prosecution by the respective international criminal court its own citizen or a foreigner, should such international treaty require this."

2150

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 11 July 2001

Consult/ICC (2001) 7

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

LES IMPLICATIONS POUR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE DE LA RATIFICATION DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

PROGRESS REPORT BY AZERBAIJAN

The Republic of Azerbaijan has not yet ratified the Rome Statute of the International Criminal Court. Nonetheless the Azerbaijani legis lator, when adopting relevant laws in recent years, has taken into consideration some principal provisions of the Statute, presupposing its possible future ratification. Thus, the Criminal Code of the Republic of Azerbaijan which was adopted on 30 December 1999, and entered into force on 1 September 2000, provides in Chapters 16 and 17 [(i)] for the criminal responsibility for crimes against humanity and war crimes, hereby reflecting the definitions of the respective crimes under the jurisdiction of the Intern ational Criminal Court.

Bearing in mind that the Rome Statute differentiates the procedure of extradition applied between States and that of surrender which applies between a State party and the Court, the Azerbaijani Law on Extradition of Criminals of 15 May 2001 (entered into force on 19 June 2001) in its art. 1.3 [(ii)] provides that the provisions of this law shall not extend to surrender of persons to international judicial bodies.

As far as future possible ratification of the Rome Statute is concerned, this process is expected to be impeded by problems of constitutional character, particularly, by the ban on extraditing of Azerbaijani nationals (art. 53(II) of the Constitution), immunity of State officials (art. 90, 128 of the Constitution), possibility of granting pardon etc. In addition, there may arise other issues, particularly, those connected with the requirement of the Criminal Procedure Code of Azerbaijan as to trial by jury.

i *unofficial translation*

Extract of the
CRIMINAL CODE OF THE REPUBLIC OF AZERBAIJAN

Section VII

CRIMES AGAINST PEACE AND SECURITY OF MANKIND

Part 16

Crimes against peace and crimes against humanity

Article 100. Planning, preparation, initiation or waging of a war of aggression

100.1. Planning, preparation or initiation of a war of aggression–
shall be punished by deprivation of freedom for a term of 8 to 10 years.

100.2. Waging of a war of aggression–
shall be punished by deprivation of freedom for a term of 10 to 15 years or by life imprisonment.

Article 101. Public incitement to initiating a war of aggression

101.1. Public incitement to initiating a war of aggression–
shall be punished by restriction of freedom for a term of up to 3 years or by deprivation of freedom for the same term.

101.2. The same acts committed with the use of mass media or by a public official–
shall be punished by deprivation of freedom for a term of 2 to 5 years, with disqualification to engage in specified activities for a term of up to 3 years or without thereof.

Article 102. Attacks directed against internationally protected persons or institutions

Attacks directed against an internationally protected representative of a foreign state, or on a staff member of an international organisation, or on premises or means of transport of these persons, if such acts are committed with intent to provoke a war or aggravate international relations–
shall be punished by deprivation of freedom for a term of 5 to 10 years.

Article 103. Genocide

Killing members of a national, ethnical, racial or religious group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group, if such acts are committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such–
shall be punished by deprivation of freedom for a term of 10 to 15 years or by life imprisonment.

Note: Any acts defined in Articles 103113 of this Chapter and committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, whether in time of peace or war, shall be regarded as crimes against humanity.

Article 104. Incitement to genocide

Direct and public incitement to commit any of the acts defined in Article 103 of this Code–
shall be punished by deprivation of freedom for a term of 5 to 10 years.

2153

Article 105. Extermination

Extermination of a population, in whole or in part, without elements of genocide
shall be punished by deprivation of freedom for a term of 10 to 15 years or by life imprisonment.

Article 106. Enslavement

106.1. Enslavement, i. e. the exercise of any or all the powers attaching to the right of ownership over a person –
shall be punished by deprivation of freedom for a term of 5 to 10 years.

106.2. The same acts committed against a minor or with intent to convey a person to a foreign country –
shall be punished by deprivation of freedom for a term of 7 to 12 years.

106.3. Slave trade, i.e. detention of a person with intent to reduce him or her to slavery or use him or her as a slave, sell or exchange; disposal of a person; any acts related to trade or trafficking in slaves; sexual slavery or any acts encroached upon sexual freedom based on enslavement
shall be punished by deprivation of freedom for a term of 5 to 10 years.

Article 107. Deportation or forcible transfer of population

Forced displacement of a population by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law and laws of the Republic of Azerbaijan –
shall be punished by deprivation of freedom for a term of 10 to 15 years.

Article 108. Sexual violation

Rape, enforced prostitution, enforced sterilisation, or any other acts related to sexual violence
shall be punished by deprivation of freedom for a term of 10 to 15 years or by life imprisonment.

Article 109. Persecution

Persecution against any group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are prohibited under international law, i.e. severe deprivation of fundamental rights by reason of the identity of the group or collectivity, if these acts are connected to other crimes against mankind –
shall be punished by deprivation of freedom for a term of 5 to 10 years.

Article 110. Enforced disappearance of persons

Arrest, detention or abduction of persons with the authorisation, support or acquiescence of a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time–
shall be punished by deprivation of freedom for a term of 5 to 10 years.

Article 111. Racial discrimination (apartheid)

111.0. Any of the following acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons:

111.0.1. denial to a member or members of a racial group or groups of the right to life and liberty of person, i.e. murder of members of a racial group or groups; infliction upon them of serious bodily or mental harm; subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; or arbitrary arrest and illegal imprisonment of such persons;

2154

111.0.2. deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

111.0.3. any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognised trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

111.0.4. any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

111.0.5. exploitation of the labour of the members of a racial group or groups;

111.0.6. persecution of organisations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid–
shall be punished by deprivation of freedom for a term of 10 to 15 years or by life imprisonment.

Article 112. Deprivation of liberty in violation of rules of international law

Imprisonment or other deprivation of liberty of persons in violation of rules international law–
shall be punished by deprivation of freedom for a term of 5 to 8 years.

Article 113. Torture

Infliction of severe pain or suffering, whether physical or mental, upon persons detained or otherwise deprived of their liberty–
shall be punished by deprivation of freedom for a term of 7 to 12 years.

PART 17

War Crimes

Article 114. Mercenarism

114.1. Recruitment, training, financing and other material provision of mercenaries, as well as use of such persons in an armed conflict or hostilities–
shall be punished by deprivation of freedom for a term 4 to 8 years.

114.2. The same acts committed by a public official by using his or her official position, or with relation to a minor –
shall be punished by deprivation of freedom for a term of 8 to 15 years.

114.3. Participation of a mercenary in an armed conflict or hostilities–
shall be punished by deprivation of freedom for a term of 3 to 8 years.

Note:
1. Any of the acts defined in this Part and committed in connection with planning, preparation, initiating or waging of hostilities, whether during international or internal armed conflict, shall be regarded as war crimes.

2. "Mercenary" means a person who is not a national of a State party to the armed conflict or hostilities, is not a permanent resident of territory of that State, has not been sent on official duty, and acts for private gain.

Article 115. Violations of laws and customs of war

115.1. Compelling prisoners of war, and other persons protected by international humanitarian law to serve in the armed forces of the capturing Power, as well as compelling nationals citizens of the hostile Power to take part in the operations of war directed against their own country–
shall be punished by deprivation of freedom for a term of 2 to 5 years.

115.2. Subjecting persons mentioned in Article 115.1. of this Chapter to torture, cruel or inhuman treatment or medical, biological or other experiments, removing the internal organs for the purpose of transplantation, or utilising the presence of such persons to render its own military forces or objects immune from armed operations, or holding such persons as hostages, or compelling the civilian population to forced labour or deporting them for other purposes from the area in which they are lawfully present –
shall be punished by deprivation of freedom for a term of 5 to 10 years.

115.3. The acts defined in Articles 115.1 and 115.2. of this Code which cause death or serious injury to the health of such persons–
shall be punished by deprivation of freedom for a term of 10 to 15 years.

115.4. Wilful killing of persons mentioned in Article 115.1. of this Code–
shall be punished by deprivation of freedom for a term of 12 to 15 years or by life imprisonment.

Article 116. Violations of rules of international humanitarian law in time of armed conflict

116.0. Violations of international humanitarian law in time of armed conflict, i.e.:

116.0.1. use of methods and means of warfare which may cause significant destruction;

116.0.2. causing widespread, long-term and severe damage to the natural environment;

116.0.3. directing attacks against personnel involved in a peacekeeping mission or humanitarian assistance, as well as against personnel, buildings, installations and means of transport using the distinctive emblems of the Red Cross or Red Crescent;

116.0.4. using starvation of civilians as a method of warfare;

116.0.5. recruiting minors into armed forces;

116. 0.6. causing extensive destruction to justified by military necessity;

116.0.7. directing attacks against undefended areas, dwellings or demilitarised zones;

116.0.8. directing attacks without any military necessity against historic, religious, educational, scientific, charitable or medical objects, and places where the sick and wounded are collected, provided that they are not military objectives, are easily seen and distinguishable, and specially protected;

116. 0.9. breach of temporary armistice agreements or agreements on termination of military operations with a view to remove the dead and wounded from the battlefield, exchange or transportation thereof;

116.0.10. directing attacks against the civilian population as such or against individual civilians not taking part in hostilities;

116.0.11. causing violence against civilian population, robbing, destroying or seizing their property on the pretext of military necessity in hostility areas;

116.0.12. directing attacks against installations which may cause excessive loss of life among the civilian population or inflict severe damage to civilian objects;

116.0.13. directing attacks against a person who has evidently for the accused stopped his direct participation in military operations, or has no arms, or has surrendered having laid down his arms, or is not able to offer resistance because of having been wounded or for other reason;

116.0.14. transfer of parts of its own civilian population into the occupied territories;

116.0.15. unjustifiable delay in the repatriation of prisoners of war or civilians;

116.0.16. employing in armed conflict weapons, means and methods of warfare prohibited by the international treaties to which the Republic of Azerbaijan is a Party;

116.0.17. committing rape, sexual slavery, enforced prostitution, enforced sterilisation and other acts related to sexual violence;

116.0.18. imprisonment or other deprivation of liberty, in violation of rules international law, of persons mentioned in Article 115.1 of this Code, and deprivation of such persons of the procedural rights–
shall be punished by deprivation of freedom for a term of 7 to 15 years or by life imprisonment.

Article 117. Failure to act or giving a criminal order in time of armed conflict

117.1. Intentional non-use in time of armed conflict by a commander or a public official of all the opportunities within his power to prevent the commission by his subordinates of any crime defined in Articles 115 and 116 of this Code–
shall be punished by deprivation of freedom for a term of 5 to 10 years.

117.2. Declaring or ordering to the subordinates that there shall be no survivors in the hostility areas, or giving the subordinates an order to commit any of the crimes defined in Articles 115 and 116 of this Code –
shall be punished by deprivation of freedom for a term of 10 to 15 years or by life imprisonment.

Article 118. Pillage

Plunder of the property of persons killed or wounded in the battlefield (pillage)–
shall be punished by deprivation of freedom for a term of 3 to 10 years.

Article 119. Misuse of protective signs

119.1. Carrying in the battlefield area the distinctive signsof the Red Cross or the Red Crescent by persons that are not entitled to use them, as well as misusing in time of war the flags and signs of the Red Cross and Red Crescent or of the colours of medical transport units–
shall be punished by deprivation offreedom for a term to 2 years.

119.2. Making improper use of a flag of truce, of the flag, insignia or uniform of the United Nations, as well as of the distinctive emblems protected by the Geneva Conventions of 1949, resulting in death or serious injury to the health of a person,
shall be punished by deprivation of freedom for a term 5 to 10 years.

[ii] *Unofficial translation*

Extract of the
LAW OF THE REPUBLIC OF AZERBAIJAN
ON EXTRADITION OF CRIMINALS
(adopted on 15 May 2001; entered into force on 19 June 2001)

Article 1.3. The provisions of this Law shall not extend to surrender of a person to international judicial bodies.

Extract of the
LAW OF THE REPUBLIC OF AZERBAIJAN
ON LEGAL ASSISTANCE IN CRIMINAL MATTERS
(adopted in June 2001)

Article 2.4. The provisions of this Law shall not extend to issues of cooperation with international judicial bodies.

2158

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 18 July 2001

Consult/ICC (2001) 20

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

LES IMPLICATIONS POUR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE DE LA RATIFICATION DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

PROGRESS REPORT BY MOLDOVA

Moldova has been unable thus far to ratify the Rome Statute of the International Criminal Court because the latter's provisions are in contradiction with the Constitution of the Republic of Moldova.

Article 59 of the statute requires member States to arrest, or to arrest and surrender, any person who has committed a crime within the jurisdiction of the Court, while Article 17, paragraphs 3 and 4, of Moldova's Constitution stipulates:

"(...)

(3) No citizen of the Republic of Moldova can be extradited or expelled from his/her country.

(4) Foreign nationals or stateless persons may be extradited only in compliance with an international agreement or under conditions of reciprocity in consequence of a decision of a court of law."

Under its Constitution, therefore, Moldova cannot extradite its own citizens, so in order to ratify the Rome Statute it must first amend the above provisions of the Constitution.

Article 114 of the Constitution provides that justice is to be administered in the name of the law by courts of law only.

Article 115 paragraphs 1 and 2 establish the following jurisdictions:

"(1) Justice shall be administered by the Supreme Court of Justice, the Court of Appeal, courts of first and second instance.

(2) To hear certain categories of cases special courts may be set up under the law.

(...)"

Under the above provisions of the Constitution, therefore, any crime committed on Moldovan territory, including those provided for in Articles 5, 6, 7 and 8 of the Rome Statute, falls within the exclusive jurisdiction of the courts mentioned in Article 115 of the Constitution, which makes no provision for any other court to judge these crimes.

Moldova is therefore unable to ratify the Rome Statute of the International Criminal Court without first amending its Constitution, which is a lengthy and complex process.

2160

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 12 September 2001

Consult/ICC (2001) 23 Revised
English only

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

LES IMPLICATIONS POUR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE DE LA RATIFICATION DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

PROGRESS REPORT BY PORTUGAL

Introduction

Portugal believes that the International Criminal Court (ICC) may in the future establish an unparalleled jurisdiction. This jurisdiction will aim at preventing and repressing crimes which amount to intolerable offences to the values arising from the dignity of the human being, whose protection the international community considers, consensually, as ind ispensable.

The recognised importance and interest as to the creation of the ICC has systematically been stressed by Portugal. In fact, the Portuguese delegation to the United Nations Special Commission has actively participated in the works of the commis sion- prior, during and after the Rome Conference that approved the ICC Statute.

Furthermore, Portugal signed the Statute of Rome in October 1998, and is presently busy preparing the extraordinary revision of the Constitution, approved by the Assembly of the Republic on the 29 March 2001 with a view to ratify the respective Statute.

1. Ratification

In the scope of the ratification of the ICC statute, the main problems falling under a constitutional nature concern the competence, punitive system, immunit ies and the handing over of persons to the Court.

a) As far as competence is concerned, it is alleged that ratification of the Statute of Rome implies a reduction of sovereign competence assigned to Portuguese courts to judge crimes committed on national ter ritory which have been established in the articles of the Constitution, in particular, articles 1, 5 no. 3, 202 and 209 and subsequent.

b) With respect to the punitive system, the Portuguese Constitution in its article 30 no. 1 forbids the sentence of lifelo ng imprisonment provided for in article 77 of the Statute. One does not seem to be able to get around the respective prohibition by way of the mechanism of obligatory revision once the 25 years of the said sentence have been served, as provided for in article 110 of the Statute.

c) As far as immunities are concerned, one must resort to articles 130, 157 and 196 of the Constitution, which define a special regime of allocating responsibility in the criminal domain, embracing the President of the Republic, Deput ies and members of the Government, which is furthermore incompatible with the stipulations in article 27 of the Statute.

d) Notwithstanding the specification contained in the Statute which differentiates between "handing over" and "extradition", the handing over of persons to the Court may conflict with the constitutional prohibition of extraditing either nationals or any person whomsoever, for crimes connected to a sentence of lifelong imprisonment outside the observance of the requirements of article 33 no. 3 and no.5.

Nonetheless, it is deemed that the above -mentioned problems do not render the achievement of the objective Portugal is pursuing as unviable, namely the ratification of the ICC Statute.

In accordance with the Projects of Extraordinary Rev ision of the Constitution, the channel that will probably be chosen to resolve the above -mentioned problems shall be to amend the Constitution by adding an article whereby Portugal recognises the jurisdiction of the ICC.

Cumulatively, in the act of ratification, a statement may be made in which the inability of Portugal to receive persons sentenced by the ICC to imprisonment sanctions exceeding the maximum limit stipulated in Portuguese criminal law, is stated.

2. Implementation

With respect to the imple mentation of Statute's rules, some problems arise in the domain of substantive criminal law as well as at the level of the co -operation with the Court, and the execution of sentences.

a) Substantive Criminal Law

In the chapter designated as " Crimes against Humanity", the Portuguese Criminal Code defines the crime of genocide, namely in article 239, crimes of war against civilians, in article 241, the crime regarding the destruction of monuments, in article 242, and the crime of torture and cruel, degrading or inhuman treatments, in articles 243 and 244. It is anticipated that the Portuguese criminal law shall be modified so as to encompass all criminal conduct described in articles 6, 7 and 8 of the Statute in a clear and integral manner, by complying with t he principle of legality incorporated in article 29 of the Constitution and in article 1 of the Criminal Code.

It should be stressed that article 29, no. 2 of the Constitution provides for imputing the penal responsibility within the limits of domestic or der, of the conduct deemed as crime according to International Law.

A problem may be raised due to the non -applicability of any statute of limitations, given the fact that the Portuguese criminal system considers that criminal liability expires by the elapsing of the limitations period. This is foreseen namely in articles 118 and following, as well as in article 122 and following of the Criminal Code. The considerations of criminal policy, which justify the existence of a statute of limitations for common crimes, must be reflected upon in the light of the particular nature of international crimes.

b) Co-operation with the Court

The undertaking of the obligations to co -operate with the Court arising from the ratification of the Statute must be implemented through the approval of a law that clearly and unequivocally establishes these obligations.

However, it should be mentioned that Law No. 102/2001, of 25 August, which regulates the co-operation with the Special Criminal Courts for Ex -Yugoslavia and Rwanda, was recently approved, and no difficulties are foreseen in this area.

c) Execution of Sentences

With respect to this domain, the inability of Portugal to receive prisoners whom are serving sentences and whose maximum limit exceeds that established i n Portuguese criminal law is reiterated, namely prison sentences of a perpetual nature.

Annexes:
Articles of the Portuguese Constitution, which have been referred to in the present document.

APPENDIX

Constitution of the Republic

Article 7
(International relations)

1. As far as international relations are concerned, Portugal is governed by the principles of national independence, respect for the Human Rights, the Law of Nations, equality between States, peaceful resolution of international conflicts, no n-interference in the internal issues of other States and co -operation with all other nations for the emancipation and progress of humanity.

Article 8
(International law)

1. Rules and principles of general or common international law are an integral part of Portuguese law.

2. Rules established in international conventions regularly ratified or approved are directly in force at the internal level after their official publication and furthermore, as long as they are internationally binding on the Portuguese State .

3. Rules imposed by competent bodies of international organisations of which Portugal is a member-state, are directly in force at the internal level as long as they have been established in the respective constitutive treaties.

Article 130
(Criminal Responsibility)

1. The President may be brought before the *Supremo Tribunal de Justiça* (Supreme Court of Justice) for crimes practiced in the exercise of his duties.

2. The initiative of the process falls upon the Assembly of the Republic through a proposal carried out by one fifth and the deliberation thereof approved by a two -thirds majority of active Deputies.

3. Condemnation implies destitution from the post and the impossibility of re -election.

4. The President of the Republic shall be brought before the common co urts at the end of his mandate for crimes alien to the exercise of his duties.

Article 157
(Immunities)

1. Members of Parliament are not civil, criminal or disciplinarily liable for the votes and opinions expressed in the exercise of their functions.

2. Members of Parliament shall not be heard neither as declarants nor as accused without the permission of the Assembly. Furthermore, the authorisation is compulsory whenever there is strong evidence of the practice of an intentional crime punishable with sent ence of imprisonment, whose maximum limit exceeds three years.

3. No Members of Parliament shall be detained or arrested without the authorisation of the Assembly save for intentional crime punishable with sentence of imprisonment referred in the previous paragraphs and moreover, in *flagrante delicto.*

4. Once criminal proceedings are set in motion against any Member of Parliament and he has been definitively accused, the Assembly decides whether the Member of Parliament shall or shall not be suspended for the e ffect of pursuance of the proceeding. Furthermore, the decision regarding suspension is compulsory whenever the crime involved is one of those referred to in the previous paragraphs.

Article 196
(Rendering the criminal responsibility of members of the Government effective)

1. No member of the Government shall be detained or arrested without the authorisation of the Assembly of the Republic save for intentional crime punishable with sentence of imprisonment, whose maximum limit exceeds three years and regard s *flagrante delicto.*

2. Once criminal proceedings are set in motion against any Member of Government and he has been definitively accused, the Assembly decides whether the Member of Government shall or shall not be suspended for the effect of pursuance of the proceeding. Furthermore, the decision regarding suspension is compulsory whenever the crime involved is one of those referred to in the previous paragraphs.

2166

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 27 July 2001

Consult/ICC (2001) 24

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

LES IMPLICATIONS POUR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE DE LA RATIFICATION DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

PROGRESS REPORT BY SLOVENIA

Slovenia signed the Rome Statute on 7 October 1998. In March 1999 the Ministry of Foreign Affairs ordered a study on consequences of the Statute for the Slovenian legal system. The study, finished in September 1999, showed which legal changes were required, including the amendment to Article 47 of the Constitution (extradition). In the following months the Statute was translated into the Slovenian language. Before submitting the Statute to the Government, the Government Office for Legislation adopted a relevant opinion. This opinion was negative, stating that the Statute was contrary to Article 47 of the Slovenian Constitution. At the beginning of 2001, experts on criminal law established that the verified translation was not good. The Ministry of Foreign Affairs requested them to provide a new translation, which was finished in mid-July. The translation still needs to be verified. At the end of July, the Slovenian Government began the procedure of amending the Constitution. In addition to other amendments, an amendment to Article 47 was also proposed, which provides for the extradition of Slovenian citizens to international courts, such as the ICC.

2168

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 Orie
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.

2169

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

a) illegal foundation of the International Tribunal;
b) wrongful primacy of the International Tribunal over national courts;
c) lack of jurisdiction *ratione materiae.*

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

> "THE TRIAL CHAMBER [. . .]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." (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995 (Case No. IT-94-1-T), at 33 (hereinafter *Decision at Trial*).)

Appellant now alleges error of law on the part of the Trial Chamber.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.
From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

a) the jurisdiction of the Appeals Chamber to hear this appeal;
b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.

B. Jurisdiction Of The Appeals Chamber

4. Article 25 of the Statute of the International Tribunal (Statute of the International Tribunal (originally published as annex to *the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)* (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter *Statute of the International Tribunal*)) adopted by the United Nations Security Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

As the Prosecutor of the International Tribunal has acknowledged at the hearing of 7 and 8 September 1995, the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for "*Trials and Appeals*" (Art.15). The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence (Rules of Procedure and Evidence, 107-08 (adopted on 11 February 1994 pursuant to Article 15 of the Statute of the International Tribunal, as amended (IT/32/Rev. 5))

2-170

(hereinafter *Rules of Procedure*)).

5. However, Rule 73 had already provided for "*Preliminary Motions by Accused*", including five headings. The first one is: "objections based on lack of jurisdiction." Rule 72 (B) then provides:

> "The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." (Rules of Procedure, Rule 72 (B).)

This is easily understandable and the Prosecutor put it clearly in his argument:

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.
>
> So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.
>
> [. . .]
>
> So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

The question has, however, been put whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?

In his Brief in appeal, at page 2, the Prosecutor has argued in support of a negative answer, based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal. (Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 7 July 1995 (Case No. IT-94-1-T), at 4 (hereinafter *Prosecutor Trial Brief*).)

2171

6. This narrow interpretation of the concept of jurisdiction, which has been advocated by the Prosecutor and one *amicus curiae*, falls foul of a modern vision of the administration of justice. Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed - this is by no means conclusive, but interesting nevertheless: were not those questions to be dealt with *in limine litis*, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of Appellant's interlocutory appeal is indisputable.

C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It has also read the *amicus curiae* briefs submitted by *Juristes sans Frontières* and the Government of the United States of America, to whom it expresses its gratitude.

8. Appellant has submitted two successive Briefs in appeal. The second Brief was late but, in the absence of any objection by the Prosecutor, the Appeals Chamber granted the extension of time requested by Appellant under Rule 116.
The second Brief tends essentially to bolster the arguments developed by Appellant in his original Brief. They are offered under the following headings:

a) unlawful establishment of the International Tribunal;
b) unjustified primacy of the International Tribunal over competent domestic courts;
c) lack of subject-matter jurisdiction.

The Appeals Chamber proposes to examine each of the grounds of appeal in the order in which they are raised by Appellant.

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

9. The first ground of appeal attacks the validity of the establishment of the International Tribunal.

A. Meaning Of Jurisdiction

10. In discussing the Defence plea to the jurisdiction of the International Tribunal on grounds of invalidity of its establishment by the Security Council, the Trial Chamber declared:

> "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 the lawfulness of its creation [. . .]" (Decision at Trial, at para. 4.)

There is a *petitio principii* underlying this affirmation and it fails to explain the criteria by which it the

2172

Trial Chamber disqualifies the plea of invalidity of the establishment of the International Tribunal as a plea to jurisdiction. What is more important, that proposition implies a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae and materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word itself, *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.

This is the meaning which it carries in all legal systems. Thus, historically, in common law, the **Termes de la ley** provide the following definition:

> "jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

> "[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633).)

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal

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

> (1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case
> (2) the question whether the Security Council in establishing the International Tribunal complied with the United Nations Charter raises "political questions" which are "non-justiciable" (id. at 12-14).

The Trial Chamber approved this line of argument.

2173

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

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

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

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

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

15. To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (see United Nations Charter, Arts. 7(2) & 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal.

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

> "[T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgements cannot bind the General Assembly which established it.
>
> [. . .]
>
> The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was

2174

established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body." (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of 13 July) (hereinafter *Effect of Awards*).)

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

> "In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal." (Id. at 51-2, *quoting* Statute of the United Nations Administrative Tribunal, art. 2, para. 3.)

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

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

This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court - as of any other judicial body - is to ascertain its own competence." (Judge Cordova, dissenting opinion, advisory opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. Reports, 77, 163 (Advisory Opinion of 23 October)(Cordova, J., dissenting).)

19. It is true that this power can be limited by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.
As no such limitative text appears in the Statute of the International Tribunal, the International Tribunal can and indeed has to exercise its "*compétence de la compétence*" and examine the jurisdictional plea of the Defence, in order to ascertain its jurisdiction to hear the case on the merits.

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

> "[T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers,

2175

> involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council." (Decision at Trial, at para. 5; *see also* paras. 7, 8, 9, 17, 24, *passim.*)

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

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

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

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

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

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

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

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

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

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

2. Is The Question At Issue Political And As Such Non-Justiciable?

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

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

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

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

This dictum applies almost literally to the present case.

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

C. The Issue Of Constitutionality

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

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

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was

> never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

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

> 1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?
> 2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
> 3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

1. The Power Of The Security Council To Invoke Chapter VII

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

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, 26 June 1945, Art. 39.)

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

2178

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

> "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." (Id., Art. 24(2).)

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

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

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the **determination** that there exists one of the situations justifying the use of the "exceptional powers" of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes **recommendations (i.e.,** opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering measures to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.
The situations justifying resort to the powers provided for in Chapter VII are a "threat to the peace", a "breach of the peace" or an "act of aggression." While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

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

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

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

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

2-179

threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats [. . .] by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), at para. 5.4 (hereinafter *Defence Appeal Brief*).) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. The Range of Measures Envisaged Under Chapter VII

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

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

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

3. The Establishment Of The International Tribunal As A Measure Under Chapter VII

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

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

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well

2180

as before this Chamber on at least three grounds:

> a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;
>
> b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;
>
> c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

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

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

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

> ...[I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures." (Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 3.2.1 (hereinafter *Defence Trial Brief*).)

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

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

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

2181

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

2182

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

2183

> Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222 (hereinafter ECHR))

and in Article 8(1) of the American Convention on Human Rights, which provides: "

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." (American Convention on Human Rights, 22 November 1969, art. 8, para. 1, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (hereinafter ACHR).)"

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

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

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

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

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

It is clear that the legislative, executive and judicial division of powers which is largely followed in most

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

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

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

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

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

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

This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law" (Decision at Trial, at para. 34). Two similar proposals to this effect were made (one

2185

by the representative of Lebanon and one by the representative of Chile); if adopted, their effect would have been to prevent all *ad hoc* tribunals. In response, the delegate from the Philippines noted the disadvantages of using the language of "pre-established by law":

> "If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes." (*See* E/CN.4/SR 109. United Nations Economic and Social Council, Commission on Human Rights, 5th Sess., Sum. Rec. 8 June 1949, U.N. Doc. 6.)

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

This concern about *ad hoc* tribunals that function in such a way as not to afford the individual before hem basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights. (See General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988), Cariboni v. Uruguay H.R.Comm. 159/83. 39th Sess. Supp. No. 40 U.N. Doc. A/39/40.) A similar approach has been taken by the Inter-American Commission. (*See*, e.g., Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 March 1974, at 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinise closely "special" or "extraordinary" criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of Article 14.

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

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

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

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT

2186

DOMESTIC COURTS

49. The second ground of appeal attacks the primacy of the International Tribunal over national courts.

50. This primacy is established by Article 9 of the Statute of the International Tribunal, which provides:

"Concurrent jurisdiction

> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
>
> 2. *The International Tribunal shall have primacy over national courts.* At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." (Emphasis added.)

Appellant's submission is material to the issue, inasmuch as Appellant is expected to stand trial before this International Tribunal as a consequence of a request for deferral which the International Tribunal submitted to the Government of the Federal Republic of Germany on 8 November 1994 and which this Government, as it was bound to do, agreed to honour by surrendering Appellant to the International Tribunal. (United Nations Charter, art. 25, 48 & 49; Statute of the Tribunal, art. 29.2(e); Rules of Procedure, Rule 10.)

In relevant part, Appellant's motion alleges: " [The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected." ([Defence] Motion on the Jurisdiction of the Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 2.)

Appellant's Brief in support of the motion before the Trial Chamber went into further details which he set down under three headings:

(a) domestic jurisdiction;

(b) sovereignty of States;

(c) *jus de non evocando.*

The Prosecutor has contested each of the propositions put forward by Appellant. So have two of the *amicus curiae*, one before the Trial Chamber, the other in appeal.

The Trial Chamber has analysed Appellant's submissions and has concluded that they cannot be entertained.

51. Before this Chamber, Appellant has somewhat shifted the focus of his approach to the question of primacy. It seems fair to quote here Appellant's Brief in appeal:

> "The defence submits that the Trial Chamber should have denied it's [sic] competence to exercise primary jurisdiction while the accused was at trial in the Federal Republic of Germany and the German judicial authorities were adequately meeting their obligations under international law." (Defence Appeal Brief, at para. 7.5.)

2187

However, the three points raised in first instance were discussed at length by the Trial Chamber and, even though not specifically called in aid by Appellant here, are nevertheless intimately intermingled when the issue of primacy is considered. The Appeals Chamber therefore proposes to address those three points but not before having dealt with an apparent confusion which has found its way into Appellant's brief.

52. In paragraph 7.4 of his Brief, Appellant states that "the accused was diligently prosecuted by the German judicial authorities"(*id.*, at para 7.4 (Emphasis added)). In paragraph 7.5 Appellant returns to the period "while the accused was at trial." (*id.*, at para 7.5 (Emphasis added.)
These statements are not in agreement with the findings of the Trial Chamber I in its decision on deferral of 8 November 1994:

> "The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by the Counsel for Du{ko Tadic, that the said Du{ko Tadic is the subject of an *investigation* instituted by the national courts of the Federal Republic of Germany in respect of the matters listed in paragraph 2 hereof." (Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Du{ko Tadic, 8 November 1994 (Case No. IT-94-1-D), at 8 (Emphasis added).)

There is a distinct difference between an investigation and a trial. The argument of Appellant, based erroneously on the existence of an actual trial in Germany, cannot be heard in support of his challenge to jurisdiction when the matter has not yet passed the stage of investigation.

But there is more to it. Appellant insists repeatedly (*see* Defence Appeal Brief, at paras. 7.2 & 7.4) on impartial and independent proceedings diligently pursued and not designed to shield the accused from international criminal responsibility. One recognises at once that this vocabulary is borrowed from Article 10, paragraph 2, of the Statute. This provision has nothing to do with the present case. This is not an instance of an accused being tried anew by this International Tribunal, under the exceptional circumstances described in Article 10 of the Statute. Actually, the proceedings against Appellant were deferred to the International Tribunal on the strength of Article 9 of the Statute which provides that a request for deferral may be made "at any stage of the procedure" (Statute of the International Tribunal, art. 9, para. 2). The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany. Deferral of the proceedings against Appellant was requested in accordance with the procedure set down in Rule 9 (iii):

> "What is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal [. . .]" (Rules of Procedure, Rule 9 (iii).)

After the Trial Chamber had found that that condition was satisfied, the request for deferral followed automatically. The conditions alleged by Appellant in his Brief were irrelevant.

Once this approach is rectified, Appellant's contentions lose all merit.

53. As pointed out above, however, three specific arguments were advanced before the Trial Chamber, which are clearly referred to in Appellant's Brief in appeal. It would not be advisable to leave this ground of appeal based on primacy without giving those questions the consideration they deserve.

The Chamber now proposes to examine those three points in the order in which they have been raised by

Appellant.

A. Domestic Jurisdiction

54. Appellant argued in first instance that:

> "From the moment Bosnia-Herzegovina was recognised as an independent state, it had the competence to establish jurisdiction to try crimes that have been committed on its territory." (Defence Trial Brief, at para. 5.)

Appellant added that:

> "As a matter of fact the state of Bosnia-Herzegovina does exercise its jurisdiction, not only in matters of ordinary criminal law, but also in matters of alleged violations of crimes against humanity, as for example is the case with the prosecution of Mr Karadzic et al."(Id. at para. 5.2.)

This first point is not contested and the Prosecutor has conceded as much. But it does not, by itself, settle the question of the primacy of the International Tribunal. Appellant also seems so to realise. Appellant therefore explores the matter further and raises the question of State sovereignty.

B. Sovereignty Of States

55. Article 2 of the United Nations Charter provides in paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members."

In Appellant's view, no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest "justified by a treaty or customary international law or an *opinio juris* on the issue." (Defence Trial Brief, at para. 6.2.)

Based on this proposition, Appellant argues that the same requirements should underpin the establishment of an international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the principle of State sovereignty would have been violated. The Trial Chamber has rejected this plea, holding among other reasons:

> "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 the State." (Decision at Trial, para. 41.)

The Trial Chamber relied on the judgement of the District Court of Jerusalem in *Israel v. Eichmann:*

> "The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State." (36 **International Law Reports** 5, 62 (1961), affirmed by Supreme Court of Israel, 36 **International Law Reports** 277 (1962).)

Consistently with a long line of cases, a similar principle was upheld more recently in the United States of America in the matter of *United States v. Noriega:*

> "As a general principle of international law, individuals have no standing to challenge violations

> of international treaties in the absence of a protest by the sovereign involved." (746 F. Supp. 1506, 1533 (S.D. Fla. 1990).)

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.

56. That Appellant be recognised the right to plead State sovereignty does not mean, of course, that his plea must be favourably received. He has to discharge successfully the test of the burden of demonstration. Appellant's plea faces several obstacles, each of which may be fatal, as the Trial Chamber has actually determined.

Appellant can call in aid Article 2, paragraph 7, of the United Nations Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State [. . .]." However, one should not forget the commanding restriction at the end of the same paragraph: "but this principle shall not prejudice the application of enforcement measures under Chapter VII." (United Nations Charter, art. 2, para. 7.)

Those are precisely the provisions under which the International Tribunal has been established. Even without these provisions, matters can be taken out of the jurisdiction of a State. In the present case, the Republic of Bosnia and Herzegovina not only has not contested the jurisdiction of the International Tribunal but has actually approved, and collaborated with, the International Tribunal, as witnessed by:

> a) Letter dated 10 August 1992 from the President of the Republic of Bosnia and Herzegovina addressed to the Secretary-General of the United Nations (U.N. Doc. E/CN.4/1992/S-1/5 (1992));
>
> b) Decree with Force of Law on Deferral upon Request by the International Tribunal 12 Official Gazette of the Republic of Bosnia and Herzegovina 317 (10 April 1995) (translation);
>
> c) Letter from Vasvija Vidovic, Liaison Officer of the Republic of Bosnia and Herzegovina, to the International Tribunal (4 July 1995).

As to the Federal Republic of Germany, its cooperation with the International Tribunal is public and has been previously noted.

The Trial Chamber was therefore fully justified to write, on this particular issue:

> "[I]t 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

2190

> the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction." (Decision at Trial, at para. 41.)

57. This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind.

As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held:

> "These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one.
>
> [. . .]
>
> The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be.
>
> [. . .]
>
> Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lèse-humanité (reati di lesa umanità)* and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed (articles 537 and 604 of the penal code)." (13 March 1950, in **Rivista Penale** 753, 757 (Sup. Mil. Trib., Italy 1950; unofficial translation).1

Twelve years later the Supreme Court of Israel in the *Eichmann* case could draw a similar picture:

> "[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. [. . .]
>
> Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations.
>
> [. . .]

2191

> [T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing."(Israel v. Eichmann, 36 **International Law Reports** 277, 291-93 (Isr. S. Ct. 1962).)

58. The public revulsion against similar offences in the 1990s brought about a reaction on the part of the community of nations: hence, among other remedies, the establishment of an international judicial body by an organ of an organization representing the community of nations: the Security Council. This organ is empowered and mandated, by definition, to deal with trans-boundary matters or matters which, though domestic in nature, may affect "international peace and security" (United Nations Charter, art 2. (1), 2.(7), 24, & 37). It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. In the Barbie case, the Court of Cassation of France has quoted with approval the following statement of the Court of Appeal:

> "[. . .]by reason of their nature, the crimes against humanity [. . .] do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign. *(Fédération Nationale de Déportés et Internés Résistants et Patriotes And Others v. Barbie,* 78 *International Law Reports* 125, 130 (Cass. crim.1983).)2

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

59. The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal.

The Trial Chamber was fully justified in writing:

> "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 recognised 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."(Decision at Trial, at para. 42.)

60. The plea of State sovereignty must therefore be dismissed.

2192

C. *Jus De Non Evocando*

61. Appellant argues that he has a right to be tried by his national courts under his national laws.

No one has questioned that right of Appellant. The problem is elsewhere: is that right exclusive? Does it prevent Appellant from being tried - and having an equally fair trial (see Statute of the International Tribunal, art. 21) - before an international tribunal?

Appellant contends that such an exclusive right has received universal acceptance: yet one cannot find it expressed either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions.

In support of this stand, Appellant has quoted seven national Constitutions (Article 17 of the Constitution of the Netherlands, Article 101 of the Constitution of Germany (unified), Article 13 of the Constitution of Belgium, Article 25 of the Constitution of Italy, Article 24 of the Constitution of Spain, Article 10 of the Constitution of Surinam and Article 30 of the Constitution of Venezuela). However, on examination, these provisions do not support Appellant's argument. For instance, the Constitution of Belgium (being the first in time) provides:

> "**Art. 13**: No person may be withdrawn from the judge assigned to him by the law, save with his consent." (Blaustein & Flanz, Constitutions of the Countries of the World, (1991).)

The other constitutional provisions cited are either similar in substance, requiring only that no person be removed from his or her "natural judge" established by law, or are irrelevant to Appellant's argument.

62. As a matter of fact - and of law - the principle advocated by Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial.

This principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations. No rights of accused are thereby infringed or threatened; quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal. No accused can complain. True, he will be removed from his "natural" national forum; but he will be brought before a tribunal at least equally fair, more distanced from the facts of the case and taking a broader view of the matter.

Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.

63. The objection founded on the theory of jus de non evocando was considered by the Trial Chamber which disposed of it in the following terms:

> "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." (Decision at Trial, at para. 37.)

No new objections were raised before the Appeals Chamber, which is satisfied with concurring, on this particular point, with the views expressed by the Trial Chamber.

64. For these reasons the Appeals Chamber concludes that Appellant's second ground of appeal, contesting the primacy of the International Tribunal, is ill-founded and must be dismissed.

IV. LACK OF SUBJECT-MATTER JURISDICTION

65. Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal an additional alternative claim is asserted to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed.

Before the Trial Chamber, the Prosecutor responded with alternative arguments that: (a) the conflicts in the former Yugoslavia should be characterized as an international armed conflict; and (b) even if the conflicts were characterized as internal, the International Tribunal has jurisdiction under Articles 3 and 5 to adjudicate the crimes alleged. On appeal, the Prosecutor maintains that, upon adoption of the Statute, the Security Council determined that the conflicts in the former Yugoslavia were international and that, by dint of that determination, the International Tribunal has jurisdiction over this case.

The Trial Chamber denied Appellant's motion, concluding that the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts. The Trial Chamber concluded therefore that it had jurisdiction, regardless of the nature of the conflict, and that it need not determine whether the conflict is internal or international.

A. Preliminary Issue: The Existence Of An Armed Conflict

66. Appellant now asserts the new position that there did not exist a legally cognizable armed conflict - either internal or international - at the time and place that the alleged offences were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of

2194

fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter *Geneva Convention I*); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter *Geneva Convention III*); *see also* Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter *Geneva Convention IV*).)

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

> "[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations." (Geneva Convention IV, art. 6, para. 2 (Emphasis added).)

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter *Protocol I*).) In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, art. 4, para.1, 1125 U.N.T.S. 609 (hereinafter Protocol II). Article 2, paragraph 1, provides:

> "[t]his Protocol shall be applied [. . .] to all persons *affected* by an armed conflict as defined in Article 1."(Id. at art. 2, para. 1 (Emphasis added).)

The same provision specifies in paragraph 2 that:

"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(*Id.* at art. 2, para. 2.)

2195

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opstina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs (Appeal Transcript; 8 September 1995, at 36-7). In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

B. Does The Statute Refer Only To International Armed Conflicts?

1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument *a contrario* based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and

2196

purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). It is notable that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects. (*See* Transcript of the Hearing on the Motion on Jurisdiction, 26 July 1995, at 47, 111.)

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (See Memorandum of Understanding, 27 November 1991.) Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Mr. Miljenko Brkic (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter **Agreement No. 1**).) Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at

whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were **internal**, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. ("No special agreement shall adversely affect the situation of [the protected persons] as defined by the present Convention, nor restrict the rights which it confers upon them." (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.

74. The Security Council's many statements leading up to the establishment of the International Tribunal reflect an awareness of the mixed character of the conflicts. On the one hand, prior to creating the International Tribunal, the Security Council adopted several resolutions condemning the presence of JNA forces in Bosnia-Herzegovina and Croatia as a violation of the sovereignty of these latter States. See, e.g., S.C. Res. 752 (15 May 1992); S.C.Res. 757 (30 May 1992); S.C. Res. 779 (6 Oct. 1992); S.C. Res. 787 (16 Nov. 1992). On the other hand, in none of these many resolutions did the Security Council explicitly state that the conflicts were international.

In each of its successive resolutions, the Security Council focused on the practices with which it was concerned, without reference to the nature of the conflict. For example, in resolution 771 of 13 August 1992, the Security Council expressed "grave alarm" at the

> "[c]ontinuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." (S.C. Res. 771 (13 August 1992).)

As with every other Security Council statement on the subject, this resolution makes no mention of the nature of the armed conflict at issue. The Security Council was clearly preoccupied with bringing to justice those responsible for these specifically condemned acts, regardless of context. The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well.

2198

75. The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was

> "clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General, at para. 62, U.N. Doc. S/25704 (3 May 1993) (hereinafter *Report of the Secretary-General*).)

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. (See statements by representatives of France, the United States, and the United Kingdom, Provisional Verbatim Record of the 3217th Meeting, at 11, 15, & 19, U.N. Doc. S/PV.3217 (25 May 1993).) As an example of such supplementary agreements, the United States cited the rules on internal armed conflict contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." (*Id.* at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute."(*id.*)).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in

either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

78. With the exception of Article 5 dealing with crimes against humanity, none of the statutory provisions makes explicit reference to the type of conflict as an element of the crime; and, as will be shown below, the reference in Article 5 is made to distinguish the nexus required by the Statute from the nexus required by Article 6 of the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg. Since customary international law no longer requires any nexus between crimes against humanity and armed conflict (*see below*, paras. 140 and 141), Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal. As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. Appellant maintains that these Articles apply only to international armed conflicts. However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.

Thus, the Security Council's object in enacting the Statute - to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects - suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.

In light of this understanding of the Security Council's purpose in creating the International Tribunal, we turn below to discussion of Appellant's specific arguments regarding the scope of the jurisdiction of the International Tribunal under Articles 2, 3 and 5 of the Statute.

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:

> "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
>
> (b) torture or inhuman treatment, including biological experiments;

2200

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

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

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

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

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

(h) taking civilians as hostages."

By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (see, e.g.,[*Amicus Curiae*] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, *U.S. Amicus Curiae Brief*), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. Appellant argues that, as the grave breaches enforcement system only applies to international armed conflicts, reference in Article 2 of the Statute to the grave breaches provisions of the Geneva Conventions limits the International Tribunal's jurisdiction under that Article to acts committed in the context of an international armed conflict. The Trial Chamber has held that Article 2:

"[H]as 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'."

[. . .]

[T]he 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.

[. . .]

[T]here 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 [sic] 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." (Decision at Trial, at paras. 49-51.)

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal.

2201

The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.

82. The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the "grave breaches" system of the Geneva Conventions, reference is made to "international armed conflicts" (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the *amicus curiae* brief submitted by the Government of the United States, where it is contended that:

> "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its

2202

significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (*see above,* para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (see id. at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

84. Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.

85. Before the Trial Chamber, the Prosecutor asserted an alternative argument whereby the provisions on grave breaches of the Geneva Conventions could be applied to internal conflicts on the strength of some agreements entered into by the conflicting parties. For the reasons stated below, in Section IV C (para. 144), we find it unnecessary to resolve this issue at this time.

(b) Article 3

86. Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

> "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

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

(e) plunder of public or private property."

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is *in casu* an internal armed conflict; therefore, to the extent that the jurisdiction of the International Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). However, as the Report indicates, the Hague Convention, considered *qua* customary law, constitutes an important area of humanitarian international law. (*Id.*) In other words, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" and that the so-called "Hague Regulations" constitute an important segment of such law. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (Id., at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (*id.*, at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover **all violations** of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

2204

88. That Article 3 does not confine itself to covering violations of Hague law, but is intended also to refer to all violations of international humanitarian law (subject to the limitations just stated), is borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal. As mentioned above, three Member States of the Council, namely France, the United States and the United Kingdom, expressly stated that Article 3 of the Statute also covers obligations stemming from agreements in force between the conflicting parties, that is Article 3 common to the Geneva Conventions and the two Additional Protocols, as well as other agreements entered into by the conflicting parties. The French delegate stated that:

> "[T]he expression 'laws or customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed." (Provisional Verbatim Record of the 3217th Meeting, at 11, U.N. Doc. S/PV.3217 (25 May 1993).)

The American delegate stated the following:

> "[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute:
>
> Firstly, it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions." (Id., at p. 15.)

The British delegate stated:

> "[I]t would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions." (*Id.*, at p. 19.)

It should be added that the representative of Hungary stressed:

> "the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia." (*Id.*, at p. 20.)

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law (on this point *see below,* para. 143).

90. The Appeals Chamber would like to add that, in interpreting the meaning and purport of the expressions "violations of the laws or customs of war" or "violations of international humanitarian law",

one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasises the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to "**serious violations**" of international humanitarian law" (*See* Statute of the International Tribunal, Preamble, arts. 1, 9(1), 10(1)-(2), 23(1), 29(1) (Emphasis added.)). It is therefore appropriate to take the expression "violations of the laws or customs of war" to cover serious violations of international humanitarian law.

91. Article 3 thus confers on the International Tribunal jurisdiction over **any** serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

93. The above interpretation is further confirmed if Article 3 is viewed in its more general perspective, that is to say, is appraised in its historical context. As the International Court of Justice stated in the *Nicaragua* case, Article 1 of the four Geneva Conventions, whereby the contracting parties "undertake to respect and ensure respect" for the Conventions "in all circumstances", has become a "general principle [. . .] of humanitarian law to which the Conventions merely give specific expression." (Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. Reports 14, at para. 220 (27 June) (hereinafter *Nicaragua Case*). This general principle lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations. It was with this obligation in mind that, in 1977, the States drafting the two Additional Protocols to the Geneva Conventions agreed upon Article 89 of Protocol I, whereby:

> "In situations of **serious violations** of the Conventions or of this Protocol, the High Contracting Parties **undertake to act, jointly or individually, in co-operation with the United Nations** and in conformity with the United Nations Charter." (Protocol I, at art. 89 (Emphasis added).)

Article 3 is intended to realise that undertaking by endowing the International Tribunal with the power to prosecute all "serious violations" of international humanitarian law.

(ii) The Conditions That Must Be Fulfilled For A Violation Of International Humanitarian Law To Be Subject To Article 3

94. The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions

2206

must be met (see below, para. 143);

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) **Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts**

a. **General**

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed

violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. **Principal Rules**

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard

the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

> "The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question [. . .] I am not in a position to make any statement on the subject. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

> "[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:
>
> (1) The intentional bombing of civilian populations is illegal;
> (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
> (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." **(League of Nations, O.J. Spec. Supp. 183**, at 135-36 (1938).)

2209

102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. In 1947, instructions were issued to the Chinese "peoples' liberation army" by Mao Tse-Tung who instructed them not to "kill or humiliate any of Chiang Kai-Shek's army officers and men who lay down their arms." (*Manifesto of the Chinese People's Liberation Army,* in Mao Tse-Tung, 4 Selected Works (1961) 147, at 151.) He also instructed the insurgents, among other things, not to "ill-treat captives", "damage crops" or "take liberties with women." (*On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention - Instruction of the General Headquarters of the Chinese People's Liberation Army,* in *id.*, 155.)

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law.

105. As a notable example, we cite the conduct of the Democratic Republic of the Congo in its civil war. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment regarding the conduct of hostilities:

> "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.
>
> In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [sic]. It also expects the rebels - and makes an urgent appeal to them to that effect - to act in the same manner.
>
> As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in **American Journal of International Law** (1965) 614, at 616.)

2210

This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (See A.H.M. Kirk-Greene, **1 Crisis and Conflict in Nigeria, A Documentary Sourcebook 1966-1969**, 455-57 (1971).) This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (see New Nigerian, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (See Daily Times - Nigeria, 3 September 1968, at 1; Daily Times, - Nigeria, 4 September 1968, at 1.)

This attitude of the Nigerian authorities confirms the trend initiated with the Spanish Civil War and referred to above (see paras. 101-102), whereby the central authorities of a State where civil strife has broken out prefer to withhold recognition of belligerency but, at the same time, extend to the conflict the bulk of the body of legal rules concerning conflicts between States.

107. A more recent instance of this tendency can be found in the stand taken in 1988 by the rebels (the FMLN) in El Salvador, when it became clear that the Government was not ready to apply the Additional Protocol II it had previously ratified. The FMLN undertook to respect both common Article 3 and Protocol II:

> "The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II, take into consideration the needs of the majority of the population, and defend their fundamental freedoms." (FMLN, *La legitimidad de nuestros metodos de lucha,* Secretaria de promocion y proteccion de lo Derechos Humanos del FMLN, El Salvador, 10 Octobre 1988, at 89; unofficial translation.)3

108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable

2211

contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously4 adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

> "the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was "declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (See 67 **American Journal of International Law** (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously5 adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).)The resolution stated the following:

> "Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:
>
> 1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

2212

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.

4. Civilian populations as such should not be the object of military operations.

5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.

6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application." (G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

"In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6 European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council in its resolution 788 (in operative paragraph 5 it called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law") (S.C. Res. 788 (19 November 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 January 1995)) and in resolution 1001 (S.C. Res. 1001 (30 June 1995)).

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also

made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, "the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population") (S.C. Res. 794 (3 December 1992)) and resolution 814 (S.C. Res. 814 (26 March 1993)). As for Georgia, see Resolution 993, (in which the Security Council reaffirmed "the need for the parties to comply with international humanitarian law") (S.C. Res. 993 (12 May 1993)).

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. On 17 January 1995 the Presidency of the European Union issued a declaration stating:

> "The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and international humanitarian law are continuing. The European Union strongly deplores the large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

The appeal was reiterated on 23 January 1995, when the European Union made the following declaration:

> "It deplores the serious violations of human rights and international humanitarian law which are still occurring [in Chechnya]. It calls for an immediate cessation of the fighting and for the opening of negotiations to allow a political solution to the conflict to be found. It demands that freedom of access to Chechnya and the proper convoying of humanitarian aid to the population be guaranteed." (Council of the European Union-General Secretariat, Press Release 4385/95 (Presse 24), at 1 (23 January 1995).)

116. It must be stressed that, in the statements and resolutions referred to above, the European Union and the United Nations Security Council did not mention common Article 3 of the Geneva Conventions, but adverted to "international humanitarian law", thus clearly articulating the view that there exists a **corpus** of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope.

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

This proposition is confirmed by the views expressed by a number of States. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). After having been repeatedly invited by the General Assembly to comply with humanitarian law in the civil war raging on its territory (*see*, e.g., G.A. Res. 41/157 (1986)), the Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war (although an objective evaluation prompted some Governments to conclude that all the conditions for such applications were met, (see, e.g., 43 **Annuaire Suisse de Droit International**, (1987) at 185-87). Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place"(6) (*See Informe de la Fuerza Armata de El Salvador sobre el*

2214

respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987, at 3 (31 August 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987),; (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

> "[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (Humanitarian Law Conference, Remarks of Michael J. Matheson, (2) **American University Journal of International Law and Policy** (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

> Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992, DSK AV207320065, at para. 211 in fine; unofficial translation.)(7)

119. So far we have pointed to the formation of general rules or principles designed to protect **civilians or civilian objects** from the hostilities or, more generally, to protect **those who do not (or no longer) take active part in hostilities**. We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards **means and methods of warfare**. As the Appeals Chamber has pointed out above (see para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w] eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." (*Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).) It should be noted that this Declaration, emanating from a group of distinguished experts in human rights and humanitarian law, has been indirectly endorsed by the Conference on Security and Cooperation in Europe in its Budapest Document of 1994 (Conference on Security and Cooperation in Europe, Budapest Document 1994: Towards Genuine Partnership in a New Era, para. 34 (1994)) and in 1995 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (*Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, U.N. Doc. E/CN.4/1995/L.33 (1995)).

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States

2215

have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

> "The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

This statement was reiterated by the Greek representative, on behalf of the Twelve, on many occasions. (See U.N. GAOR, 1st Comm., 43rd Sess., 4th Mtg., at 47, U.N. Doc. A/C.1/43/PV.4 (1988)(statement of 18 October 1988 in the First Committee of the General Assembly); U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtg., at 23, U.N. Doc. A/C.1/43/PV.31 (statement of 9 November 1988 in meeting of First Committee of the General Assembly to the effect inter alia that "The Twelve [. . .] call for respect for the Geneva Protocol of 1925 and other relevant rules of customary international law"); U.N. GAOR, 1st Comm., 43rd Sess., 49th Mtg., at 16, U.N. Doc. A/C.3/43/SR.49 (summary of statement of 22 November 1988 in Third Committee of the General Assembly); *see also Report on European Union [EPC Aspects*], 4 European Political Cooperation Documentation Bulletin (1988), 325, at 330; *Question No 362/88 by Mr. Arbeloa Muru (S-E) Concerning the Poisoning of Opposition Members in Iraq*, 4 European Political Cooperation Documentation Bulletin (1988), 187 (statement of the Presidency in response to a question of a member of the European Parliament).)

121. A firm position to the same effect was taken by the British authorities: in 1988 the Foreign Office stated that the Iraqi use of chemical weapons against the civilian population of the town of Halabja represented "a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The U.K. condemns unreservedly this and all other uses of chemical weapons." (59 **British Yearbook of International Law** (1988) at 579; *see also* id. at 579-80.) A similar stand was taken by the German authorities. On 27 October 1988 the German Parliament passed a resolution whereby it "resolutely rejected the view that the use of poison gas was allowed on one's own territory and in clashes akin to civil wars, assertedly because it was not expressly prohibited by the Geneva Protocol of 1925"(8) . (50 **Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht** (1990), at 382-83; unofficial translation.) Subsequently the German representative in the General Assembly expressed Germany's alarm "about reports of the use of chemical weapons against the Kurdish population" and referred to "breaches of the Geneva Protocol of 1925 and other norms of international law." (U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtng., at 16, U.N. Doc. A/C.1/43/PV.31 (1988).)

122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

> Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements." (United States, Department of State, Press Guidance (9 September 1988).)

On 13 September 1988, Secretary of State George Schultz, in a hearing before the United States Senate Judiciary Committee strongly condemned as "completely unacceptable" the use of chemical weapons by Iraq. (*Hearing on Refugee Consultation with Witness Secretary of State George Shultz,* 100th Cong., 2d Sess., (13 September 1988) (Statement of Secretary of State Shultz).) On 13 October of the same year,

2216

Ambassador R.W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Sub-Committee on Europe and the Middle East of the House of Representatives Foreign Affairs Committee did the same, branding that use as "illegal." (See **Department of State Bulletin** (December 1988) 41, at 43-4.)

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas charges." (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. In the aforementioned statement, Ambassador Murphy said:

> "On September 17, Iraq reaffirmed its adherence to international law, including the 1925 Geneva Protocol on chemical weapons as well as other international humanitarian law. We welcomed this statement as a positive step and asked for confirmation that Iraq means by this to renounce the use of chemical weapons inside Iraq as well as against foreign enemies. On October 3, the Iraqi Foreign Minister confirmed this directly to Secretary Schultz." (*Id.* at 44.)

This information had already been provided on 20 September 1988 in a press conference by the State Department spokesman Mr Redman. (See State Department Daily Briefing, 20 September 1988, Transcript ID: 390807, p. 8.) It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons; rather, those countries accused the United States of "conducting a smear media campaign against Iraq." (See New York Times, 15 September 1988, at A 13; Washington Post, 20 September 1988, at A 21.)

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals - a matter on which this Chamber obviously cannot and does not express any opinion - there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.

125. State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations. (*See* Pius Nwaoga v. The State, 52 **International Law Reports**, 494, at 496-97 (Nig. S. Ct. 1972).)

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. (On these and other limitations of international humanitarian law governing civil strife, see the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 **Annuaire Suisse de Droit International** (1982) 137 at 145-49.))

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to

2217

govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

(iv) **Individual Criminal Responsibility In Internal Armed Conflict**

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (See The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 445, 467 (1950).) The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals (id., at 445-47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*id.*, at 447.)

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. As mentioned above, during the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law (see paras. 106 and 125).

131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (**Humanitäres Völkerrecht in bewaffneten Konflikten** - Handbuch, August 1992, DSK AV2073200065, at para. 1209)(unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3, such as "wilful killing, mutilation, torture or inhumane treatment including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages", as well as "the fact of impeding a fair and regular trial"(9) . (Interestingly, a previous edition of the German Military Manual did not contain any such provision. See Kriegsvölkerrecht - Allgemeine Bestimmungen des Kriegführungsrechts und Landkriegsrecht, ZDv 15-10, March 1961, para. 12; Kriegsvölkerrecht - Allgemeine Bestimmungen des Humanitätsrechts, ZDv 15/5, August 1959, paras. 15-16, 30-2).

22-18

Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, Interim Law of Armed Conflict Manual, para. 1807, 8). The relevant provisions of the manual of the United States (Department of the Army, The Law of Land Warfare, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", **i.e.,** "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (War Office, The Law of War on Land, Being Part III of the Manual of Military Law (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (***infractions graves***) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (***[c]onstituent des crimes de droit international***) within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions,* Moniteur Belge, (5 August 1993).)

133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the

2219

notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (*see* para. 132) such violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that:

> "Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence **and to punish those responsible in accordance with the law in force.**" (Agreement No. 1, art. 5, para. 2 (Emphasis added).)

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that

> "All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released." (Agreement No. 2, 1 October 1992, art. 3, para. 1.)

This provision, which is supplemented by Article 4, paragraphs 1 and 2 of the Agreement, implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.

(v) **Conclusion**

137. In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied.

(c) Article 5

138. Article 5 of the Statute confers jurisdiction over crimes against humanity. More specifically, the Article provides:

> "The International Tribunal shall have the power to prosecute persons responsible for the

2220

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."

As noted by the Secretary-General in his Report on the Statute, crimes against humanity were first recognized in the trials of war criminals following World War II. (Report of the Secretary-General, at para. 47.) The offence was defined in Article 6, paragraph 2(c) of the Nuremberg Charter and subsequently affirmed in the 1948 General Assembly Resolution affirming the Nuremberg principles.

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it to those acts committed "in the execution of or in connection with any crime against peace or any war crime." He argued that this limitation persists in contemporary international law and constitutes a requirement that crimes against humanity be committed in the context of an international armed conflict (which assertedly was missing in the instant case). According to Counsel for Defence, jurisdiction under Article 5 over crimes against humanity "committed in armed conflict, whether international or internal in character" constitutes an ex post facto law violating the principle of *nullum crimen sine lege.* Although before the Appeals Chamber the Appellant has forgone this argument (*see* Appeal Transcript, 8 September 1995, at 45), in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5.

140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945. (Control Council Law No. 10, Control Council for Germany, Official Gazette, 31 January 1946, at p. 50.). The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict. (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 1, 78 U.N.T.S. 277, Article 1 (providing that genocide, "whether committed in time of peace or in time of war, is a crime under international

2221

law"); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, arts. 1-2Article . I(1)).

141. It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege.*

142. We conclude, therefore, that Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts. In addition, for the reasons stated above, in Section IV A, (paras. 66-70), we conclude that in this case there was an armed conflict. Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).).

144. We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute. As the defendant in this case has not been charged with any violations of any specific agreement, we find it unnecessary to determine whether any specific agreement gives the International Tribunal jurisdiction over the alleged crimes.

145. For the reasons stated above, the third ground of appeal, based on lack of subject-matter jurisdiction, must be dismissed.

V. DISPOSITION

146. For the reasons hereinabove expressed
and
Acting under Article 25 of the Statute and Rules 72, 116 bis and 117 of the Rules of Procedure and Evidence,

2222

The Appeals Chamber

(1) By 4 votes to 1,

Decides that the International Tribunal is empowered to pronounce upon the plea challenging the legality of the establishment of the International Tribunal.

IN FAVOUR: *President* Cassese, *Judges* Deschênes, Abi-Saab and Sidhwa

AGAINST: *Judge* Li

(2) Unanimously

Decides that the aforementioned plea is dismissed.

(3) Unanimously

Decides that the challenge to the primacy of the International Tribunal over national courts is dismissed.

(4) By 4 votes to 1

Decides that the International Tribunal has subject-matter jurisdiction over the current case.

IN FAVOUR: *President* Cassese, *Judges* Li, Deschênes, Abi-Saab

AGAINST: *Judge* Sidhwa

ACCORDINGLY, THE DECISION OF THE TRIAL CHAMBER OF 10 AUGUST 1995 STANDS REVISED, THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL IS AFFIRMED AND THE APPEAL IS DISMISSED.

Done in English, this text being authoritative.*

(Signed) Antonio Cassese,
President

Judges Li, Abi-Saab and Sidhwa append separate opinions to the Decision of the Appeals Chamber

Judge Deschênes appends a Declaration.

(Initialled) A. C.

Dated this second day of October 1995
The Hague

2223

The Netherlands

[Seal of the Tribunal]

* French translation to follow

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1 "Trattasi di norme [concernenti i reati contro le leggi e gli usi della guerra] che, per il loro contenuto altamente etico e umanitario, hanno carattere non territoriale, ma universale... Dalla solidarietà delle varie nazioni, intesa a lenire nel miglior modo possibile gli orrori della guerra, scaturisce la necessità di dettare disposizioni che non conoscano barriere, colpendo chi delinque, dovunque esso si trovi....
..[I] reati contro le leggi e gli usi della guerra non possono essere considerati delitti politici, poichè non offendono un interesse politico di uno Stato determinato ovvero un diritto politico di un suo cittadino. Essi invece sono reati di lesa umanità, e, come si è precedentemente dimostrato, le norme relative hanno carattere universale, e non semplicemente territoriale. Tali reati sono, di conseguenza, per il loro oggetto giuridico e per la loro particolare natura, proprio di specie opposta e diversa da quella dei delitti politici. Questi, di norma, interessano solo lo Stato a danno del quale sono stati commessi, quelli invece interessano tutti gli Stati civili, e vanno combattuti e repressi, come sono combattuti e repressi il reato di pirateria, la tratta delle donne e dei minori, la riduzione in schiavitù, dovunque siano stati commessi." (art. 537 e 604 c. p.).
Back

2 ."..[E]n raison de leur nature, les crimes contre l'humanité (...) ne relèvent pas seulement du droit interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères." (6 octobre 1983, 88 Revue Générale de Droit international public, 1984, p. 509.)

3 "El FMLN procura que sus métodos de lucha cumplan con lo estipulado per el art'culo 3 comun a los Convenios de Ginebra y su Protocolo II Adicional, tomen en consideración las necesidades de la mayor'a de la población y estén orientados a defender sus libertades fundamentales."

4 The recorded vote on the resolution was 111 in favour and 0 against. After the vote was taken, however, Gabon represented that it had intended to vote against the resolution. (U.N. GAOR, 23rd Sess., 1748th Mtg., at 7, 12, U.N.Doc. A/PV.1748 (1968)).

5 The recorded vote on the resolution was 109 in favour and 0 against, with 8 members abstaining. (U.N. GAOR, 1922nd Mtg., at 12, U.N.Doc. A/PV.1922 (1970).)

6 "Dentro de esta l'nea de conducta, su mayor preocupación [de la Fuerza Armada] ha sido el mantenerse apegada estrictamente al cumplimiento de las disposiciones contenidas en los Convenios de Ginebra y en El Protocolo II de dichos Convenios, ya que a&uacuten no siendo el mismo aplicable a la situación que confronta actualmente el país, el Gobierno de El Salvador acata y cumple las disposiciones contenidas endicho instrumento, por considerar que ellas constituyen el desarrollo y la complementación del Art. 3, comœn a los Convenios de Ginebra del 12 de agosto de 1949, que a su vez representa la protección mínima que se debe al ser humano encualquier tiempo y lugar."
Back

7 "Ebenso wie ihre Verbündeten beachten Soldaten der Bundeswehr die Regeln des humanitären Völkerrechts bei militärischen Operationen in allen bewaffneten Konflikten, gleichgültig welcher Art."
Back

8 "Der Deutsche Bundestag befürchtet, dass Berichte zutreffend sein könnten, dass die irakischen Streitkräfte auf dem Territorium des Iraks nunmehr im Kampf mit kurdischen Aufständischen Giftgas eingesetzt haben. Er weist mit Entschiedenheit die Auffassung zurück, dass der Einsatz von Giftgas im Innern und bei bürgerkriegsähnlichen Auseinandersetzungen zulässig sei, weil er durch das Genfer Protokoll von 1925 nicht ausdrücklich verboten werde..."
Back

9 "1209. Schwere Verletzungen des humanitären Völkerrechts sind insbesondere; -Straftaten gegen geschützte Personen (Verwundete, Kranke, Sanitätspersonal, Militärgeistliche, Kriegsgefangene, Bewohner besetzter Gebiete, andere

2224

Zivilpersonen), wie vorsätzliche Tötung, Verstümmelung, Folterung oder unmenschliche Behandlung einschliesslich biologischer Versuche, vorsätzliche Verursachung grosser Leiden, schwere Beeinträchtingung der körperlichen Integrität oder Gesundheit, Geiselnahme (1 3, 49-51; 2 3, 50, 51; 3 3, 129, 130; 4 3, 146, 147; 5 11 Abs. 2, 85 Abs. 3 Buchst. a)
[. . .]
-Verhinderung eines unparteiischen ordentlichen Gerichtsverfahrens (1 3 Abs. 3 Buchst. d; 3 3 Abs. 1d; 5 85 Abs. 4 Buschst. e)."
Back

2225

WASHINGTON WORKING GROUP ON THE

INTERNATIONAL CRIMINAL COURT

Hyde Introduces Anti-ICC Amendment to Defense Appropriations (November 28, 2001)

Late in the evening on November 28, Rep. Henry Hyde (R-IL) slipped in a last-second amendment to the FY2002 Department of Defense Appropriations Act that would prohibit any cooperation with the International Criminal Court (ICC). Hyde made it clear that his amendment, which would prohibit any American cooperation with the International Criminal Court (ICC), was intended to serve as a marker for later inclusion of the Helms-DeLay American Servicemembers' Protection Act in the Defense Appropriations Act in the Senate or during the conference committee. The ASPA would bar U.S. cooperation with the ICC, prohibit military assistance to other countries that ratify the ICC Statute, restrict U.S. participation in peacekeeping, and conceivably authorize the use of force against the Netherlands to free individuals held before the ICC. This last provision has led European media and public to dub it "the Hague Invasion Act."

The Department of Defense Appropriations Act has not been marked up in committee in the Senate yet, but may be scheduled for next week.

Language of Hyde Amendment

DIVISION C--ADDITIONAL GENERAL PROVISIONS SEC. __. None of the funds made available in Division A of this Act may be used to provide support or other assistance to the International Criminal Court or to any criminal investigation or other prosecutorial activity of the International Criminal Court.

Congressional Record of Hyde Statement:

Mr. HYDE. Mr. Chairman, this amendment is intended to protect the men and women of our Armed Forces from the risk of criminal prosecution by the U.N. International Criminal Court. This is a new court. It has not yet come into existence, but it predictably will, because it is getting ratification from the 60 countries that is necessary, so we should face the fact that this is going to be a reality. Now, once this court is operating, it will claim jurisdiction to prosecute the men and women of our Armed Forces, as well as officials of our government, for alleged war crimes, crimes against humanity, et cetera, even though our country has not and will not ratify the treaty establishing the court. The court is a threat to the sovereignty of our Nation. Its claim of criminal jurisdiction over our citizens directly conflicts with the supremacy clause of our Constitution, and any Americans prosecuted by this court will be without the protections guaranteed them by our Bill of Rights, beginning with the right to trial

2226

by jury. For those of us who are committed to protecting our Constitution, and we have heard many such voices during our debate on the terrorism bill just a few weeks ago, the first place to begin is with the International Criminal Court. Terrorists, like the suicide bombers who attacked our Nation on September 11, will not be deterred by the threat that if caught and successfully prosecuted they may be sentenced to life imprisonment, because that is the highest penalty the international court can impose. But U.S. military personnel and their civilian and military commanders will have to worry a great deal about the threat of criminal prosecution by the court. As a result, if the court were in existence today, the U.S. military operations currently underway in Afghanistan would have to be reconfigured in order to avoid the risk of criminal prosecution by the court. It is imperative that we in Congress do everything within our power to ensure that our Nation's ability to respond to terrorists and others who threaten us is not circumscribed by the U.N. court operating in conflict with the Constitution. The purpose of my amendment prohibits the use of funds appropriated in this act to support or assist any activity of the International Criminal Court. I wish the Rules of the House permitted me to offer a broader amendment, because I think it is important to permanently prohibit any form of U.S. support to or cooperation with the International Criminal Court, not just support or cooperation by the Department of Defense, but any government agency in the United States. On September 25, the administration informed us it supports a revised version of the American Servicemembers' Protection Act that a number of us negotiated with the administration. That revised language was based on a bill, H.R. 1794, that was introduced on May 10 of this year by the gentleman from Texas (Mr. DELAY), the gentleman from Pennsylvania (Mr. MURTHA) and myself. The text of that bill was approved by the House as a floor amendment on May 10 by a vote of 282 to 137. I hope that in conference the agreed language that we have worked out with the administration can be submitted with the text of my amendment, because I believe that our agreed language will better protect military personnel from the threat of prosecution by the International Criminal Court. Mr. Chairman, the Constitution protects Americans. To put Americans outside the protection of the Constitution in a court that does not permit jury trials is an abandonment of one of the core indicia of citizenship. It is not a good idea, and I hope my amendment is adopted. Mr. Chairman, I yield back the balance of my time.

Mr. YOUNG of Florida. Mr. Chairman, I yield 1 minute to the gentleman from California (Mr. CUNNINGHAM

Mr. CUNNINGHAM. Mr. Chairman, I ask my colleagues to think seriously. Generally, we say, ``Let Hyde be your guide.'' The United Nations votes against the United States at least 90 percent of the time, even though we pay the lion's share of funding for the United Nations. On many of the key votes, we are vetoed out of the process. I do not think any of us wants our men and women that we ask to go in harm's way in our military, or our intelligence agencies and their members, to be tried in a kangaroo court without the proper jurisdiction. I rise in strong support of the Hyde amendment. I think it is a good amendment and it is good for our men and women both in the service and in our intelligence agencies.

Mr. YOUNG of Florida. Mr. Chairman, I yield myself the balance of my time. I simply rise to thank the gentleman from Illinois for offering this amendment. I think it is

2227

something that we should have considered, and we are considering. We are prepared to accept this amendment. Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Illinois (Mr. HYDE). The amendment was agreed to.

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