

101 NIGHTS

ON THE DISCOURSE OF SELF-LEGITIMIZATION:

THE CASE OF

DUŠKO TADIĆ.

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Abstract

This thesis addresses the legitimacy discourse of the ad-hoc International Criminal Tribunal for the Former Yugoslavia, by focusing on a particular case study: the Interlocutory Motion challenging the jurisdiction of the Tribunal in the Duško Tadić case. This, the first ever International Criminal Tribunal established by the United Nations Security Council, faced in the initial proceedings with the first indictee to be present in the Chambers a challenge as to the lawfulness of its own establishment, and therefore as to its legitimacy.

The lack of historical precedents for this novel jurisdiction, and the context of the more multicultural-driven international relations of the 1990s, that is, because of the collapse of the superpowers and the temporary suspension of the logic of a bipolar world, were all expected to validate a complex discourse of legitimacy, namely, through recourse to extra-legal references. In fact, the acceptance, and therefore the legitimacy, of the new jurisdiction depended on the recognition of a shared historical, cultural and political context, or, at least, of recognizable politico-cultural references beyond the legalistic self-contained judicial speech.

After extensively reviewing the initial materials of the challenge presented before the court, the thesis focuses its research on the Tribunal's Decisions, both at Trial and Appeal levels, identifying the attempts to break a self-referential legal discourse. The uncertainty of the historical moment, together with the hesitation on the use of politico-cultural references on the part of the Tribunal, sustains the conclusion of this thesis that no coherent legitimacy discourse is here attained.

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Abbreviations

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|------------------------|--|
| <i>Appeal Decision</i> | Decision of the Appeal Chamber of the ICTY regarding the <i>Motion</i> challenging the legitimacy of the Tribunal (formally challenging the jurisdiction). |
| <i>Appeal Motion</i> | Including, by the Defence of Duško Tadić: <ul style="list-style-type: none"> - the Notice of Appeal (filed: 14 August 1995); - the first Appeal Brief (filed: 25 August 1995); - The second Appeal Brief (filed: 6 September 1995, but dated 25 August 1995). |
| <i>Appeal Response</i> | The "Prosecution Response to the Defence Interlocutory Appeal Brief" (filed: 1 September 1995) |
| Brief | "Brief to support the motion on the jurisdiction of the tribunal" as filed by the Defence of Duško Tadić before the ICTY on the 23 June 1995. |
| Charter | Charter of the UN. |
| Chap. | Chapter (preceded by the origin. If no previous mention made, usually of the Charter of the UN Charter) |
| Decision(s) | Decision(s) by the Tribunal's Chambers (Trial and/or Appeal). |
| Defence | The Defence of Duško Tadić before the ICTY, i.e., legal team and its work. |
| GA / UNGA | General Assembly / UN General Assembly |
| Hearings | The hearings on 25 and 26 July 1995 of the " <i>Motion</i> on the jurisdiction of the tribunal", by the Defence of Duško Tadić. |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| IHL | International Humanitarian Law |

| | |
|------------------------|---|
| International Tribunal | Designation adopted by the ICTY (and the ICTR) when referring to themselves. |
| <i>Motion</i> | General reference to the positions of the Defence of Duško Tadić, regarding the challenge on legitimacy (at Trial and Appeal). |
| Res. | Resolution (preceded by the origin. If no previous mention made, usually from the UNSC – “UNSC Res.” – or just “Res.”) |
| <i>Response</i> | General reference to the positions presented by the Prosecution, regarding the Defence Motion challenging the Tribunal's jurisdiction (legitimacy), regardless if at Trial or Appeal level . |
| RPE | Rules of Procedure and Evidence of the ICTY. |
| SC /UNSC | Security Council/United Nations Security Council |
| SICTY | Statute of the ICTY |
| S / Stat. | Statute/Statute if and when followed by Tribunal (e.g. SICTY) |
| <i>Tadić case</i> | Proceedings of the Duško Tadić Defence “ <i>Motion</i> on the jurisdiction of the tribunal” (ICTY), from the filing of the <i>Motion</i> (23 June 1995), to the Appeal's Decision (2 October 1995). |
| <i>Trial Decision</i> | Decision of the Trial Chamber of the ICTY, regarding the <i>Motion</i> challenging the legitimacy of the Tribunal (formally challenging the jurisdiction), dated 10 August 1995. |
| <i>Trial Motion</i> | - “ <i>Motion</i> on the Jurisdiction of the Tribunal”, before the Trial Chamber II of the ICTY (filed: 23 June 1995); and - “ <i>Brief to support the Motion on the Jurisdiction of the Tribunal</i> ”, filed on the same date. |
| <i>Trial Response</i> | Prosecutor's “ <i>Response to the Motion of the Defence on the Jurisdiction of the Tribunal</i> ” (filed: 7 July 1995). |
| UN | Organization of the United Nations |
| UNSG | United Nations Secretary-General |
| <i>USA brief</i> | “Submission of the Government of the United States of America (...) in the case of The Prosecutor of the Tribunal v. Dusan Tadic”, filed as, <i>amicus curiae</i> , on 17 July 1995, before the ICTY. |

Preface

The thesis which follows, born of a concern to examine general issues of references of legitimacy in International Criminal Law came to rest, and confidently, on close examination of a particular case-study.

The decision to focus on the case of Duško Tadić, the very first indictee to be present before the International Criminal Tribunal for the Former Yugoslavia, at The Hague, and also the first to challenge the legitimacy of the Tribunal, will stand, but not in isolation, as a lesson and a warning to those, even and especially professional lawyers, who would pretend that the Law, national or international, can transcend the political constraints which drive, motivate and, yes, distort the implementation of its own discourses.

The reader, whilst encountering a body of thought and argumentation drawn primarily from the *Motion*, *Response*, and *Decisions*, will rapidly learn that interfering, often contradictory, elements intrude. As the thesis develops and as the reader becomes accustomed to the nature of the legalistic discourses under analysis, the emphasis will be ever more on the interferences, whilst never neglecting the legal discursive base.

Introduction

The subject of research is the basis of the judicial discourse of ad-hoc International Criminal Tribunals, insofar as they address the legitimacy of their own establishment. Although reference is made to other Courts and Tribunals, it is made so as to mark, within the same timeframe, the uniqueness of ad-hoc Tribunals in the period prior to the establishment of the International Criminal Court (ICC), an option explained by the fact that only ad-hoc Tribunals were established by the United Nations Security Council (UNSC) Resolutions (Res.) acting under Chapter VII of the UN Charter.

When considering the historical process of establishing ad-hoc International Criminal Tribunals (Yugoslavia and Rwanda), their respective initial cases and first legitimacy challenges, a clear seminal reference surfaces regarding the Duško Tadić case, or better still its proceedings following the Defence *Motion on the Jurisdiction of the Tribunal, The Prosecutor of the Tribunal v. Duško Tadić (Tadić case)*, challenging the legitimacy of the Tribunal. Subsequent references reinforcing the precedent nature of that first judicial review lead to the hypothesis that the Decisions on this legitimacy-challenging *Motion*, both at Trial and Appeal level, can constitute the first basis of a legitimacy discourse by these Tribunals.

The full analysis of the discursive contents of the proceedings of the *Tadić case* is incompatible with the formal limitations of a Thesis, thus imposing difficult choices. So as to allow for a full focused review of the central arguments regarding the legitimacy of the ICTY, only the first part of the Decisions will be fully reviewed, i.e., the Trial and Appeal's Decisions discourse facing the question on the legitimacy of the establishment of the ICTY (and not the second challenge, on the primacy over national courts, nor the third, on the subject-matter jurisdiction of the Tribunal).

These imposed limits, in the review of the Decisions, have the advantage of the non-contamination of arguments given that, at times, the argumentative path, although keeping the traditional legal discourse (of containment of arguments, and

final *collage* in the Decision) seems to use some circumlocutory speeches for reasoning in more than one challenge.

However, the challenges posed by the *Tadić* case could not be coherently grasped without the framing of legal questions faced by the ICTY. To this end, and given that first limitation, an option was made to review extensively all the initial documents submitted to the Trial Chamber of the ICTY, in order to present a complete picture of those initial references, or misconceptions, inherent in questioning the legitimacy (and not, as formally dubbed, the legality) of a novel, international criminal jurisdiction, established by a political organ of the United Nations (UN).

The objective of the research is to present that framing of the legitimacy questions posed before the ICTY, and then, parting from the legal proceedings, to discuss the legitimacy arguments in those Decisions' discourses *vis-à-vis* (i) the Tribunal's power to review UNSC Resolutions, and (ii) if and when the Tribunal decides on its lack of competence to do so, if the arguments summoned to these Decisions end up addressing the issue; (iii) finally, in this last case, even in a non-binding Decision, to ascertain if the justifying arguments constitute, in fact, a global doctrine (i.e. discourse) on the legitimacy of these judicial organs.

Hopefully, the result will allow us to answer seven questions:

1. In the proceedings of the ad-hoc Tribunal, do the elements in its official positions, the Decisions, address the legitimacy of the Tribunals?
2. Considering these Decisions, do they present a discourse of legitimacy?
3. Do these Decisions, in fact, and not only or necessarily *de jure*, review the UNSC Resolutions' legitimacy or legality?

According to such a possible discourse, is the UNSC:

4. A constitutional body?
5. Empowered to create judicial organs?
6. Empowered to impose Tribunals upon States?

After answering these questions and focusing on the *Tadić* case, we might draw one or more of two sets of possible conclusions:

1. Regarding the Tribunal's discourse on legitimacy:
 - 1.1. There is no judicial discourse on the legitimacy of the ICTY; or
 - 1.2. There is a judicial discourse on the legitimacy of this Tribunal. In which case:
 - 1.2.1. It is fully recognised by the Tribunal as the exercise of its own judicial powers; or
 - 1.2.2. It is adopted even though the Tribunal refers to it partially or only in an explanatory, non-binding way.

And

- 1.2.3. Such discourse does not review UNSC Resolutions; or
 - 1.2.4. Such discourse reviews UNSC Resolutions, even if not in a binding manner.
2. Regarding the judicial (re)view of the UNSC powers:
 - 2.1. The UNSC is not a constitutional organ; or
 - 2.2. The UNSC is a constitutional organ empowered to establish judicial organs, but respecting State sovereignty (in whatever way); or
 - 2.3. The UNSC is a constitutional organ empowered to establish judicial organs, which can be imposed upon States.

CHAPTER I – The Issue

Section I – The Issue in perspective

The thesis will follow an empirical approach, by extensively reviewing the case study. However, in this particular case, the empirical research reaches into the theoretical research, not so much to limit the subject of the thesis, but rather because the theoretical avant-garde of the matter is set precisely where the subject finds its data: the Tribunal's legal discourse. Other approaches tend to focus on one of two aspects: (i) reviewing the Tribunals' Decisions in the light of established legal Doctrine; or (ii) bringing out the precedent nature of the uniqueness of some aspects of the Decisions, as the creation of new recognisable Rules of International Law. The hypothesis that the *Tadić case*¹ constitutes the first basis of this discourse, further highlighted by its possible precedent nature, presents the double advantage: (i) of parting with global theoretical approaches (on jurisdiction as on international rules) and focusing on a specific judicial discourse; and (ii) reinforcing the possibilities that the research can obtain two goals (conclusions on the legitimacy discourse, and on the importance of the *Tadić case* in this same discourse).

The intended difference of the current research from the strictly legalistic is its primarily socio-cultural resonance: to start with the Decisions, and only those, parting from legal preconceptions on their analysis, and aiming not to identify new Rules, but rather recognising the judicial view of the legislative power of judicial creation. It might be said that such an approach touches, or nonetheless concerns, International Relations or Political Theory. The aimed novelty is to gather and process data, originated in the judicial discourse, from a cultural discourse analysis perspective, aware of our conclusions, possible interest for those fields of study.

¹ As it is now clear, the importance of *Tadić case* to the current research results solely from the proceedings directly connected with the *Motion* challenging the ICTY legitimacy. Therefore, hereinafter, every reference to the "*Tadić case*", should be understood as referring only to that part of the case, i.e. the proceedings from the *Motion* to the Appeals' Chamber Decision.

Unlike any others, the International Criminal Tribunal for (the Former) Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are political creations² to obtain a political goal, through judicial imposition of legal means yet to be ascertained. It was up to the Tribunals to establish their discourse, as always, but uniquely also to establish the legal interpretation of the political acts that created them, as well as to create (and not only discover) new rules in International Criminal Law, e.g. Rules of Procedure and Evidence.

Empirical research is also involved because the subject is a novelty, and a novelty set in a record time: the 92 calendar days between UNSC Res. 808, deciding to establish the ICTY and UNSC Res. 827, establishing the Tribunal and adopting the SICTY, but also, regarding the *Tadić case* – i.e. the legitimacy challenge proceedings – the 101 calendar days between the filing of the *Motion* on 23 June 1995 and the *Appeal Decision* on 2 October 1995. The solutions, object of academic scrutiny, though incorporating many of the theoretical debates of the day, are in themselves empirically born as the result of judicial Decisions, yet theoretical advancements, for the novelty of the never before explored solutions adopted. In this sense this is empirical research both because the reality of the Tribunal surpassed theoretical fiction, and the empirical work of the ad-hoc courts became the edge of the research theory.

Suffice it to say that after the first two stones were thrown – ICTY and ICTR – the international community made a very real theoretical U-turn, by going back to the well established traditional instruments, such as the Treaty of Rome establishing the ICC. The fact remains that the jurisprudence of those Tribunals is considered to be the first codification of much International Humanitarian Law (IHL). On the other hand, the Tribunals, themselves, are not only still operational, as they are operating: a statement on the relevance of the empirical advancement of the science, or of the fusion between International Law and International Relations.

² See generally, Kerr (2004: 175-207), where in particular the ICTY is said to be “inherently political (...) by virtue of their method of establishment”, and the quotation therein of Justice Richard Goldstone (4n), both p.175.

The legalization of International Relations politicized International Law. Either way it is the experience of the experiments that brings, and in fact brought the acceptance of the novelties in enforcing International Criminal Law (ICL) by ad-hoc Tribunals. And the fact that an ICC was long longed for, and the ICTY took fewer than 100 days from intention to establishment, suggests the relevance of an empirical approach.

The subject matter for the research, the origins of an International Criminal Tribunal's Discourse prior to the ICC, is set mainly considering the interest in recording and researching the self-legitimizing discourse of a new type of international jurisdiction. An interest renewed by later contradictory developments: moving away of the new solution, as the ICL enforcement by UNSC subsidiary organs, but still keeping operational both ICTY and ICTR.

Thus our field of research, when looking for legitimacy discourse, focuses (i) on the International Criminal Tribunals prior to the ICC, and among these (ii) only the ones established up until the establishment of the ICC, on 1 July 2002, and even among these, rendering particular relevance to (iii) those which follow new forms of establishment, i.e. the ICTY and ICTR.

Between all International Criminal Courts and Tribunals within the period, an unmanageable enterprise beyond the scope of this thesis, only that representing a theoretical novelty will be subject to deeper research on its discourse. That discourse means the official documents that either (i) establish the case or (ii) are the results of the Tribunals' review of legitimacy, usually as a result of challenges to its jurisdiction, i.e. the first proceedings which can include a legitimacy discourse.

The main difficulty anticipated, in delimiting the subject of research, results from separate approaches, from theory, attaining themselves to the legal perspective on legality or, more relevantly, the political perspective of legitimacy in international relations and its consequent cultural impact. Such a difficulty may be overcome by

reviewing the full set of legal arguments, as included in official documents by the Tribunals, and only then discussing those in the light of their legitimacy discourse(s). This methodology is intended to avoid a Gordian knot of International Relations theories, Political Theory and Legal Theory through an empirical approach to the subject.

A theoretical International Law critique would mainly focus on the Decisions, as self-contained speech, while a legal procedural approach would review the full extent of the proceedings. Neither would at the same time distance from the strictly judicial process and adopted Decisions, and still be able to find a possible, and somewhat more political, discourse of legitimacy attributable only to the Tribunal, regardless of the judicial enforcement or creation of International (Criminal) Law rules.

This conditioning led us to a preliminary review of all the material for the proceedings of the "*Motion* on the jurisdiction of the Tribunal" in the Tadić case. As later mentioned, the *Motion* formally challenging the jurisdiction starts by challenging the legitimacy of the Tribunal, the only matter truly relevant for this research. However, from an early stage of the research, it became evident that by exploring these materials from a procedural approach, one might find later difficulties in ascertaining the authorship of arguments. In view of such possibility for error, the selection of material follows the certainty of authorship by the Tribunal, i.e. Decisions at Trial and Appeal level, thus not considering, at least as empirical research material, documents not issued by the Tribunal itself, keeping as secondary sources, in the *Tadić* case, otherwise relevant documents such as the Defence initial Motion, the Prosecutor Response and the submission by the *amicus curiae* – EUA Government. These specific secondary sources will be reviewed, as exceptions, but for the ulterior motive of setting the frame of the challenges faced by the court, in their own initial context. The extensive review of these case materials, as initially presented before the court, is also expected to allow us gradually to set aside the arguments less relevant to the review of the

legitimacy discourse. This method will permit a review of the reasoning in the Decisions focused only in those arguments directly connected with that legitimacy discourse. Additionally, the full review of those initial materials will laterally, but usefully, determine the concepts underlying each set of arguments as well as their scope and intended legal use in the case, a result that enables the review of the Decisions not to be entangled, even deeper, with the legalistic discourse.

As core subjects of research, then, we can anticipate reference to:

1. UNSC Resolutions, as decisions leading to the establishment of the ad-hoc International Criminal Tribunal for the Former Yugoslavia, insofar as they are referred by the ICTY itself;
2. Materials filed before the court, regarding the challenge on the ICTY's Jurisdiction, in the Tadić case;
3. Decisions of the ICTY (Trial and Appeal);
4. Possible additional information officially published by the ICTY, regarding, or pertinent to, its legitimacy.

Section II – International Criminal Tribunals

After the establishment of the UN (1945) the then recent Nuremberg (and Tokyo) trials had imprinted upon the new international, would-be global, organization, (which as we know endured and became operational, contrary to its predecessor League of Nations) the will to debate at its General Assembly (UNGA) the creation of a permanent International Criminal Court as early as 1948, with the subsequent work on two projects of statutes by the International Law Commission (ILC), which never came into being.³

Only after the détente of the Cold War – until then conditioning international relations by the balance of force between the blocks, but also because of the assumption by each superpower of a policing action imposed upon their allies or

³ See UN website: <http://www.un.org/News/facts/iccfact.htm>.

spheres of influence – the conditions were met for a free incursion of sovereign politics and international public opinion into the agenda of the UN.⁴ The World Organization was under a new order. The idea of a permanent international court, immediately renewed, officially from 1993 onwards, later made way for the Treaty of Rome on July 1998. But the political atmosphere of the early 1990s – faced with the reigniting of old nationalisms and the lack of a super-national / proto-global reference of alignment, i.e. the need to solve regional conflicts without the pre-justified intervention of super-powers on maintenance of political balance – was a stage directly disputed by Nation States, but also by the public opinion, more prone to embark on radical and idealistic defence of *values* as a means to solve *problems*.

Such was the politico-cultural frame⁵ in which the both ad-hoc International Criminal Tribunals were established in 1993 and 1994: the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), respectively. The permanent, and intended as global, International Criminal Tribunal ended up succeeding, with the establishment of the International Criminal Court (ICC) adopted by the Rome Treaty (1998), and fully established with the entering into force of the treaty, on 1 July 2002.⁶

However, the subject of the current research is precisely the case-studies of ad-hoc International Criminal Tribunals prior to the ICC. Accordingly, the International Criminal Tribunals to be considered as source of research materials would be those established between:

1. The establishment of the ICTY (on 25 May 1993), inclusive; and

⁴ See Kerr (2004: 12).

⁵ See O'Brien (1993: 639).

⁶ The debate on the establishment of the ICC formally started in 1995, up until the 1998 conference, when the Statute was adopted. Following the provisions of the Treaty, the ICC was to be established with the coming into force of the Treaty after the ratification of at least 60 States, which happened on 1 July 2002. For the process leading to the Treaty of Rome and the establishment of the ICC see: <http://untreaty.un.org/cod/icc/index.html>.

2. The establishment of the ICC (on 1 July 2002), exclusive.

In the last decade of the second millennium and the first decade of the third, the jurisdictional bodies one may consider as international in nature and criminal in scope, are a limited yet unique group of seven:

(A) Ad-hoc tribunals:

1. The International Criminal Tribunal for the Former Yugoslavia (ICTY);⁷
(25 May 1993)
2. The International Criminal Tribunal for Rwanda (ICTR);⁸
(8 November 1994)

(B) Hybrid courts (& Special Panels):

3. The Special Panels, East Timor (SPET);⁹
(6 June 2000)¹⁰
4. The Special Court for Sierra Leone (SCSL);¹¹
(16 January 2002)
5. The Extraordinary Chambers for Cambodia (ECC);¹²
(29 April 2005/18 January 2006)
6. The Special Tribunal for Lebanon (STL).¹³
(1 March 2009)

(C) Permanent Court:

7. The International Criminal Court (ICC).¹⁴
(1 July 2002)

⁷ <http://www.icty.org/>

⁸ <http://www.unicttr.org/>

⁹ <http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm>

¹⁰ <http://www.un.org/en/peacekeeping/missions/past/etimor/untactR/Reg0015E.pdf>

¹¹ <http://www.sc-sl.org/>

¹² <http://www.eccc.gov.kh/english/>

¹³ <http://www.stl-tsl.org/action/home>

¹⁴ <http://www.icc-cpi.int/Menus/ICC?lan=en-GB>

Section III – Relevant Tribunals for the subject

(A) The chronological perspective – before and after the ICC.

With the Treaty of Rome (1998/2002),¹⁵ any other such Tribunal would only either fall short of, or discredit, the ICC. So, post-Rome ICT's are likely to translate a wilful statement on the legitimacy of the ICC, rather than their own, on their own, i.e. if a set of jurisdiction *ratione materiae, personae, loci* and *temporis* is not submitted to the ICC, whatever the solution may be, it represents an intention to avoid such jurisdiction.¹⁶ Concurrently well-established bases of legitimacy would be summoned in the political manoeuvring towards the establishment of such jurisdictions, e.g. SCSL, ECC and STL – SPET are a particular case of establishment by an Administering power. Therefore the research on International Criminal Tribunals created before the Treaty of Rome allows a different, and more objective, analysis, becoming more likely to produce relevant conclusions regarding *the other options*, tested, followed or abandoned, prior to the adoption of the classical legitimacy of treaties between sovereign States.

For the current research it is purposeless to enter the discussion on the global jurisdiction of the ICC. Although a primary subject for any conclusions that may arise from this research, the lively debate on the legitimacy of the global jurisdiction of the ICC would most certainly interfere with the approach followed here about the more explicit establishment of *ad-hoc* International Criminal Tribunals, where the legitimacy of the establishing treaty is not a question – as there are none.

Consequently, our research must focus on the cases within the dates specified above, from 25 May 1993 until 1 July 2002, limiting the relevant cases to four:

1. The ICTY – 25 May 1993;

¹⁵ Adopted by a diplomatic conference on 17 July 1998; entered into force on 1 July 2002.

¹⁶ This conclusion carries neither preconceptions nor prejudice. In fact the objective might be to strengthen a national judicial body, or show how national legal norms are sufficient and fair, yet recognizing some sort of incapability to carry out the full proceedings (e.g. the cost of specialized chambers within the Cambodian jurisdiction, leading to a request for assistance, although still applying national rules).

2. The ICTR – 8 November 1994;
3. The SPET – 6 June 2000; and
4. The SCSL – 16 January 2002.

(B) The novelty perspective of the act of establishment.

Another set of more relevant arguments, as far as this research is concerned, brings the ICTY and the ICTR to the up-front question of legitimacy, otherwise solved by previous experiences. In fact the SCSL, the ECC and the STL find their legal basis on separate and different agreements between the countries involved and the UN.¹⁷ Although these Courts differ in several aspects of their proceedings,¹⁸ the old legitimacy of sovereignty, and its power to celebrate treaties, is, first and foremost, the legal basis for the establishment of all these courts.

The questions on the circumstances that led to the signing of each treaty, from need to pressure, case studies for International Relations or Political Theory as they may be, lay out of the subject of the present one. In fact, the option taken to make reference, and use, a well established source of legitimacy for international action (treaties / agreements) presents an immediate answer to any questions that may arise on the source of such legitimacy.

These courts' discourses of legitimacy are therefore based on references to well-known landmarks of International Law. A world apart from the loose international legal norms and theory regarding ad-hoc Tribunals created before there were any legal landmarks for international jurisdictions other than those created by Treaty.

¹⁷ In March 2002 (Sierra Leone), March 2003 (Cambodia), and February 2007 (Lebanon).

¹⁸ E.g. the SCSL rules of criminal procedure are based on ICTR rules, Prosecutor and Registrars are international (as 2 of the 3 judges); the ECC follows Cambodian law with reference to international law (only) if necessary, having 2 local prosecutors and 1 international, and a Cambodian Registrar with an international deputy; the STL follows national law (with exceptions) in the proceedings, although held by international judges.

CHAPTER II – THE FRAMING OF THE ISSUE

Section I – The founding discourse, ICTY and the Duško Tadić case.

(A) The need for the ICTY

"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", usually know as the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the ad-hoc Tribunal for Yugoslavia, was formally established by Res. 827 of the UNSC, adopted in 25 May 1993.

Shraga & Zacklin,¹⁹ in a very brief, but meaningful, picture of the circumstances in which The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established, emphasise an evolving path:

1. The minor and lateral role of the UN direct involvement (through UNPROFOR) up to then (February 1993);
2. Its inability to play a peace keeping function;
3. The growing signs of the perpetration of "*international crimes*";²⁰
4. The disregard of the parties in conflict of the UNSC Resolutions and appeals, particularly regarding the respect for IHL.

The listing of facts, by these authors becomes increasingly relevant to the current research, for the possible self-awareness of the political organ (UNSC), of its legitimate role in the possible enforcement of International Law:

5. The acknowledgment, by the UNSC, of its own inability to control the violation of "international norms", directly leading the UNSC to ask the SG

¹⁹ Shraga (1994: 360-361).

²⁰ The option to keep the term used by the authors is justified so as to maintain the broadest meaning of the crimes, which, in these authors' words, referring to Bosnia, included "mass executions, mass sexual assaults and rapes, the existence of concentration camps and the implementation of a policy of so-called 'ethnic cleansing'." (*Ibid.*: 360).

to “establish a Commission of Experts”²¹ entrusted with reporting on those alleged violations of IHL. The intention was to show the seriousness of the UNSC, thus creating a “dissuasive effect”;

6. However the idea of an International Criminal Court was already at play, not only in previous references by various western politicians, but also (still according to the above mentioned authors) as an “unspoken understanding (...) if the parties did not conform to Security Council resolutions.”;
7. The unique political circumstances of those days suffered more from public opinion twists than from strategic guidelines.²² Public opinion, particularly in Europe, with the memory of the Axis practices upon minorities and occupied nations, “demanded accountability and action” in Yugoslavia, pressuring UNSC permanent members to act swiftly;

(B) The decision to establish the ICTY.

The decision to establish the ICTY is said to have been “taken reluctantly by some or indifferently by others”²³ but, either way, well aware of the implications this step might have in future peace talks, when trying to reach agreements with the very leaders who would be under scrutiny by the Tribunal. The fact that the conflict was still ongoing could limit the Tribunal's capability to investigate and prosecute, a difficulty which might render the Tribunal inoperative but still an effective PR display of good intentions.

An improbable success was also the political conclusion that the UNSC might draw from decades of unsuccessful studies and conferences on the creation of an International Criminal Tribunal. The newborn new world order was yet to start the

²¹ UNSC Res. 780, 6 October 1992 – S/RES/780 (1992).

²² The lack of recognizable bloc leaders with the end of the cold war confrontation and, more important to the Balkans, the disintegration of the eastern bloc of influence/support/deterrent, a scenario locally aggravated by the call of nationalism and ethnical divide as demagogic fast-track to political power.

²³ Shraga (1994: 361).

road of codification of International Criminal Law, and IHL. In the absence of such tools, and under pressure for immediate action, the facts that followed can be explained in two ways:

1. The traditionally long process of negotiating a Treaty, adopting it, waiting for it to enter into force and then implementing the Tribunal (not even considering the negotiation with the countries and territories whose leaders were to be scrutinized) was in conflict with the ongoing conflict and international public opinion outrage, opening ways to an unprecedented and more proactive attitude of the UNSC. Such was in fact the option taken, when the UNSC assumed its intention²⁴ to establish a specific International Criminal Tribunal, asking the UNSG for an urgent²⁵ report on this matter; and
2. The factual and legal challenges for the ICTY to operate were such that, even after the establishment of the Tribunal, it might take years before:
 - 2.1. it was in place
 - 2.2. It could start and proceed with cases, on account of the problems in investigating and prosecuting or in hearing witnesses
 - 2.3. Its decisions might have a real effect upon persons still in conflict.

So, from a political stance, the UNSC could answer western public opinion, without the objection of a protective eastern bloc, and not care too much with this first attempt, as all signs pointed to a profitable theoretical discussion, on ways to implement such a Tribunal in the future, but also to a practical improbability of successes of the ICTY itself. "Despite its desirability, it [was] probable that the tribunal [would] not be so effective" (Meron, 1993: 132). Although no definitive proofs can be drawn from this research, one should not deny the possibility that the ICTY was intended to be a first attempt only. As known facts we must refer to the

²⁴ "The use of Chapter VII of the Charter as the legal basis for the establishment of the Tribunal is perhaps the most visible and innovative aspect" Shrager (1994: 360- 361).

²⁵ Within 60 days (UNSC, Res. 808, 22 February 1993 – S/RES/808 (1993)).

calls, from the spring of 1992 until the adoption of UNSC Res. 827²⁶ on 25 May 1993, from the USA, Germany and France for the creation of a Criminal Tribunal (Cassese, 2003: 336, 24n).

Either way the ICTY was not only the first ad-hoc International Criminal Tribunal, it was also the first to be created by the UNSC, a move here “explained” both by the urgency to take measures (accountability) to stop the crimes – measures immediately taken as impossible, yet later proven otherwise – and by the pressure of “public opinion” on the political powers.

Adopting Res. 827 was also a precedent for the Council to assume its own power to create a judicial organ, furthermore based upon the belief of acting vested with the power(s) of Chapter VII of the UN Charter.

(C) The founding discourse.

The ICTY affirms,²⁷ as doctrine²⁸ does, to have been established in 1993 through Resolution 827, adopted by the United Nations Security Council, at its 3217th meeting, on 25 May 1993. The source of that claim lies within the scope of the current research, reason for which will be addressed *infra* (The *Tadić* case), where the precedent of Res. 827, like the initial jurisprudence of the ICTY, are discussed so as to determine the Tribunal’s possible discourse of legitimacy.

It is however important to notice that the public presentation the ICTY makes of its own Timeline reveals that great importance is given to results, be it proceedings’ incidents or public initiatives of the Tribunal, and only a very limited number of facts and references are made to issues connected with the creation of the ICTY. This absence could elsewhere be quite unsurprising, e.g. in well established legal

²⁶ S/RES/827 (1993).

²⁷ In the broadest of terms towards the general public in the ICTY website: <http://www.icty.org/sections/AbouttheICTY#>, <http://www.icty.org/sid/319>.

²⁸ Cassese (2003, 337). Interestingly, this author presided over the Appeal Chamber of the ICTY which pronounced the Decision on the very same *Tadić* case we here review.

systems with separations of courts according to subject matter (*ratione materiae*) – where (e.g.), within Administrative courts new fiscal chambers are to be created.

In fact, other than the reference to the UNSC Res. which established it, only experts end up finding the argumentation in the bases of the Tribunal's discourse regarding the legitimacy, or at least the legality, of its creation – found in the Tadić case²⁹ – that will be the main subject of this research. A perceived weakness of the Tribunal in wishing not to publicize its discourse of legitimacy cannot be overlooked, however speculative it could be to try to pursue what can only be judged as “hearsay”, rumour or mere opinion.

The oddness, in the ICTY case, of judicious public display of arguments relating to its own legitimacy, is twofold:

1. The ICTY is:
 - 1.1. an International Tribunal;
 - 1.2. a Criminal Tribunal;
 - 1.3. an Ad-Hoc Tribunal; and
 - 1.4. a Tribunal created by the UNSC.
2. The ICTY was the first ever tribunal simultaneously to aggregate all of the above-mentioned characteristics, i.e. the very first of its kind. Moreover, it has kept that leading role on until today, among the full set of only two of the same kind: ICTY and ICTR.

The supra-nationality of its nature could well justify a more detailed attention to a self explanatory discourse towards, at least, the more classical actors of the International Community, i.e., the sovereign States. However, its criminal nature – the personal jurisdiction (*ratione personae*), as individual criminal responsibility –

²⁹ Under “Cases”, “Completed cases”, “Tadić”, and then under “Appeals chamber decisions”, regarding the year 1995. The relevance of this Decision, and the arguments therein – including those carried from the Trial *Motion* on legitimacy – are inversely proportional to the display of relevance given by the ICTY itself, available at: <http://www.icty.org/case/tadic/4>.

would suggest, more than justify, that such explanatory and self-justification discourse was made to what we now call “international public opinion”. Such discourse would hopefully be directed towards the communities and individuals, as they could be subjects of prosecution, over which the Tribunal was to have territorial jurisdiction (*ratione loci*), or otherwise towards its own “public”, i.e. the public opinion of the powers imposing the Tribunal. In this last case, facing those who could support, and even cry for, the establishment of the ICTY, the non-permanent nature of the Tribunal (Ad-Hoc), if for nothing else for its novelty, had to foresee possible historical confrontations or questions of posthumous prognosis – if we/you/they can do this what if it was done in past cases? – and furthermore, given the length of its proceedings still in place, should publicise the arguments of its uniqueness as an open institution’s answer to the application of different solutions afterwards.³⁰

So, even if at the date it was established, the ICTY would disregard the passing of the message on the arguments for its creation, and conversely give a low key-note for its very special subject matter, later developments show just how important this dialogue attempt was, a fact that the tribunal explicitly admits by holding its first Outreach Symposium with judicial representatives from the Former Yugoslavia on 15 October 1998, “thereby launching its pioneering communications programme dedicated to making the work of the Tribunal more accessible and intelligible to the local communities”.

The mystery deepens when we focus on the uniqueness of the Tribunal, and furthermore on its pioneering role, not in the self laudatory description above, but rather in view of the fact that the ICTY was, and will forever be, the very first tribunal to gather all the above-mentioned characteristics. Its work, useful or vain, good or bad, was the first and the one to be held as standard measure of others.

³⁰ The only other similar case was the ICTR, established 18 months later: ICTY in UNSC Res. 827 of 25 May 1993, and ICTR in UNSC Res. 955 of 8 November 1994.

The burden of such responsibility (and we are not even focusing on the consequences of jurisprudence arising from the common law insert) weighs heavier by considering that the ICTY was established by the UNSC, a political and non-representative organ of the UN, which assumed a gathering – and no separation – of powers to create the Tribunal. Anticipating a later discussion, it is enough here to say that the Executive decisions took, in this case, a legislative nature (UNSC Res. 827) expressly justified on self-referential considerations³¹ that imply the qualification of criminal behaviour: a jurisdictional function.

Considering that the first use of such powers by the UNSC might be challenged by claims that “by establishing the Tribunal the Security Council exceeded its powers under the (UN) Charter” (Cassese, 2003: 337, 8) it seems a little less than adequate that such a major question is dismissed by a single piece of the ICTY Appeal Chamber proceedings – Tadić, Interlocutory Appeal, §§ 9-40 (*ibid.*) – and that such Decision rests upon an answer of “Kompetenz – Kompetenz”.³²

It becomes clear that the legitimacy discourse we seek is limited to the Decisions (Trial and Appeal) on one particular case (challenging the jurisdiction of the tribunal). For the first ever institution addressing individual accountability regarding international criminal offences, the arguments in the sources mentioned above were expected to be exploited to the full extent in public awareness of the fervently desired accomplishment in the evolution of ICL.

Disregarding facts that, though connected with the internal proceedings of the ICTY, do not have a direct connexion with the international legitimacy of the Tribunal – for the purposes and within the scope of this research – a brief summary

³¹ As per the recognition of a “threat to peace and security” and the assuming of (special) powers under Chapter VII of the UN Charter (see *infra* and Appendix I).

³² As explained by Friman, Hakan. “Jurisdictional Challenges”, in Cassese (2009: 399,400). A conclusion reached by the Tribunal that it has “jurisdiction to determine its own jurisdiction”, also termed “Kompetenz-Kompetenz” or “la compétence de la compétence”.

of the ICTY chronology, extends well beyond any selection one might reach from the dates the ICTY itself includes on its Timeline:³³

| Year | Day/Month | Action | Source |
|------|--------------|---|-------------|
| 1993 | 25 May | establishment of the ICTY by Res. 827 by the UNSC; | ICTY / UNSC |
| | 15 September | election of the first judges by the UN General Assembly | ICTY |
| 1994 | 8 July | UNSC appoints the Prosecutor; | ICTY |
| | 7 November | ICTY first indictment; | ICTY |
| 1998 | 15 October | the ICTY holds its first Outreach Symposium with judicial representatives from the Former Yugoslavia, "thereby launching its pioneering communications programme dedicated to making the work of the Tribunal more accessible and intelligible to the local communities"; | ICTY |
| 1999 | 24 May | The ICTY indicts Yugoslav President Slobodan Milošević for crimes in Kosovo. This is the first time an international court indicts a sitting head of state ³⁴ (the charges against him are later extended to cover crimes committed against non-Serbs in | ICTY |

³³ Adapted from the ICTY website: <http://www.icty.org/action/timeline/254>, where the full version is available, dates and facts only indirectly connected with the legitimacy question are here marked in grey.

³⁴ The indictment of the sitting Head of State is here considered as directly connected with the legitimacy question as an inescapable consequence of discuss the establishment of the ICTY outside the imperatives of the Law of the Treaties, i.e., without the need for the agreement of the State (Yugoslavia), through its representatives – the Head of state himself. The issue, though minor in face of the creation of the Tribunal, could become a keynote to the form used to approve the establishment of such a Tribunal.

| Year | Day/Month | Action | Source |
|------|---------------------------|---|--------|
| | | Croatia, Bosnia-Herzegovina and Kosovo from 1991 to 1999). | |
| 2003 | 15 January to 21 February | The ICTY and the Office of the High Representative in Bosnia-Herzegovina agree on ways to develop the country's capacity for war-crimes trials and urge the establishment of a specialised war Crimes Chamber within the country's State Court. | ICTY |

A tentative chronology, which partially includes dates and facts mentioned above on the ICTY timeline, is set out in the chart below referencing main events leading to, or resulting from, the establishment of the ICTY. This new chart also includes the events of the Duško Tadić case, in particular the proceedings from the preliminary Motion challenging the Tribunal's jurisdiction, until the ICTY Decisions, Trial an Appeal, here reviewed in search of a legitimacy discourse:

| Year | Day/Month | Action | Source |
|------|--------------|---|-------------|
| 1993 | 22 February | Res. 808 – Decides that an International Criminal Tribunal shall be established; requests a report from the UNSG. | UNSC |
| | 25 May | Res 827 – Adopts the UNSG Report; Establishes the ICTY; and approves the ICTY Statute. | ICTY / UNSC |
| | 15 September | Election of the ICTY first judges by the UN General Assembly. | ICTY |
| 1994 | 12 February | Duško Tadić arrested by German authorities. | ICTY |
| | 08 July | UNSC appoints the Prosecutor. | ICTY |
| | 07 November | ICTY first indictment against Dragan Nikolić; | ICTY |
| 1995 | 13 February | Initial indictment of Duško Tadić by the ICTY | ICTY |
| | 24 April | Duško Tadić transferred from Germany to the | ICTY |

| Year | Day/Month | Action | Source |
|------|---------------|---|--------|
| | | ICTY. | |
| | 26 April | Tadić's initial appearance and plea of not guilty. | ICTY |
| | 23 June | <i>Tadić case</i> – Filing of the interlocutory “Motion on the Jurisdiction of the Tribunal”, by the Defence, in the “Prosecutor v. Duško Tadić” case. | ICTY |
| | 7 July | <i>Tadić case</i> – Filing of Prosecution “Response to the Motion of the defence on the Jurisdiction of the Tribunal”. | ICTY |
| | 17 July | <i>Tadić case</i> – “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”, a brief presented as <i>amicus curiae</i> . | ICTY |
| | 25-26 July | <i>Tadić case</i> – Hearings of the <i>Motion</i> by the Trial Chamber II. | ICTY |
| | 10 August | <i>Tadić case</i> – Trial “Decision on the Defence Motion on Jurisdiction”. | ICTY |
| | 14 August | Filing of the notice of Appeal, and of extension to submit further materials. | ICTY |
| | 25 August | Filing of the Appeal Brief by the Defence. | ICTY |
| | 1 September | Filing of the Prosecutor Response to the Appeal. First amendment to Tadić's indictment. | ICTY |
| | 6 September | Filing of a second Appeal Brief by the Defence. | ICTY |
| | 7-8 September | <i>Tadić case</i> – Hearings of the Appeal to the Trial “Decision on the Defence Motion on Jurisdiction”. | ICTY |
| | 2 October | <i>Tadić case</i> – Appeal Decision on the defence motion for interlocutory appeal on jurisdiction | ICTY |

| Year | Day/Month | Action | Source |
|------|-------------|--|--------|
| | 14 December | Second amendment to Tadić's indictment. | ICTY |
| 1997 | 7 May | Duško Tadić Trial Chamber judgment. | ICTY |
| | 14 July | Duško Tadić Trial Chamber sentencing (20 years imprisonment). | ICTY |
| 1998 | 13 May | UNSC Res. 1166 – ICTY Statute amendment. | UNSC |
| | 15 October | The ICTY holds its first Outreach Symposium with judicial representatives from the Former Yugoslavia, "thereby launching its pioneering communications programme dedicated to making the work of the Tribunal more accessible and intelligible to the local communities"; | ICTY |
| 1999 | 24 May | The ICTY indicts Yugoslav President Slobodan Milošević for crimes in Kosovo. This is the first time an international court indicts a sitting head of state (the charges against him are later extended to cover crimes committed against non-Serbs in Croatia, Bosnia and Herzegovina and Kosovo from 1991 to 1999). | ICTY |
| | 15 July | Duško Tadić Appeals Chamber judgement | ICTY |
| 2000 | 26 January | Duško Tadić Appeals Chamber sentencing | ICTY |
| | 31 October | Duško Tadić transferred to Germany for the remainder of his sentence (credit for imprisonment time since 13 February 1994) | ICTY |
| | 30 November | Res. 1329 – ICTY Statute amendment. | UNSC |
| 2002 | 17 May | Res. 1411 – ICTY Statute amendment. | UNSC |
| | 14 August | Res. 1431 – ICTY Statute amendment. | UNSC |
| 2003 | 19 May | Res. 1481 – ICTY Statute amendment. | UNSC |
| 2005 | 20 April | Res. 1597 – ICTY Statute amendment. | UNSC |

| Year | Day/Month | Action | Source |
|------|--------------|-------------------------------------|--------|
| 2006 | 28 February | Res. 1660 – ICTY Statute amendment. | UNSC |
| 2008 | 17 July | Duško Tadić granted early release. | ICTY |
| | 29 September | Res. 1837 – ICTY Statute amendment. | UNSC |
| 2009 | 7 July | Res. 1877 – ICTY Statute amendment. | UNSC |

(D) Preliminary conclusions

As preliminary conclusions we can point out:

- a) The official arguments on the legitimacy of the establishment of the ICTY can be found in:
 - i. the preparatory works of Res. 827 of the UNSC – *maxime* Res. 808 and the following UNSG Report (S/25704);
 - ii. Resolution 827 of the UNSC;
 - iii. The Statute of the ICTY;
 - iv. The Decisions (Trial and Appeal) on the Defence *Motion* (/ for interlocutory appeal) on jurisdiction in the Tadić case.
- b) From these, we can ascertain as the Tribunal's Discourse on legitimacy, the arguments found in the Decisions, from Trial and Appeal, on the defence *Motions* challenging legitimacy in the Tadić case.
- c) The ICTY was established under very specific political and geostrategic circumstances, those favouring its creation as opposed its success;
- d) The ICTY was the first ad-hoc International Criminal Tribunal³⁵, and still has the leading role on the matter;
- e) The main feature of the ICTY, shared only with the ICTR,³⁶ is the use, by the UNSC of powers within Chapter VII of the UN Charter, to create a jurisdictional organ to guarantee peace and security.

³⁵ It is self evident the differences from previous occurrences of a military nature of (e.g. Nuremberg and Tokyo).

Section II – Blossoming powers in the establishment of the ICTY.

(A) From intention to action in 92 days.

The first statement of the UNSC on its intention to establish an ad-hoc International Criminal Tribunal for the Former Yugoslavia appears in Res. 808 (unanimously adopted in 22 February 1993),³⁷ whereby not only the Security Council “Decides that an international tribunal shall be established”,³⁸ but also where the UNSG is asked, as a matter of urgency, to make such a report and recommendations needed for the establishment of that Tribunal.

Despite the extremely short time conceded by the UNSC, only 60 days, for the enormous task as to envisage the needs, construct a possible legal frame and propose the appropriate solutions for such concept-changing novelty as a criminal judicial subsidiary organ, the UNSG did present its Report in 70 days, on the 3 May 1993 (S/25704). 22 days later the UNSC adopted it (again) unanimously, in Res. 827, on 25 May 1993. Altogether, from the announcement of the intention to the establishment of the ICTY in the spring of 1993, it took 92 days.

Given that the UNSC Resolution in question (Res. 827), includes three distinguishable decisions – adoption of the UNSG Report; establishment of the ICTY; adoption of the Statute of the ICTY – it is at times difficult to address one of these without the context of the others. The hesitations, for the research at hand as for the Tribunal when deciding (see *infra* the arguments on the legal equivalency of the three decision of Res. 827), are particularly interesting in the ICTY public speech when referring to UNSC Resolutions while addressing, or better, presenting to the public, its Statute.

³⁶ Other shared characteristics in both institutions are, e.g. the composition of both Appeals Chambers by the same individual judges.

³⁷ Reproduced in Appendix IV.

³⁸ *Idem*.

As stated in page 23 above, the ICTY follows the established legal doctrine, in considering to have been established through UNSC Res. 827, on 25 May 1993. The very Res. which adopted the Tribunal's Statute, and was later amended³⁹ for nine times in:

1. 13 May 1998 (Res. 1166);
2. 30 November 2000 (Res. 1329);
3. 17 May 2002 (Res. 1411); and
4. 14 August 2002 (Res. 1431);
5. 19 May 2003 (Res. 1481);
6. 20 April 2005 (Res. 1597);
7. 28 February 2006 (Res. 1660);
8. 29 September 2008 (Res. 1837); and
9. 7 July 2009 (Res. 1877).

The updated Statute as published by the ICTY website is labelled as: "Not an official document. This compilation is based on original United Nations resolutions". The claim of non-authenticity, though applicable to UNSC Resolutions in themselves as they are here published by another institution, the ICTY, is however non convincing for the Statute itself, nor the specific listing chosen for the so called "compilation".

Since the Statute of the ICTY (SICTY) was adopted by the UNSC, it is arguable that such instrument is not a part of the Tribunal's own discourse.

The fact that the SICTY was adopted and could only be amended by the UNSC, does not preclude that the SICTY must be an authentic document within the ICTY. Should that not be the case, the incapability of the Tribunal to recognise the authenticity of its Statute, amendments and other Resolutions, would obstruct the

³⁹ As per the September 2009 version of the Statute (partially included in Appendix V), and available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, last accessed on 20/03/2011.

capability for the Tribunal to “be”, *ad absurdum* not recognising itself. The uncertainties arising for the interpreter from this excess of precautions, could give way to finding some unwillingness from the Tribunal in assuming its role and duties, given the novelty and uniqueness of its creation, an hypothesis which could imperil the belief in the capability of the Tribunal to construct a legitimacy discourse.

Therefore, at least regarding the legal instruments it will have to use, the ICTY's official discourse must, first and foremost, state what it recognises as its own original founding acts, so as to be capable, by its proceedings, to affirm the authenticity of the decisions taken and published. In this sense the published version of the SICTY is in fact a primary source, not for the fact that it originates from the ICTY, but from the fact that the Statute is a condition *sine qua non* for the Tribunal to be able to determine its own jurisdiction, even if by Kompetenz/Kompetenz. This to say that for the Tribunal to apply a norm it must recognise such norm both as (i) applicable, as effective in itself, and as (ii) within the scope of the Tribunal's competences (jurisdiction). However, in so doing, i.e. reviewing, the Tribunal is making such a norm its own, in the sense that the norm incorporates the legal discourse, or accepted possible discourses, of the Tribunal itself.

We can therefore conclude that the unavoidable need for a Tribunal to know of the jurisdiction to apply implies a judgement that validates the rules the Tribunal can apply, and by which it applies them: the competence to determine its own competence. Such a judgement, effectively handled in the *Tadić* case, translates the Tribunal's own discourse. I.e. the recognition of the norms for its own establishment implied the acceptance of pre-existing speech into the Tribunal's discourse. The incorporation of the externally drafted and approved Statute, in the Tribunal's discourse, makes it a primary source within our research, as the last legislative act becomes the first judgement of jurisdiction.

Oddly enough, this primary source, in the sense stated above, although containing a list of “ICTY RELATED RESOLUTIONS”, immediately after Res. 827 and its subsequent nine amendments, places Res. 808 *not* among these “related resolutions”, but rather *prior* to the founding Res. 827, without ever qualifying it.⁴⁰

The nuance, casual as it may seem, acquires an important meaning when we take into consideration that, as the ICTY itself warns that “This compilation is based on original United Nations resolutions”. So, despite explicitly acknowledging its own establishment under Res. 827, on this compilation the ICTY finds relevant the previous Res. 808, but not as a “ICTY Related Resolutions”, in fact not giving any explanation for such inclusion. A somehow natural pre-history of the establishment might justify the inclusion, in which case – and taking Res. 808 as not particularly or inextricably intertwined with the establishment of the Tribunal – all other UNSC Resolutions, attempting to bring peace or evaluate the situation in Yugoslavia, should also be mentioned.

If only UNSC Res. 808 is mentioned, there must be a special feature to it, a particular characteristic that differs from all its predecessors, and makes it relevant to be mentioned where others are ignored. And, in fact, there is; it was Res. 808 and not Res. 827 which first set out the *will to establish* the Tribunal. From a certain perspective, the ICTY is created in Res.808, leaving the formal establishment to a later date when the needed preparatory work, i.e. the Statute, would be done. *Mutatis mutandis*, such a view is reflected in the adoption of a very complex legal instrument, the very first of its kind and a first exercise of such power by the UNSC, without any changes whatsoever.

With all due consideration for the UNSG’s work – a report accomplished in “no later than 60 days”, and for which the SG should take “into account suggestions put forward in this regard by Member States” – it seems unique that the UNSC can adopt a Statute of the very first International Tribunal, for which it (the UNSC) is

⁴⁰ See Appendix V.

using for the first time alleged powers to create a jurisdictional organ, in such a short time and with no amendments at all.

The importance of the Statute for this thesis arises from its interpretation, while the legitimacy of the ICTY itself is questioned in court. For the references and confrontation needed in the review of the case the most relevant parts of the document are presented under Appendix V, while its discussion is inbuilt in that review.

(B) Initial conclusions.

As preliminary conclusions, but already noting the culturally inbuilt character of a legitimacy discourse in the SICTY (as in UNSC Res. 827, of which it is part), itself no longer just a set of rules, we can state that:

1. The documents published by the ICTY, as legal documents or compilations of documents, directly relevant for the Tribunals proceedings, be it norms of jurisdiction or procedure, are, in the sense of validation of own jurisdiction, primary sources on the Tribunal's discourse;
2. The way in which the ICTY organized the so called "compilation" of its Statute reveals a judgement of relevance to the UNSC Resolutions, a conclusion drawn from the consideration given to pre Res. 827 materials;⁴¹
3. The key note of the SICTY, regarding the legitimacy of the Tribunal, lies only upon "Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations";
4. Given that the UNSG Report was submitted on 3 of May 1993, the preparatory works of the Statute took at most 70 days;
5. The concise, though dense, set of norms (included in only 34 articles, and now, after numerous revisions, in a somewhat larger 37) can at times be sufficiently vague so as to be opened to a broad spectrum of interpretation, particularly regarding the Tribunal's jurisdiction.

⁴¹ See, for the relevance of the structure of such compilation, Appendix V.

CHAPTER III – THE TADIĆ CASE

(A) The Tadić case

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

(Judge Sidhwa, separate opinion, §1, of the Appeal Decision)

The first time the ICTY pronounced on the legitimacy of the Tribunal was in the judgment of a Defence *Motion* challenging the tribunal's legitimacy, in the Duško Tadić case.⁴² The Decisions of the ICTY (Trial and Appeal Chambers) did not only set a precedent, but also the standards of the judicial discourse regarding the legitimacy of ad-hoc tribunals (Alvarez, 1996: 245-246). First the Trial Chamber (II), and then the Appeal Chamber, had the opportunity to dissect the arguments on the limitations to the Tribunal's powers, *vis-à-vis* the superior determinations of the UNSC – therefore ascertaining the boundaries of the power to know its jurisdiction – and on the legitimacy of the establishment of those same powers, a possible indirect judgement on the legality of UNSC Resolutions.

The importance of the case, for this research, lies not only on its subject matter – the legitimacy and legality of the establishment and precedence of the ICTY – but also for the foundational character of the official discourse of the ad-hoc tribunals regarding their own legitimacy.

⁴² Formally the *Motion*, filed on 23 June 1995, is entitled “*Motion on the jurisdiction of the Tribunal*”. Although both *Motion* and supporting *Brief* do present challenges to the *jurisdiction* of the Tribunal (in particular regarding the primacy over domestic courts and questioning Article 2 to 5 of the SICTY), the relevant arguments of the *Motion*, as far as the present research subject allows, are initial arguments on the *legitimacy* of the establishment of the Tribunal, even though sometimes aimed at its legality.

In fact when researching the ad-hoc Tribunals', ICTY and ICTR, official discourse (which as earlier concluded is limited by their judicial powers and proceedings to their Decisions on challenges to the Tribunal's legality or legitimacy) we can find only four cases:

1. The Tadić case, before the ICTY in 1995;⁴³
2. The Kanyabashi case, before the ICTR in 1997;⁴⁴
3. The Slobodan Milošević case, before de ICTY, in 2001; and
4. The Karemera (*et al.*) case, before the ICTR in 2005.⁴⁵

The primacy of the Tadić case, and the rationale for the focus on it in this thesis, become clear when we consider, in inverted chronology, that:

1. The Decisions on the Karemera case consider that the same issues regarding the challenges to the jurisdiction of the Tribunal had already been decided in the Kanyabashi decision and the Tadić Decision, adopting those Decisions reasoning and findings;⁴⁶
2. The Milosevic Decisions directly refer to the Tadić case on this challenge;
3. The Decision on the Kanyabashi case, following the same logic, and despite a more proactive attitude from the Trial Chamber by considering and debating subjective political concepts – such as “threat to peace and security” and “internal” or “international conflict” – follows and quotes the Tadić Decisions.

So, apart from the legal instruments (Statutes, and UNSC Res as *legislation*), the *suo motu* discourse of ad-hoc Tribunals, regarding their own legitimacy (as legality) can be found:

⁴³ Case n° IT-94-1-AR72.

⁴⁴ Case n° ICTR-96-15-T.

⁴⁵ Actually filed by another defendant, Joseph Nzirorera, in the case of the Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera (case n° ICTR-98-44-R73) (Karemera case: ICTR-97-24).

⁴⁶ Trial Chamber III, Decision on renewed *Motion* to dismiss for lack of jurisdiction..., 5 August 2005, §§ 5 and 6.

- In its jurisprudence (decisions); and within these
 - In the decisions regarding legitimacy/jurisdiction challenges,
 - On preliminary motions (as per the Statutes of the ICTY and ICTR),
 - of which there are four cases – two in each ad-hoc Tribunal,
 - and they all follow the main arguments set on the first:
 - the Tadić case.

The proceedings of all of the Duško *Tadić* case are, for this research, of less interest, as only the separate proceedings on the cited *Motion* present an interest so as to extract useful conclusions. On a different ground – the authenticity of the research material – particular attention must be given to the Tribunal's own discourse, i.e., the ICTY Decisions. Such an option is primarily based in the need for a clear delimitation of the subject: the Tribunal's own self-legitimizing discourse. As a consequence, important parts of the proceedings (such as the Prosecutor's response to the defence *Motion*, or the submission by the US Government, relevant as they are for the understanding of the discussion) are not primarily sources of research. Despite being included in this group, the defence *Motion* (or *Trial Motion*, including motion and supporting Brief) will be thoroughly reviewed, as it sets the questions which the Tribunal *must* answer, even if by a recognition of lack of competence to answer.

Section I – The Defence *Trial Motion*

The Defence *Motion*, filed on 23 June 1995, that became the landmark of the challenges to the ad-hoc tribunals' legitimacy, is in itself rather simple and short. The review of arguments from this point on is not to be read from a legal theory perspective, but rather as a cultural analysis, aiming to find the gaps or references that made such discourse possible at the time of enunciation and decision making. In half a page, with three arguments, the Defence requests three alternative rulings, aiming to dismiss the case or the charges.

Firstly the Defence summons Rule 73 (A)(i) of the RPE – currently Rule 72 (A)(i)⁴⁷ – as the legal basis for challenging the jurisdiction of the Tribunal, only then stating the *Motion* itself, in which affirming:

1. That the Tribunal is legally unfounded, therefore:
 - 1.1. Its jurisdiction constitutes an infringement of the State's sovereignty; and
 - 1.2. Its primacy over national courts is also an infringement of that sovereignty.
2. That the Tribunal does not have material jurisdiction to try the crimes under Articles 2-5⁴⁸ of the SICTY, as these fail to determine or describe the contents of the offences, as required in substantive law.

The *Motion* ends requesting the dismissal of the case or, alternatively, of the charges, adding the formula – usual in most legal orders – allowing for other options the Tribunal might find to suit the request.⁴⁹

Formally, in the Trial Chamber, the Defence *Motion* challenging the legitimacy of the Tribunal had three lines of argument: (i) the illegal establishment of the Tribunal; (ii) the wrongful primacy over national courts; and (iii) the lack of jurisdiction *ratione materiae* (subject matter jurisdiction). However, the first challenge will prove to be on the legitimacy of the tribunal (rather than on its jurisdiction), while the other two, both on jurisdiction, are divided into the questioning of primacy of jurisdictions (national v. international), and the specific substantive law on the case (the operative articles defining the crimes) as per the indictment of Duško Tadić.

⁴⁷ The Rule “Preliminary Motions” adopted in the original version of the RPE on 11 February 1994 was amended on 10 July 1998, 4 December 1998, 21 July 2005 and 12 July 2007.

⁴⁸ Article 2: Grave breaches of the Geneva conventions of 1949; Article 3: Violations of the laws or customs of war; Article 4: Genocide; Article 5: Crimes against humanity.

Note: the original version of the SICTY was first amended on 13 May 1998, by UNSC Res. 1166, after the proceedings we refer to in this research. Furthermore all of the nine amendments refer to the Judges' Status or Mandate (term) or to the composition of the Chambers, with no amendment affecting the relevant Articles cited in the Tadić case.

⁴⁹ Requesting, as third option: “Such order(s) as the Trial Chamber may deem fit to make in the circumstances” (Trial Motion, Motion: 2).

(A) Preview

It is important to note, first and foremost, that such challenges imply a variety of questions to the legitimacy of the ICTY rulings. Should the arguments of this case be taken, the consequences on the Tribunal's capability to hold ground as an organ created *to restore international peace* could fade. Before we even start to review the Tribunal's own line of argumentation, in the Appeal as in the Trial, it might be useful to clear up those consequences by analysing the Defence *Motion* arguments and discourse.

1. Illegal establishment of the Tribunal.

The argument here can be said to be somewhat internal in nature, as it appeals to the ICTY to address the UNSC Res. which established itself. This particular challenge – most important to our research – could have a string of consequences:

1.1. If the Tribunal accepted to review such a challenge, it would no longer be defining the limits of its jurisdiction, i.e. the Tribunal would not be, by the use and consideration of known legal instruments, searching for the provisions it could and should apply in the cases it was empowered to review. On the contrary, the Tribunal would be stepping up a level, reviewing the legality of the procedure of the Organ which created the Tribunal, and furthermore, such a review would focus exactly on such actions as those that effectively created the Tribunal. A path which would be forcing one instance to review the action of another, while the first is created by the latter, and the reviewed action is in fact the creation of the first. Despite the paradox of addressing an organ for it to recognize the illegality of itself, the strength of a favourable decision would be unquestionable, as the ICTY, created by the UNSC, would be the one recognising the illegality of the UNSC action in creating it (ICTY).

1.2. Disregarding the question of jurisdiction over the UNSC Resolutions, the ICTY, on reviewing the legality of its own establishment, would be judging in its own (interest) cause. If the Tribunal, i.e. the Judges, recognised an

applicable jurisdiction, or better still the criminality of the actions it was supposed to prosecute (in the sense of set of norms that address such events as the ones that occurred in the former Yugoslavia), it would forcefully be recognising the need for an instance to prosecute those crimes in – i.e. a court. The only question to answer would be which court? A national or international court? Since the Judges who make up the ICTY would have to recognize the lawfulness of an organ they were nominated to, and accepted such nomination, any review of such legality could be biased. The argument is particularly compelling if the decision favours the continuity of the tribunal, and the Judges, as it reinforces the legality of their own nomination. In the end, the very review addressing the question of illegal establishment of the Tribunal casts possible doubt on the impartiality of a negative decision for the *Motion*;

- 1.3. Should a positive decision be reached, and a paradox created: the Tribunal would decide it was illegal to establish the Tribunal, making this latter's Decisions void, or better, null, i.e. the consequence would affect the very Decision of lack of legality. But even then an effective consequence could arise: the possibility of a judicial review of an UNSC Resolution to declare this latter illegal. Even not considering, for this matter, the fact that the created jurisdiction would declare illegal the actions of its "legislative" creator, a new possible jurisdiction for the review of political decisions of the UNSC would be set. And the review would be of political decisions as that is the only possible type of action which would justify for a UNSC Res. to establish a subsidiary organ of a judicial nature.

2. Wrongful primacy over national courts.

The argument of primacy, though less appealing, could bear more practical force by its political implications, or lack of same. Not challenging the UNSC, nor the creation of the Tribunal, the argument conforms with the main points summoned to

legitimize the ICTY.⁵⁰ Such an attitude avoids the ill disposition as described above, over the consequence of the illegality of the establishment of the Tribunal altogether. Rather cleverly it implies that even when such an International Tribunal exists it would only have a supplementary role, when national courts would lack the capability to prosecute such crimes.

This question might have a double standard consequence as (i) it might save the face of the UNSC determination to create a tribunal, and (ii) render it inoperative due to a national court's actions.

The base line question would be the respect for sovereignty, whereby the Tribunal, i.e. the UNSC creation, should comply with due respect for the State's sovereignty, and only after proven – effective and not presumed – incapability for such State level institutions to render justice, would an International body, such as the Tribunal, be competent to step in.

The underlying doctrine here would keep the inviolability of the State, interpreting the establishment of the ICTY not as an intervention, but rather as a complementary guarantee of justice. However, such an interpretation could easily lead us to consider the ICTY not as a subsidiary organ supposed to “maintain or restore international peace and security”, but rather as a new and external jurisdiction, which would not be imposed, as intervention, in so far as it would respect the national courts primacy. Either way the claim of UNSC, acting under Chapter VII, as proposed in the *UNSG Report* and adopted by the UNSC, would fall.

3. Lack of jurisdiction *ratione materiae*.

The very compelling argument rests upon the distinction between internal and international conflict. The case is that international jurisdiction, applicable to

⁵⁰ See generally Cryer (2005: 127-142), particularly the framing of the primacy regime of the ICTY, 127-132.

international conflict, could only be considered, when facing internal conflicts, when international crimes were committed. In the case under review, should the ICTY consider the conflict as internal, only crimes against humanity could, according to the Defence, eventually be called upon for prosecution in an international jurisdiction, leaving, on the contrary, crimes of war outside the ICTY jurisdiction.⁵¹

A side effect of such a review would be, and in fact was, the necessity for a judicial body such as the ICTY to review a political conclusion over the Yugoslavian conflict(s). The case is particularly important given the legal justification for the UNSC intervention, in creating the ICTY, appealing to its conclusion that the conflict in the former Yugoslavia represented an international threat. To review the issue the ICTY would have to make a political evaluation considering the facts, an option usually outside the competence of judicial bodies, given both the principle of legality (application of the law) and the separation of powers (making it inappropriate for courts to review policies or discretionary acts of political nature).⁵²

(B) The Brief in support of the *Motion*.

Separately the Defence filed a Brief⁵³ in support of this *Motion* where arguments are put forward regarding each of the Claims:

1. For the illegal establishment of the Tribunal:
 - 1.1. The lack of a Treaty;
 - 1.2. That only the UNGA might assure international legitimacy; and
 - 1.3. The lack of competence of the UNSC.

⁵¹ As later discussed, when reviewing the Trial Decision, this understanding of the Defence is not settled, nor even generally accepted, as the customary nature of the "laws and customs of war" is widely accepted to limit the action of belligerents engaged in internal conflicts.

⁵² Although outside the scope of this research, this question cannot be completely set aside, given its discussion as a central argument of the ICTY competence to pass judgment on its own legitimacy, i.e. to review the political act of its own establishment (see *infra*).

⁵³ "Brief to support the Motion on the jurisdiction of the Tribunal", filed in 23 June 1995, in the ICTY case: The Prosecutor of the Tribunal v. Duško Tadić (Case n.º IT-94-T), hereinafter "The Brief", or, as reference "(Trial Motion, Brief)".

2. For the wrongful primacy over national courts – as a denial of accused right to be judge in their jurisdiction:
 - 2.1. The domestic jurisdiction within the internationally recognized sovereignty of Bosnia-Herzegovina;
 - 2.2. Sovereignty of States;
 - 2.3. *Jus de non evocando*;
3. For the lack of subject matter jurisdiction – mainly based upon the qualification of “internal conflict”:
 - 3.1. lack of substantive law;
 - 3.2. lack of jurisdiction regarding the Geneva Conventions;
 - 3.3. lack of jurisdiction regarding laws of war;
 - 3.4. lack of jurisdiction regarding IHL.

1. Illegal establishment of the Tribunal

On the illegal establishment of the Tribunal three main sustaining arguments are set: (1.1.) the lack of a treaty; (1.2.) that, in the absence of such treaty, only the UNGA might assure the international legitimacy to establish the Tribunal; and (1.3.) the ill-founded establishment of the Tribunal by the UNSC. So, after identifying possible consequences of the *Motion* requests, the analysis of the *Motion's* arguments is made based on this Brief (both hereinafter referred to as the *Motion*).

1.1. The lack of a Treaty.

The main argument presented being the need to respect State sovereignty.

- 1.1.1. However, in an ambiguous way, the Defence argues the implied need for States to be able to make their (dis)approval known, i.e. the establishment of an international jurisdiction implies taking into account the State sovereignty, which in turn implies the opportunity to make their (State's) will known.⁵⁴

⁵⁴ Trial Motion, Brief: 2.

This argument does not, however, seem to be necessarily true, at least in the case of alternative measures of administering justice; i.e. should the tribunal *not* have primacy over national courts, and/or administer justice only outside national borders, then the State sovereignty would be respected *within* the State territory, the only *loci* submitted to that sovereign power, even though a different solution (jurisdiction) would be applied to every individual actor outside that territory. In such a case, the knowledge of the State's will is irrelevant for the jurisdiction to be established outside its borders, even if it relates to events which occurred within its borders, on an internationalized version of internal rules regarding foreign actions (as, e.g., internal rules fighting international corruption or money laundering).

Regardless of this, the first stone of the path the Defence describes, so as to connect the establishment of the Tribunal with the need for a treaty, can be summarized in the following link: taking into account the State's sovereignty (when establishing the jurisdiction) involves the possibility of the State's will to be known.

1.1.2. Concurrently the *Motion* argues that for such (State) will to be known, the Tribunal should have been based on a treaty.⁵⁵

Again – easy as it may seem to a post-Rome Statute reader – this does not seem to be necessarily the truth. A decision by an organ, of an international organization of which the State is Part/Member or is represented in, might just achieve that goal. The underlying argument that such an international organ/organization would itself be based upon a treaty cannot benefit the Defence's argument: as the UNSC emerges from the creation – by treaty – of the UN, which would, following the Defence argument, legitimize the Tribunal. In fact that was the case here, as the Federal Republic of Yugoslavia (Serbia, with current Kosovo, and Montenegro) issued a letter on the matter addressed at to the UNSG, but explicitly aimed to reach both the UNGA (A/48/170) and the UNSC (as per S/25801), hereby

⁵⁵ *Ibid.*

exposing its disagreement to the establishment of the Tribunal.⁵⁶ The underlying question, therefore, is not whether a treaty form is needed for the sovereign will to be known, which is not the case, but rather if a treaty is needed for that will to be respected. At odds are the concepts of the UN as an intergovernmental organization or a supra-national organization, i.e. is the UNSC above sovereignty? Was there a freely willed full transfer of sovereignty from the State(s) to the UNSC, to which states are now subjects? And if so, does that transfer of sovereignty affect the State power to determine its jurisdiction, i.e. to prosecute and try its citizens (Alvarez, 1996: 252, 256)?

On an apparent reversal of its support for a universal criminal court,⁵⁷ the Yugoslavia (F.R.Y.) letter goes on to ascertain the illegitimacy, based on the illegality, of the establishment of the Tribunal (ICTY), as the UNCS would have no mandate under the Charter (Chapter VII and Article 29). Also referred to were past failures to establish a permanent Tribunal, because of the dissent of some nations or the concordance with the group following the thesis that such a Tribunal would have to be established by Treaty. Furthermore, again oddly, the Yugoslavia letter to the UNSG remembers the OSCE position, in which a UNGA decisive influence might be enough to legitimize such Tribunal. All these arguments the Defence Brief fails to explore, when calling on the need for the possibility of the will of the State to

⁵⁶ In so doing that State did not follow the Defence argument, as it considered that, for its will to be known, there was no need for a treaty, a simple letter to the International Organization was enough.

⁵⁷ Yugoslavia (F.R.Y.) itself, in the above-mentioned letter – acknowledging its support for a permanent criminal court and a universal jurisdiction – leaves the emphasis on the discriminatory option to try war crimes and crimes against humanity in Yugoslavia, leaving all the others be (examples given such as: Korea, Vietnam, Algeria, Cambodia, Lebanon, Afghanistan, DRC, Iraq or Panamá). On a parallel note, Yugoslavia claims that the universality of such war crimes makes it more difficult to accept a reduction of jurisdiction to the former Yugoslavia, an act that would no doubt violate the principle of universality, and that of equality, an argument later recovered by the Defense when arguing the lack of subject matter jurisdiction. A final approach to this argument is made by questioning the impartiality of a Tribunal created by an Organ that already seems biased against “Serbs”.

be known, without explaining why it would have to be through a Treaty, and not a letter to the UN (UNSG and UNGA) as issued by F.R.Y.

1.1.3. For such argument the Defence appeals to several authorities, but mostly to letters from UNSC members and others (States).

The Defence summons, in support of its argument, the UNSG Report⁵⁸ and eight letters or statements from member States,⁵⁹ all regarding the ICTY, forgetting however other submissions, such as those made by Italy, USA, Canada, and Egypt, but more significantly the above-mentioned letter by the F.R.Y.

Overlooking the difference between political positions and effective binding legal norms, the Defence fails to derive legal interpretations of the Charter from these cited authorities.⁶⁰ If the (politically) preferred path of establishment would be a Treaty – not posing any theoretical doubts or difficulties, given its well established role in international law – that does not necessarily mean that, within a certain international organization, such as the UN, the will of the State could not be made known by a simple letter, declaration or vote.

This chosen line of argumentation weakens the Defence point, as it does not attack the legality of the novelty, leaving the argument of lack of a treaty dependent on the form of notice of the State's will. This strategy does not put forward the issue that, according to the UN Charter, the UNSC lacked the power to supersede the State's judicial sovereignty, a compelling argument for the need of a treaty, and one abundantly exposed by several of the cited authorities on their own

⁵⁸ S/25704.

⁵⁹ Namely letters from Mexico (S/25417), Brazil (S/25540), The Netherlands (S/25716), France (S/25266), and Sweden, this last on behalf of the CSCE (S/25307), and the statements made in the proceedings of the UNSC by China, the UK and Spain (S/PV.3217), regarding the "undermining" of the ICC.

⁶⁰ Opposite of what it does later when addressing the competence of the UNGA, the Defence completely misses the direct confrontation between State legitimacy and UNSC legitimacy, a very compelling argument numerous times addressed in the wide range of *fora* for the much debated "lack of representation" of the UNSC.

statements: in particular the excuses in the UNSG Report for not choosing the form of a Treaty, and the cited subsequent positions by UNSC members which, though recognizing the emergency, do affirm their doubts on the new path, questioning the legality of the UNSC *power* to create Tribunals as a general rule.

The tangential reference made by the Defence to the abnormality of such establishment rests: (i) on the fact that an ad-hoc tribunal was not intended as a general rule,⁶¹ a non-proceeding argument since the ICTY is an ad-hoc Tribunal, therefore non-permanent; and (ii) that such an ad-hoc Tribunal might undermine the intention to work on the creation of a permanent International Criminal Tribunal.⁶²

Even not evoking our post-prognosis knowledge of the ICC, the authorities summoned in the Brief, as the UK and Spain statements (S/PV.3217), are the first to declare their will to continue to work towards the goal of a permanent court, therefore indirectly affirming that their vote for the establishment of the ICTY does not compromise the future creation of that other tribunal. Again, the argument by the Defence fails before showing its merits. Should the Brief go on to explain, in this context, why the UNGA should worry about the future creation of a permanent court, a point might be made relating to the recognized/recognizable powers of the UNSC v. UNGA. Quite on the contrary, the Brief only underlines those positions raised in the UNSC which detach themselves from the possible consequences regarding this particular case, thus summoning the reasons for this argument not to proceed.

1.2. Only the UNGA might, in the absence of a Treaty, be able to assure the international legitimacy to establish the Tribunal.⁶³

⁶¹ A reference made by summoning the "intention" of the International Law Commission – point 1.2. See Trial (Motion, Brief: 2).

⁶² Trial Motion, Brief: 3.

⁶³ Trial Motion, Brief: 2-4.

This argument is here summoned in alternative to the previous, and not concurrently as we have referred to above. The Defence, by avoiding the issue of the powers of the UNSC v. UNGA, limits its argument on the need of a Treaty to the possibility of the (sovereign) State to make its will known – an argument that falls when (alternatively) considering a rightful establishment by the UNGA.

The Brief claims that: only the UNGA is able to guarantee a full representation of the international community; the UNGA urged the UNSC to recommend the establishment of the Ad-hoc tribunal; the UNGA would have competence to establish a tribunal; and finally that the UNGA was also competent to amend the Charter.

1.2.1. UNGA and representation of the international community.⁶⁴

All too briefly the Defence refers to the UNGA as the only international organ able to guarantee a full representation of the international community. Even if we can understand, within the international political stage, the almost self-evident nature of the claim, from a legal perspective the Defence takes for granted the irrelevance of numerous legitimacy challenges to the UNGA, in particular:

- a) The fact that not all the sovereign entities are represented in the UNGA;
- b) A discussion of the UNGA powers might raise the question of legitimacy, primarily regarding the majority rule and the absence of veto;
- c) The nature of the UN and its organs.

The Brief ends up resting this argument on the accompanying argument that UNGA's competence might derive from the fact that a state's sovereignty was at stake. In so doing, regarding the UNGA, the Defence fails to address questions of an identical nature to those it poses to the UNSC. Furthermore, if, following this argument by the Defence, we can find – as we will – some sort of a “statement of intention”, by the UNGA, favouring the creation of the ICTY, the way in which it is established might easily be justified by the arguments effectively used by the

⁶⁴ Idem, 3.

UNSG – i.e. if the UNGA's will is to create the Tribunal, the urgency of such action can justify the action of the UNSC.

1.2.2. UNGA Resolution.⁶⁵

Countering the previous line of argumentation, the Brief refers to a UNGA Resolution, adopted on 18 December 1992 (A/RES/47/121), whereby the Assembly urges the Council to “consider recommending the establishment of an ad-hoc international war crimes tribunal”, as any further action by the UNGA would constitute a breach of the rule in Article 12(1) of the Charter (see Appendix I). The UNGA Resolution is cleverly used by the Defence to propose that such position shows that the UNGA did not intend to “give the Security Council a full and exclusive authority in the matter”, a claim the brief supports with further reference to some State's statements, such as Mexico's (S/25417) and Brazil's (S/PV.3217). However, the conclusion of the Brief, on “the international community's intention to remain actively involved in the establishment of the Tribunal” (Brief, 2.2. § 2), as opposed to an action by the UNSC seems far-fetched, thus raising the doubt as to whether the UNGA – in breach of its objectives – was anticipating, and thus attempting to prevent, the UNSC from its “regular” use of powers under Chapter VII.

The text of the UNGA resolution does in fact permit such literal interpretation, but it also entails the possibility that the UNGA, while assuming its own responsibilities, was only: (i) recognizing both the seriousness of the reported abuses in the Former Yugoslavia, *maxime* in Bosnia-Herzegovina, and (ii) the urgency for taking such decisions as to render effective previous resolutions, including, mostly UNSC Resolutions (UNGA Res., § 3.), and furthermore (iii) recognizing the need for measures to be taken under Chapter VII (UNGA Res., introduction, § 13), thus denying the underlining of any attempt to prevent the use of these powers.

⁶⁵ *Ibid.*

So, it does become clear, from the text of the UNGA Resolution, that the Assembly was “gravely concerned” (*Idem*, § 9) with the matter, and condemned the non-compliance with previous resolutions (*Ibid.*, § 10) both by the Assembly and the Council (*Ibid.*, point 3.), but also convinced that the situation warranted “the implementation of decisive actions under Chapter VII of the Charter”. Accordingly, even though expressing the intention to remain actively involved in the issue (both the situation in former Yugoslavia and the possible establishment of an ad-hoc Tribunal) the UNGA, representing the international community as proposed by the Defence, recognizes the urgency for measures to be taken under Chapter VII. As we know, Chapter VII is devoted to action(s) with respect to threats to the peace, breaches of peace and acts of aggression, all actions within the powers of the Security Council, as per Article 24, n.º 2 of the Charter. This argumentation, sufficient to clarify the possible (legal) intentions of the UNGA reference to Chapter VII, becomes clearer when the text of the resolution “urges the Security Council to consider recommending” (UNGA Res. 10.). In fact, according to the rules in Chapter VII, under which “decisive actions” the UNGA considers justified by the situation in hand, the UNSC “shall make recommendations, or decide what measures shall be taken” (Charter, Article 39).

As a conclusion one might consider that the UNGA resolution not only expressly recognizes the situation as justifying actions under Chapter VII, i.e. within the powers of the Council, but also, and furthermore, implicitly recognizes the UNSC powers to decide on its own, thus (only) urging the Council to consider other options, i.e. recommending the action to the Assembly. The arguments set by Mexico and Brazil follow the same logic, preferring the involvement of the Assembly, but not refuting the Council's powers, in the case of Mexico, by using the term “should” when addressing the need for UNSC actions to respect sovereign rights of States (despite Article 24, n.º 1 of the Charter), and with Brazil expressly using the term “preferred”, when addressing the possibility for the establishment of the Tribunal to allow a broader participation by all member States of the UN. Should these positions be less clear, and the quoted statement by Brazil

further reads that this State considered it appropriate for the matter *also* to be brought to the General Assembly, i.e. recognizing the UNSC action, but also considering it might, or should, be reinforced, but never questioning the UNSC powers.

1.2.3. UNGA competence to establish the Tribunal⁶⁶

The Defence then contests the UNGA competence to establish a tribunal. Without ever expressly stating this competence to be exclusive of the Assembly, the Brief does imply such limitation by asserting that "if any organ of the UN could be said to be competent to attribute jurisdiction to an International Criminal Court, it would be the General Assembly."

To support the conclusion, the argument rests upon the UNGA's "competence in any questions or matters appearing within the scope of the Charter (Articles 10 and 11)" *vis-à-vis* the power to establish subsidiary organs (Article 22). The systematic interpretation of the Charter makes it abundantly clear that this latter norm on the establishment of subsidiary organs does not add to the Defence argument. In fact Article 22 and Article 29 have exactly the same rule, regarding the UNGA and the UNSC respectively, whereby the key note, "necessary for the performance of its functions", refers to the only possible differences: each organ's functions.

The Brief calls only on Articles 10 and 11 of the Charter to define UNGA competence within this matter, thus limiting the interpretations of those "functions" according to these powers. But the definition of the Assembly's functions and powers in Charter spans from Article 10 to 17.

In Article 10 the Charter establishes the UNGA general powers to *discuss*, and not to decide, any questions or matters within the Charter, further clarifying the power to make *recommendations*, and not decisions, to States and the UNSC, "except as provided in Article 12". If this does not mean that the UNGA cannot adopt a

⁶⁶ *Ibid.*, 3-4.

resolution including decisions, it does however limit those decisions, especially in regard to the UNSC sphere of action.

In Article 11 the Charter lists some key examples of questions and matters to be addressed by the Assembly, namely: general principles; maintenance of international peace and security, "except as provided in Article 12"; and to bring to the attention of the UNSC situations likely to endanger international peace and security. Its the Charter which further clarifies that such powers do not limit the general scope of Article 10, contrary to the Defence line or argument..

In both Articles the Charter (i) does not mention the power of the Assembly to decide the taking of any action regarding international peace and security, but rather the power to discuss and recommend; and (ii) it explicitly recognizes due respect for the exception in Article 12. Now, Article 12 prohibits the UNGA from making even a recommendation regarding any dispute or situation which the UNSC might be addressing (exercising functions assigned to it in the Charter).⁶⁷

As a conclusion one may note the lack of a proper discussion on the possible confrontation between the powers of the Assembly and the Council. Limiting the argument to only two Articles further deepens the Defence's discourse logical gap between the invoked powers (Articles 10 and 11) and the proposed conclusion of the exclusive competence of the Assembly. The summoning of Articles where an explicit exception is operational would on its own weaken the argument, if, as in the case, the exception shelters the Council's actions from the possible interference of the Assembly, the argument invalidates the conclusions:

- a) The fact that the UNGA can address any questions, does not mean it can decide them;
- b) If the UNGA can make recommendations, it does mean the decisions rest elsewhere;

⁶⁷ See article 12, n.º 2, reference to "matters relative to the maintenance of international peace and security", regarding the procedure of notification of the UNGA, clarifying which matters being dealt with by the UNSC (see Appendix I).

- c) The general competence of the Assembly does not preclude specific, special or parallel competence of other UN organs;
- d) According to the summoned Articles, even these powers of the Assembly are somewhat suspended regarding matters being dealt with by the UNSC, as was the case;
- e) So, if the Assembly urges the Council to propose, it recognizes that the Council does not necessarily have to.

Finally the Brief refers, by reference to the position of the Organization of the Islamic Conference (O.I.C.),⁶⁸ the possibility of the UNGA approval of the Statute after “the adoption of the Security Council resolutions providing for the creation of the Tribunal”. Disregarding the fact that the invoked position by the O.I.C. included a prohibition to challenge the courts legitimacy (S/25512, Annex, I, 5.), the said document expressly recommends the establishment of the Tribunal by the Council under Chapter VII, contradicting its misuse by the Defence.

1.2.4. UNGA Competence to amend the Charter.⁶⁹

In the same reasoning path, the Brief invokes the UNGA competence to amend the Charter (Articles 108 and 109), presenting a possible solution analogue to Chapter XIV (The International Court of Justice). The base line argument here would be to overcome a not invoked, but implied, lack of prevision for the solution at hands (the ICTY) within the Charter. When asserting the UNGA's competence to amend the Charter, the Brief fails to refer the role of the permanent members of the UNSC.⁷⁰

Firstly one should note that the (Defence) challenge, to the solution followed in establishing the ICTY, does not imply invoking or proposing other solutions. Taking this approach, distancing the challenge from the facts that *are* towards hypothesis

⁶⁸ UN Doc. S/25512.

⁶⁹ Trial Motion, Brief: 3-4.

⁷⁰ The *de facto* veto power of any amendment given by the Charter to the permanent members of the UNSC – Article 108, *in fine*; and Article 109, n.º 2, *in fine*.

that *might be*, the Defence strengthens a reply addressing the UNSC powers, regardless of other possible solutions by the UNGA.

Secondly, the intended analogy, between the ICTY and the ICJ, lacks the similarities needed for as: (i) the ICTY would be an *ad-hoc* court, as intended both by the UNSC (Res. 808) and the UNGA (resolution from 18 December 1992), unlike the ICJ, of a permanent nature; (ii) The ICTY was meant to deal with an ongoing situation posing a threat to international peace and security, while the ICJ aimed to deal with general future disputes; (iii) the ICTY would have to have a criminal jurisdiction, unlike the ICJ.⁷¹

Last, and more compelling to dismiss the Defence argument, the ICJ wasn't established by the UNGA but by treaty. Meaning that, again, a comparison with the ICTY would fail to prove the need for the intervention of the Assembly.⁷² We recall the detour in the Brief, by which the power to amend the Charter is invoked in this regard, however, *mutatis mutandis*, the generally recognized urgency for a criminal jurisdiction *ex post* – also recognized by the UNGA in the 18 December Resolution – wouldn't be compatible with such due process. By calling on Articles 108 and 109 of the Charter, the Brief refers to a particular process of amendment: the calling of a General Conference;⁷³ and the subsequent need for ratification.⁷⁴ This process would render impracticable and ineffective the establishment of the Tribunal for its announced purposes and with the recognized urgency.

⁷¹ As recognized by the Defence in the beginning of the hearing of the *Motion* (Affaire IT-94-1-PT, 25 July 1995), in the preliminary intervention of Mr. Wladimiroff, by the Defence (Trial hearings: 194).

⁷² One should take note of the lack of any explicit mention to specific ICJ proceedings, cases, in support of this argument. The reference, thus, should be understood as a mention to the Statute of the ICJ, as part of the UN Charter (Article 92).

⁷³ Or alternatively, with an abrogating interpretation of Article 108, by sheer power to propose amendments without a General Conference.

⁷⁴ "In accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council".

As a conclusion one can speculate that a better strategy might be to keep only the challenge of *legitimacy to establish the Tribunal* to the all UN, should the Brief insist on recognizing the competence of the UNGA, neither the amendment procedure nor the given analogy favours the Defence quest. An alternative path might draw on the discussion of the powers of the UNGA to establish the Tribunal *without* amending the Charter, as any other option falls on a procedure analogue to a treaty. However, this line of argumentation, as much of the remaining ones, seems to fall into a confrontational rhetoric which, through the incoherence of the mutually contradicting alternatives presented, lacks the appeal and acceptance and logical strength of culturally recognisable institutions.

1.3. III-founded establishment of the Tribunal by the UNSC.⁷⁵

The Defence finally addresses the question in review, UNSC powers, parting from alternative solutions which might or should have been. The key note of this challenge rests on the notion that the UNSC lacks the competence to create this subsidiary organ, and to delegate on it powers itself does not have, i.e. the possible violation of the principle *nemo plus iuris transferre potest quam ipse habet*.⁷⁶ So as to support this claim of invalid establishment of the Tribunal, the Brief summons seven⁷⁷ main arguments:

- 1.3.1.the inexistence of an international conflict;
- 1.3.2.the lack of UNSC authority under Article 41 of the Charter (Brief: 58);
- 1.3.3.the lack of authority under any other provision of the Charter (Brief: 60);
- 1.3.4.no involvement in humanitarian law (Brief: 62);
- 1.3.5.the subsidiary nature of the organ /lack of independence (Brief: 66);
- 1.3.6.the lack of exceptional circumstances (Brief: 68); and
- 1.3.7.the lack of authority over individuals (Brief: 69).

⁷⁵ Trial Motion Brief: 4-8.

⁷⁶ Principle according to which an organ cannot delegate a power itself does not have.

⁷⁷ Trial Motion Brief: 4-8.

1.3.1. The inexistence of an international conflict;

Here the key argument made by the Defence is to assume the need for an international conflict as a prerequisite for the UNSC to have the competence to determine the existence of any threat to international peace and security, i.e. the filling of a condition for the application of Article 39 (and all of Chapter VII) of the Charter. According to the Brief the Tribunal is not a measure included in Chapter VII,⁷⁸ the conflict occurs within one State, making the conflict of an internal nature,⁷⁹ there are no links between the factions and other countries,⁸⁰ and there was no spill-over.⁸¹

Meaningfully the Brief fails to refer the first part of Article 39, according to which, and with no known literal or implicit condition or limitation, "The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression". Only after conferring such wide power to determine the threat, Article 39 states the UNSC powers to be exercised "to maintain or restore international peace and security". So, it's the results that are expected to be related to international peace and security, and not the threat to peace that must be international, thus rendering these all line of argumentation useless to the *Motion*. We shall, however, review the arguments presented in support of this (erroneously) assumed precondition for the exercise of Chapter VII powers by the UNSC.

1.3.1.1. That the establishment of the Tribunal is not a measure within the scope of Chapter VII.⁸²

A double approach can be considered regarding this specific point:

- a) an international conflict as the precondition for the UNSC to be empowered to enforce measures; and

⁷⁸ Trial Motion, Brief: 4.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Trial Motion, Brief: 4-5.

⁸² Trial Motion, Brief: 4.

b) the inclusion or not (in Chapter VII) of measures of a judicial nature.

As this latter argument is further presented, from the opposite perspective (besides denying the existence of the international conflict, autonomously challenging UNSC powers under Article 41 to take judicial measures – Brief: 5), we will leave than critique to the analysis of the claim that a measure of a judicial nature is not included on Chapter VII (Article 41).

The first approach, expressly invoked by the Defence,⁸³ rests upon the claim that “the conflict between the Serbs and the Muslims within the borders of the Bosnia-Herzegovina is clearly not an international issue.” Cleverly, the Brief uses the word “Issue” and not “conflict”, thus implicitly questioning the international nature of the possible threat (as we’ve seen earlier an internal conflict can pose an international effect/threat/issue). This openness, to the possibility that even if the conflict is of an internal nature it might have international implications (“issues”), ends harming the Defence, as despite denying such international issues/effects, the sheer possibility reinforces the UNSC discretion to determine such threats.

1.3.1.2. The territory of the conflict, Bosnia Herzegovina, is one State, making the conflict of an internal nature.⁸⁴

The Defence argues with the recognition of Bosnia-Herzegovina as an independent State, and the lack of intention to recognize the Bosnian Serb Republic, mainly by the European Union.

However, the claim on the internal nature of the conflict can only hold ground, so as to challenge the legitimacy of the ICTY, if the establishment of the Tribunal depends on the international nature of the conflict, in any other case, the inter/national nature of the conflict becomes irrelevant to the question. As we’ve explained above in this same point of the arguments, *international* is the peace and security the UNSC is due to protect, but the recognition of a threat, a discretionary

⁸³ Trial Motion, Brief: 4, point 3.1.1. *in fine*.

⁸⁴ Trial Motion, Brief: 4.

power of the Council, does not necessarily have to be international, e.g. the possible spill-over of a conflict or the domino effect from the struggle for resources in an exodus, but also the maintenance, by one single country, of a credible threat against international peace or security.

Since, to legitimize UNSC action under Chapter VII, there is not a precondition of an internationalized conflict, the argument by the Defence, truthful or not, is irrelevant for the legitimacy challenge to the establishment of the Tribunal.

1.3.1.3. The lack of formal links between the factions and other countries.⁸⁵

Oddly the Defence further pushes the argument of the internal nature of the conflict, and not of the threat, not to show the impossibility of such conflict to affect the international peace and security, but rather to almost recognize the international links of the parties in conflict. By stating that such links "have never been formally established and can anyway be considered to have been broken off", the Defence adds nothing to the legitimacy challenge, but implicitly admits that some international links from the factions in conflict – though informal or past – might have occurred. An hypothesis which, on its own, raises the possibility of such conflict to have international effects.

1.3.1.4. The continuous nature of the conflict (throughout three years) and the lack of any spill-over.⁸⁶

The Defence notes that throughout the period of the conflict "the fighting has not escalated and spread to other countries". *Mutatis mutandis*, the reasoning for the previous argument is equally effective here except, apparently, for the last part. Claiming the contention of an internal conflict might reasonably condition international intervention, however, the general provision of Article 39 seems to be wide enough to pose few if any limits on the Council's discretionary powers to

⁸⁵ Trial Motion, Brief: 4.

⁸⁶ Trial Motion, Brief: 4-5.

"determine the existence of any threat to peace". *In extremis* the existence of a threat to peace does not even necessarily need the pre-existence of a conflict, but the verification of a threat. Again, it's not the occurrence of an international event that sets the standards for a UNSC Decision, but rather the possible effects on international peace and security, i.e. international peace does not have to have been affected, nor does the events that might be considered a threat need to be internationalized.

1.3.2. The lack of UNSC authority under Article 41 of the Charter.⁸⁷

In support of this point of the Brief, the Defence presents three arguments: that the list in Article 41 of the Charter does not provide for judicial measures; that such judicial measure is not effective, if not counterproductive, for peace; and that amnesty could be more effecting in reaching peace.

1.3.2.1. The measures in Article 41 of the Charter.

The Defence calls upon the list of non-military measures, in Article 41, to sustain the claim that "it is clear that the establishment of a war crimes tribunal was not intended." The Brief seems to contradict itself, on referring this list of non-military measures the Council may enforce under Article 41, as the Defence recognizes the list "may not be regarded as being exhaustive". The presentation of the literal argument (that Article 41 of the Charter does not provide for the establishment of a tribunal) although apparently accurate, reveals itself not to be correct, as further systematic interpretation of this Article leads to the conclusion that the provision⁸⁸ not only reinforces the exemplificative nature of the listing, but actually shows that the UNSC has the power to decide any other non-military measures.

The vague argument, that "it is clear that the establishment of a war crimes tribunal was not intended", is incompatible with an exemplificative listing of open-end

⁸⁷ *Ibid.*, 5.

⁸⁸ That the Security Council has discretionary power to decide what measures to be enforced, not involving the use of armed forces.

solutions. Making the claim that Article 41 does not provide for the establishment of a tribunal, as many other measures, the Defence could only benefit if able to prove the list to be exhaustive or, alternatively, if it proved the existence of a limit to the possible solutions, which it fails to achieve. However, since the list of measures in the second half of Article 41 is not exhaustive, the general rule, in the first half, clearly states that it is up for the UNSC to decide what measures are to be employed to give effect to its decisions, with the only limitation of not involving the use of force.

The additional argument (Brief: 5, *in fine*) that the measures listed in the Article are of economic and political natures, and “in no way suggest judicial measures” seems more compelling. However, it may be argued, still following a systematic interpretation of the Charter, that such measures can be a possible pressure adding to the call upon the parties, in line with Article 40. In the case, given the reports pointing to an ongoing “ethnic cleansing”, and the public and publicized will of both the Council and the Assembly, implied an effective criminal responsibility to those, individuals involved in the “form of genocide” (UNGA Res. Introduction, § 9).

So, the *numerus clausus* argument falls against the non-exhaustive list of measures, and the teleological argument falls also given the specific nature of the possible pressure to be added to the call upon the parties, in line with Article 40, i.e. the non aggravation of criminal acts which might now face prosecution. To suggest, here, that much of the Defence discourse is more rhetorical than persuasive, let alone logically convincing, namely underlines the lapse away from legal and ever towards political pleading.

1.3.2.2. Effectiveness of such judicial measure for peace.⁸⁹

On summoning this argument the Defence falls even further outside the scope of a judicial review, as the basic point is to question how the establishment of the Tribunal could contribute to peace, counter arguing that such Tribunal could even

⁸⁹ *Ibid.*

endanger a peace process, in a reference to the unwillingness of (judicially) prosecuted leaders to compromise in peace agreements.

However, *mutatis mutandis*, what we've said in the critique to the previous argument (on the form of pressure) could well justify the *détente* nature of the establishment of the Tribunal, at least facing a possible, and probable, aggravation of the reported "ethnic cleansing" in progress. On assuming its incapability to stop these actions and to enforce previous Resolutions, the UN (SC) could be using an individualized form of pressure, or promoting the individual consciousness of the criminal nature of ongoing actions by armed militias/military men.

The claim, regardless of its truthfulness, would imply an even more political judgment than the one focusing on the determination of a threat to international peace. The likelihood, or otherwise, of the establishment of the Tribunal contribution or prejudice to peace is not a direct necessary and logical consequence which could be subject to judicial review. So, surpassing the competence argument, the adequacy of the measure chosen, though arguable, can not be legally challenged on these terms, or at least the UNSC discretionarily use of its own powers can not be judicial reviewed on the basis of opportunity.

1.3.2.3. Effectiveness of an amnesty.⁹⁰

The question mark the Defence poses at the end of this argument does not preclude its advisory nature. Trying to compare cases like Argentina and South Africa to an ongoing armed conflict with reports of ethnic cleansing in Europe reveals a bad strategy to support a legitimacy challenge, as the aim of the establishment of the Tribunal is not a change of regime, nor to facilitate a transitional period, but to stop a specific type of criminal action during a conflict. Again, the fusion, or calculated confusion, of the legalistic yet overtly political argumentation is only apparent.

⁹⁰ *Ibid.*

1.3.3. The lack of authority under any other provision of the Charter.⁹¹

After questioning the legitimacy of the establishment of the ICTY by the UNSC under Chapter VII of the Charter, the Defence tries to put aside any other possible source of legal legitimacy according to the Charter, to do so, the Brief makes two claims: that the continuous extension of UNSC powers under Chapter VII must be limited; and that the judicial measure under Chapter VII cannot be founded on the general provisions of Articles 24(1) and 24 of the Charter.

1.3.3.1. Limitation to the extension of powers of the UNSC.

This apparently compelling argument on a judicial stage, *as per* the democratic principle of limitation of powers, fails to identify which are those limits that must be and that the establishment of the Tribunal is indeed a violation of such limits. So, even when agreeing with the general principles invoked, the Defence does not show nor prove any present risk of unlimited power.

On another note, it seems counter intuitive, not to say improbable, that the establishment of an International Tribunal (by the organ entrusted with the maintenance of international peace within the most globally representative international organization, and aimed to prosecute individuals responsible for crimes against humanity, and furthermore limited to apply existing International Criminal Law) could be proved to promote unlimited power. On the contrary, one might question how legally and legitimately could such Tribunal represent enough power so as to avoid unlimited powers to pursue criminal actions against humanity. Either way, though invoking a respectable principle, the Defence fails to prove its violation, rendering it inoperative to support the legitimacy challenge to the ICTY.

1.3.3.2. Judicial measures under Chapter VII unfounded in general provisions.

The Brief claims that the establishment of the Tribunal under Chapter VII cannot be founded on Articles 24(1) and 25, of the Charter (Functions and Powers of the

⁹¹ *Ibid.*

UNSC). The argument is unintelligible as the previous expositions in the Brief, also summoned here in support, contradict the claim: either the Tribunal was legitimately established under Chapter VII, and the connection with the general provisions of Articles 24 (1) and 25 follow the same path as any other measures under Chapter VII; or the establishment of the Tribunal was not legally established under Chapter VII of the Charter (as per the Defence previous claims) and the precondition of this current argument does not exist. If the tribunal was not established under Chapter VII, there would be no logical connection with such Chapter. Noteworthy Article 24 (1) refers to member states agreement that, when acting to maintain international peace and security, i.e. under Chapter VII, the UNSC is acting on their behalf, and, in Article 25 to the States acceptance of decisions of the UNSC according to the Charter (including Chapter VII).

An intelligible interpretation of the argument would be to consider that the Defence is actually claiming that any measures under Chapter VII cannot be founded on the general provisions of Articles 24 (1) and 25. If both Article 39 and 41 state that the UNSC decides, or may decide, measures regarding international peace and security, it becomes difficult to support that the provisions of Articles 24 (1) and 25, regarding the due respect for UNSC decisions by States, do exclude precisely the most important of those possible decisions. An argument explicitly inconsistent not only with systematic reading of these Articles (given Article 24 (2) and the wide scope of application of Article 25) but also, in the particular case of the mentioned Article 24 (1), with the text of the rule therein: the reference made to the effectiveness of the norm regarding UNSC actions and powers "for the maintenance of international peace and security" cannot exclude, in any legal, let alone logical, interpretation the "Action[s] with respect to threats to the peace, breaches of the peace, and acts of aggression" as per the epigraph of Chapter VII.

Another possible interpretation, arguing that this specific measure (the establishment of the ICTY) would violate articles 24 (1) and 25, would be illogical unless considering it a measure under Chapter VII, but limited by Articles 24 and

25. Even then, this interpretation could only be logical if Articles 24 and 25 would state explicit limitations to the discharge of powers under Chapter VII, a possibility which in fact occurs in Article 24 (2), but not incorporated by the Defence.

Despite the possibility of, and excuse for, a quite literal counterproductive mention to Article 24 (2) textual reference to the discharging of powers under Chapter VII, one is faced with the doubt if, in the Defence Brief, the missing mention, to this limitation to UNSC exercise of powers, does not reveal a hesitation in the speech, an uncertainty from the cultural references of those days to fulfil the general concepts on the "Purposes and Principles", in the Charter (see Appendix I).

1.3.4. No involvement in humanitarian law.⁹²

Here the Defence presents two lines of argumentation: in the first claiming that the UNSC lacks the legitimacy to deal with humanitarian law, and that this is a neutral body of law; in the second, reinforces its argument by summoning the International Committee of the Red Cross position on the differences between Humanitarian Law and the maintenance of international peace and security.

1.3.4.1. UNSC lack of legitimacy to deal with IHL.⁹³

The Brief claims the lack of an express provision empowering the UNSC to protect humanitarian law. If the UNSC primary responsibility is to ensure prompt and effective action by the UN for the maintenance of international peace and security (Article 24, 1), we can hardly see how a known and continued violation of International Humanitarian Law could not justify such prompt and effective action by the UN. The promptness being the fastest proceedings of the UNSC, but the action attributed to the UN as a whole.

On a tighter net on UNSC competences, a possible decision, by the Council, that a specific violation of IHL constitutes a threat to international peace and security,

⁹² *Ibid.*, 6.

⁹³ *Ibid.*

could, as earlier stated, overcome such lack of legitimacy, should it exist in the first place. In fact, which greater proof can one find, on the danger of a threat, then its lack of respect for a “neutral (widely accepted) body of international law”? That is, if the possible subjectivity, given its political contents, on determining a “threat to international peace and security” can on its own be questionable (though, as stated above still within the discretion of the UNSC), a founded suspicion or proof of the violation of IHL is undoubtedly a threat to international security. In this sense, one may wonder what is the determination of a “threat to international peace and security” but, facing a specific given fact or set of circumstances, becoming obvious that these are, indeed, that “threat” (e.g. I will know one when I see one). What the Defence could mean is that the UNSC role and competences are not to debate, study, endorse, promote or approve IHL. That “legislative” task still lingers in the widest stages of debate and cooperation between international actors: States and organizations. But the competence to recognize the seriousness of a threat to international peace and security from a continued violation of IHL, would actually be one of the most objective arguments to justify that qualification.

1.3.4.2. IHL as a neutral body of law.⁹⁴

It is the International Committee of the Red Cross (ICRC) which underlines this very special characteristic, a *conditio sine qua non* for the action of humanitarian organizations. The same ICRC alerts for the need for immunity and right not to testify for its members and members of alike organizations, in line with the spirit of the Geneva Conventions (ICTR, 1993).

However, politically neutral as it is, this body of law *does* prohibit and condemns criminal behaviours, even on non-international conflicts – see Geneva Convention III,⁹⁵ Article 3 (1). To consider, pointing to the same conclusion, the growing convergence between IHL and the laws of war, since the 1977 Protocols to the

⁹⁴ *Ibid.*

⁹⁵ Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

Geneva Conventions, mostly by Protocol II through the inclusion of internal conflicts, and the coercive nature of any enforcement for violation of IHL.

Here, however, the argument could only present an interesting point by raising a possible selectivity in the prosecution of international crimes (Cryer, 2005). Any other argument would fall into the determination of the applicable jurisdiction and not on the legitimacy of the Tribunal, i.e. raising the possibility that the defendant should be present for/judged by another jurisdiction, but adding nothing to the challenge on the legitimacy of the *establishment* of the ICTY. This central discussion on the political determination of international justice, interesting as it is, lies aside from the determination of the ad-hoc Tribunals own legitimacy discourse. If and when one reaches solid grounds on that legitimacy discourse, the discussion on the selectivity of the prosecution of international crimes could probably add to the path pointing to the *de facto* recognition of a *de jure* competence for the judicial review of, at least some, political acts of the UNSC.

The argument can have three different approaches:

- a) In a first hypothesis, despite the ICTY, the crimes in the bases of the indictment should be tried under another jurisdiction, in which case the legitimacy of the ICTY is not challenged, but only its precedence in jurisdiction (see *infra*);
- b) In a second perspective, that there was a selectivity in the indictments from the ICTY Prosecutor. In which case, reviewable as it might be, the challenge was, at best, against the indictment and not the Tribunal's legitimacy; or
- c) Finally, that the Tribunal itself was limited, as legally bound, to prosecute only certain types of suspects, like Serbs, or non-Muslims, in which case, for a legitimacy challenge to occur, there should be at least mention to which rules the ICTY was limited by.⁹⁶ The Tribunal, ad-hoc as it is, is in fact limited, by a specific time/spatial frame: certain facts (serious violations of International

⁹⁶ Cfr. *a contrario*, the Nuremberg or the Tokyo trials, where legitimacy challenges were not permitted.

Humanitarian Law) that occurred *in* the territory of the Former Yugoslavia *since* January 1991,⁹⁷ on the contrary there is no personal limitation regarding personal jurisdiction (*ratione personae*).

1.3.4.3. On the differences between IHL and the maintenance of international peace and security.⁹⁸

The reference, in the Brief, to a specific document of the Red Cross draws attention to the partiality of the absence of reference to another document, with the same origin, specifically directed⁹⁹ to comment the creation of the ICTY (ICRC, 1993). The well known support from the ICRC to the establishment of the ICTY is not overshadowed by comments the organization offers, so as to improve, or present notes, to particular aspects of the creation of such relevant and innovative Tribunal.

The plethora of legal references should not be allowed to detour from the cultural framing of a paradoxical lack of reference, legal, political, cultural or otherwise, in which the whole debate takes place. The theoretical difference between IHL and the maintenance, or restoring, of international peace, real as it is, usually face the same opposition: the parties in conflict. Under the ICRC cape, the Defence forces, from an antonymous perspective, a differentiation argument that facilitation of the IHL application is based on consent, whilst actions to maintain or restore peace do not exclude coercive measures. Not only is such an argument not necessarily true (as coercive imposition of restrictions so as to *enable* the consent to humanitarian relief are possible, or any of the measures in Article 41 of the Charter can hardly be classified as coercive in the sense pretended by the Defence), but it does not present a nexus with the challenge to the legitimacy of the Tribunal. From the

⁹⁷ Thus the ICTY formal designation: "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."

⁹⁸ Points 3.4.5. and 3.4.6. of the Defence Brief, in the later quoting the ICRC Report on the Protection of War Victims, 1993, (Trial Motion, Brief: 35-36).

⁹⁹ See Kerr (2004: 36, n108).

difference between the *facilitation of the application* and the *application* itself, of IHL, to the responsibility for its violation, there is a wide field of action that the Brief overlaps.

1.3.5. The subsidiary nature of the organ /lack of independence.¹⁰⁰

The argument of the Defence is here two folded: the dependency of the UNSC, as the Tribunal is established as a subsidiary organ; and the paradox that, as an organ aimed at restoring peace and security, it's judicial nature would be fully operational only after such goal was attained.

1.3.5.1. The argument on the lack of independence.

The Defence claims the lack of independence of the judicial organ based on the subsidiary nature of the tribunal, *vis-a-vis* the UNSC, and on certain Rules of Procedure and Evidence (RPE).

On the first approach, the Brief summons the UNSG report (S/25704) as well as the Brazilian statement on the establishment of the Tribunal (S/25540), to question the independence and impartiality of the court. However, those very same documents either aim to avoid such a possibility, in the Brazilian case (whereby special attention should be given to the guarantees of that independence) or affirmatively state, in the UNSG Report case, that despite being a subsidiary organ, the judicial function must not be subject to the authority or control of the UNSC.

The fail to provide further proof of such claimed lack of independence is itself a demonstration of the fragility of the argument. Nevertheless, and regarding the legitimacy challenge of the *Motion*, one can call on the restrictions arising from the separation of powers: the setting up of a jurisdiction, a legislative power, does not mean such jurisdiction is less independent, nor that the legislative will to change the Law can be seen as an intrusion into the judicial function. We understand that the subsidiary nature of the Tribunal can, in fact, question the separation of

¹⁰⁰ Trial Motion, Brief: 7.

powers, but given the right limitations to the authority of the UNSC, that independence could at worst be faced with the public inability to carry out its duties. That is to say, should there be any possible “intrusion” of the UNSC into the judicial proceedings, it would represent a visible obstruction to the proceedings themselves. So, quite on the contrary to what the Brief claims, the annual report to the UNSC could in fact denounce the obstructions the tribunal might face.

The keynote of these claims rest more on the UNSC powers to establish the Tribunal, and not on the Tribunal itself, contrary to the Brief, for if such conditions are met that guarantee the independence and impartiality of the tribunal (e.g. independence of Prosecution, Trial, Appeal as well as Defence), the proceedings can be as impartial as any others, it's the legitimacy of the subsidiary nature itself which could be questioned.¹⁰¹

1.3.5.2. The restored peace and security as a limit to the judicial function of the ICTY.

There are two questions in this argument: the political recognition of peace and security, and the potential supervening inutility. The first question has already been addressed when we established how the UNSC can discretionarily recognize a threat to peace and security, and furthermore the central role of the perceived threat, and not so much the breach of peace and security. Yet the Brief quotes again the UNSG report without realizing that the connection there established between the Tribunal and the restoration and maintenance of international peace and security, more than questioning it, ends justifying the continuity of the ICTY as a mean to restore some peace, as détente to certain ongoing crimes, but also to maintain that same peace, by avoiding retribution or vengeance resulting of the lack of justice. The Defence's confusion between “conflict” and “threat to peace

¹⁰¹ i.e. the recognition of the ICTY as a parallel organ, even if created by a “legislative power” of the UNSC, or, alternatively as a recognition of the incapability of the UNSC to perform some of its competences without detaching, into a subsidiary organ, the actions needed to attain such duties.

and security” is here very clear, as the Brief supposes that the cause for Tribunal's existence will cease with the end of the conflict, that being also the case with the scattered mentions, in all of point 3.5 of the Brief,¹⁰² surrounding the allusion to the Tribunal's role “as an enforcement measure under Chapter VII”. For the Defence, the comparison is narrow, following only the military interventionism type of measures. As we already mentioned above, regarding the authority under the Charter, this new type of measure, though not expressly foreseen, can still be regarded as a non military measure as per Article 41 of the Charter.

1.3.6. The lack of exceptional circumstances.¹⁰³

The understanding that UNSC assessments can be reviewed by the Tribunal is yet again the base line of such argument. Should the recognition of urgency or exceptional circumstances, by the UNSC, be questionable, it would take a judicial reviewing body with authority to reach such a conclusion. Not taking this issue into consideration, the attempt to establish the ICTY competence to review UNSC decisions amounts to an unreviewable argument.

The cases mentioned by the Defence (point 3.6.3)¹⁰⁴ give an impressive, though not thorough, list of cases where the UNSC did not meet the expectations it assumed in respect of the Former Yugoslavia. It is common knowledge that the chronological primacy of the ICTY is not based on lack of horror, in the form of grave breaches of IHL or the Laws of war, but rather in the proactively innovative decisions of the UNSC. There is, therefore, an underlying argument in the claim of selective approach – point 3.6.4.¹⁰⁵

That does not mean that there was any lack of exceptional circumstances, nor urgency. The Experts interim report (S/25274) referring, among others, to an ongoing ethnic cleansing, politically magnified by its geographical occurrence as it

¹⁰² Trial Motion, Brief: 7.

¹⁰³ *Ibid.*, 7-8.

¹⁰⁴ *Ibid.*, 8.

¹⁰⁵ *Ibid.*

might have been, in comparison with other cases, points to exceptional circumstances of such gravity as to be considered an urgent matter. As a consequence, the Defence case allegations show no logical link between the lack of action, by the UNSC, in other cases and the inexistence of exceptional circumstances or urgency in this one. The critique, appealing as it can be, is of an indelibly political nature, where the judicial objection could only lay in the selectiveness of such actions. The *Motion* on the challenge to the Tribunal's legitimacy does not present, in this argument, a legal claim to the legality of the establishment of the ICTY and, if any, only an argument for the UNSC to follow this example more widely.

There is, however, in the text of this argument, an implicit recognition of the Tribunal's capability, though "highly doubtful" to have a deterrent effect on the crimes committed. The Brief supports a view that the crimes have already been committed, concluding from that view that the Tribunal's actions cannot reverse those facts, thus implicitly recognizing that crimes were committed, allowing the question of punishment to arise. That same question can answer the doubts the Defence presents on the deterrent effect of the Tribunal, as the continuity or renewal of such crimes, now in retribution, could endure and result in the maintenance of a threat to peace and security.

Once again, it becomes obvious that the very scattered nature of the arguments derive less from any legal confusions than from the apparent reluctance on all sides to recognize the enmeshedness of the legal, the political, and cultural conceptual frame in which the debate occurs. The presumed pre-legal institutions are not mentioned or never tested on their (im)possible shared interpretation.

1.3.7. The lack of authority over individuals.¹⁰⁶

On an extraordinarily brief point, the Defence claims the lack of UNSC authority over individuals, implying that the Tribunal, as a subsidiary organ of the UNSC,

¹⁰⁶ *Ibid*, 8.

would have that same limitation. But there are cases, even prior to the Yugoslav one, of sanctions against individuals,¹⁰⁷ the Security Council Sanctions Committees itself explains that:

“relevant Security Council decisions have reflected a more refined approach to the design, application and implementation of mandatory sanctions. These refinements have included measures targeted at specific actors, as well as humanitarian exceptions embodied in Security Council resolutions. Targeted sanctions, for instance, can involve the freezing of assets and blocking the financial transactions of political elites or entities whose behaviour triggered sanctions in the first place.”

(Security Council Sanctions Committees)¹⁰⁸

Travel bans are nowadays a common restriction, and the fact that the UNSC has to rely on member States to impose such measures does not affect their legitimacy, but only its efficacy.¹⁰⁹ On another note, the setting of the Tribunal, to which States can be said to have vowed, as mentioned above on the UNGA/UNSC debate, indirectly legitimizes the resigning of the equivalent sovereignty over individuals.

2. Wrongful primacy over national courts.

On the wrongful primacy over national courts, as a denial of the accused right to be judge in their jurisdiction:

2.1. The domestic jurisdiction within the internationally recognized sovereignty of Bosnia-Herzegovina;¹¹⁰

¹⁰⁷ The Iraq and Kuwait case with: List of Individuals Established Pursuant To Security Council Resolution 1483 (2003), by The Security Council Committee established pursuant to resolution 661 (1990) concerning the situation between Iraq and Kuwait. An earlier case, though wider in scope, can also be found in Resolution 253 (1968) of 29 May 1968, regarding the “illegal régime in Southern Rhodesia”.

¹⁰⁸ See <http://www.un.org/sc/committees/>

¹⁰⁹ Birkhäuser, 2007.

¹¹⁰ Trial Motion, Brief: 8-9.

The undisputed jurisdiction *ratione loci* of the independent State of Bosnia-Herzegovina, is presented by the Defence both as a guarantee of prosecution and as sovereignty to be respected. The double argument rests upon the international recognition of that independent State, and the effective exercise of jurisdiction even in cases of alleged violation of the laws of war, i.e. crimes of war. The Brief supports the argument by pointing out the national prosecution of Mr. Karadzic, interestingly by resource to the (ICTY) Prosecutor's application for deferral of the case unto the ICTY.

In this argument, the Defence does make the point on the existence of national jurisdiction, yet avoiding the main question of the primacy of the ICTY over domestic courts, thus making it an interlocutory argument for its case challenging the ICTY primacy over those courts. However, there is no evidence that that primacy was set with a condition of lack of domestic jurisdiction, for even if the capability, independence, effectiveness or fairness of state jurisdictions might be such a condition, making an International Criminal Tribunal a subsidiary jurisdiction, those arguments are not here presented by the Defence.

2.2. Sovereignty of States;¹¹¹

After ascertaining the recognition of the States sovereignties, the Brief immediately states limits to such sovereignties to assume domestic jurisdiction on crimes outside their territory unless if justified by "a reasonable interest, recognized by international law". In the case of universal interests (expression under which one can understand IHL) the mentioned recognition by international law would be, according to the Brief "a treaty or customary international law, or an *opinio juris* on the issue". Once again the quotation supporting the argument is self-destructive: from all of the analysis made by Rijpkema, quoted in the Brief,¹¹² the chosen phrase clearly states that "[Adoption by resolution] only constitutes an indication of

¹¹¹ Trial Motion, Brief: 9.

¹¹² As quoted by the Defence (Trial Motion, Brief: 9): "P. P. Rijpkema, 'The Nicaragua case', XX Netherlands Yearbook of International Law, 99-107.

an *opinio juris*".¹¹³ So, if the Defence acknowledges the validity of the *opinio juris* to recognize a reasonable interest, and then summons an authority which in turn recognizes the adoption of UNSC Resolutions as an indication of such *opinio juris*, it is logically recognizing the validity of the UNSC Resolution (if not as stated in the said quotation to accept rules as binding, at least) to indicate an *opinio juris*.

From previous debates (the mention to the Commission of Experts Interim Report and its *opinio* on the establishment of an ad-hoc International Criminal Court), we can only conclude that the Defence failed to prove that there is no justified reasonable interest recognized by international law. And all of this without even summoning the contributions offered by the UNSG following Resolution 808, and in preparation of the establishment of the ICTY in Resolution 827 – most of which referring to experts in International Law and their opinion on the then current development of International Criminal Law.

Lastly the Brief recalls its position on the UNSC competence regarding IHL to challenge the primacy of the ICTY over domestic courts, an argument already debated above.

2.3. *Jus de non evocando*,¹¹⁴

Reviewing previous arguments,¹¹⁵ the Brief tries to present yet an alternative, by affirming that the consideration of an international conflict would lead to the implicit recognition of an Bosnian Serb Republic, a quite bold political statement (or goal?) for the Counsel of the Defence to make in international criminal proceedings. Altogether the Defence claims that either the conflict is of an internal nature, in

¹¹³ *Ibid.*

¹¹⁴ Trial Motion Brief: 9- 10.

¹¹⁵ On the lack of competence of the ICTY to prosecute violations of IHL; the exception to national jurisdiction based on inadequate prosecution; the national jurisdiction of Bosnia-Herzegovina, here stating its advantage to prosecute *in absentia*, unlike the ICTY; and the argument of the internal nature of the conflict.

Bosnia-Herzegovina, or that there is a proper national jurisdiction, on a Bosnian Serb Republic.

The first argument was already debated and relates to the confusion between the reason for the UNSC competence, based upon the recognition of a threat to international peace and security rather than an international conflict.

The second line of argumentation can be contradictory with the previous claim of containment within the same State: Bosnia-Herzegovina. As the later claim of *jus de non evocando* implies the independence of the Bosnia Serb Republic, the above-mentioned exception could be opposed to the argument. In fact, the individuals to be prosecuted would come from the forces responsible for such State. On the contrary, even considering a proper prosecution by the Bosnia-Herzegovina jurisdiction (disregarding the "winner's law") the possible effects of such prosecution could mount to the promotion of the very threat the UNSC should aim to avoid, as the ethnic conflict, even if in *détente*, might easily be reignited by questioning the motifs under such trials. The Tribunal's very name points in this direction, "Former Yugoslavia", recognizing the potential threat posed by ethnic divide, as any solution incorporating the ethnic divisions (between prosecutors and prosecuted) would, even if in court, maintain the conflict. Quite contrary to the previous claims of selective prosecution, the establishment of the Tribunal for the whole of the former Yugoslavia was the only way to surpass the root causes of the conflict. The critique also seems to stand under legal grounds: the consolidation of the deep changes provoked by the collapse of the Former Yugoslavia were still to settle, as later seen between Serbia and Montenegro, and the former and Kosovo. The recognition of the Bosnia-Herzegovina, didn't, *per se*, stopped the conflict in the country, nor in the region. Thus, with the various possibilities open by the evolution of the sovereignties, but also by the nationalities of the perpetrators, during the crimes and afterwards, might pose unforeseen difficulties in the probable need for "international" cooperation between neighbouring States. A legal frame under which the principle of *jus de non evocando* would remain uncertain, given the (r)evolving jurisdiction at play.

3. Lack of subject matter jurisdiction.

On the lack of subject matter jurisdiction the Defence arguments are mainly based in the qualification of “internal conflict”. For its possible relation to the challenge on the Tribunals legitimacy, these arguments will now be addressed. However, one should note that the questions here raised by the Defence are connected with the Tribunals *jurisdiction*, rather than with its *legitimacy*, meaning that the challenge is presented to the competence of the Tribunal, jurisdiction *stricto sensu*, and not to the legitimacy of the establishment of the Tribunal itself.

The Brief starts by claiming that Articles 2 to 5¹¹⁶ of the Statute of the ICTY (SICTY) have not created substantive law, reviewing then individual arguments for each of these Articles, with the exception of Article 4 (“Genocide”), never to be expressly mentioned, nor individually challenged, by the Defence.

3.1. Lack of substantive law;¹¹⁷

According to the Brief, Articles 2 to 5 of the SICTY did not create substantive law, describing only the jurisdiction, *ratione materiae*, of the ICTY.

Both in Articles 2 and 3 we find a list of acts, i.e. concepts, under the jurisdiction of the Tribunal, without proper objective description of such “crimes” – Article 2 (a) to (h), and Article 3 (a) to (e). However, the introductory text is very explicit in the reference made to “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”, in Article 2, and to “violat[ions of] the laws or customs of war”, in Article 3. In so doing the SICTY refers to such substantive law as it may be understood by the Geneva Conventions. The concepts in the above-mentioned lists are not, therefore, more abstract or less complete as what can be understood by the provisions of those Conventions. I.e.

¹¹⁶ In fact the Brief questions the application of Articles 2, 3 and 5 of the ICTY Statute (SICTY).

¹¹⁷ Trial Motion, Brief: 10-11.

even from a customary point of view, the international recognition of such crimes, be they war crimes or crimes against humanity, accepts the Geneva Conventions as starting point of codification on the matter. Therefore, the SICTY mentions to that source as the origin of the concepts latter listed can in no way be understood as an innovative and hollow reference to a crime to be prosecuted. Still in this sense, should the Brief be right, it would only reinforce the legitimacy of the Tribunal's jurisdiction, which it formally seeks to challenge.

To a certain extent, although without a clear reference to a previous source of International Law, the same can be said of Article 5. In this latter case, the sheer mention to crimes against humanity, in the Article's title, is enough to limit the scope of the definition of the substantive law, at least with respect for the rights recognized by the UN Charter.

In Article 4, none of this question holds grounds, as the acts, themselves, are described in that very Article.

Yet from another perspective, though questionable on the UNSC legislative competence, the SICTY is itself a codification instrument, at least in the sense that, according to the Charter, the member States are represented by the UNSC, when this last is discharging its duties according to the Charter (Article 24, § 1, *in fine*). Whereby the concepts in these Articles might be a reference to rules within the Geneva Conventions as substantive law.

The challenge to the Tribunal's legitimacy should, therefore, not be base upon the argument of lack of substantive law, already internationally recognized at the time, but to the legitimacy of the establishment of the organ charged with trying and reviewing the prosecution of that pre-existent substantive law.

3.2. Lack of jurisdiction regarding the Geneva Conventions;¹¹⁸

¹¹⁸ Trial Motion, Brief: 11-12.

With a loop argument, the Brief tries to prove that the references to the “Grave breaches” of the Geneva Conventions act as a limit, as they would imply the full enactment of those rules by the Tribunal. That is to say, that the references made in the SICTY to certain type of crimes, as those in the Geneva Conventions, would imply the full implementation, by the Tribunal, of all the rules in those Conventions. Following this line of reasoning, the Defence further states that the qualification of the conflict, as internal or international, would in light of the referred Conventions be outside the competence of the ICTY.

The loop argument does not stand, firstly as the Tribunal is not an organ envisaged in those Conventions, but a subsidiary organ of the UNSC; secondly as the reference, in the jurisdiction *ratione materiae* of the Tribunal, to a renowned and widely accepted source of International Criminal Law only simplifies the possible doubts on the meanings of the substantive law to be discharged, thus reinforcing the Tribunal's legitimacy by, contrary to the Brief's claim, accepting recognized substantive International Criminal Law in its jurisdiction. As such, the concepts in the Statute could at worst be considered as a reference to crimes as described in the Geneva Conventions, the fact that the Conventions, as a full legal document, may imply the existence of an international conflict, are of no value here, as the question posed refers only to certain rules of the Convention. However, the creation of the ICTY derives only from the UNSC perception of a threat to international peace, meaning that, the Statute of the ICTY can be limited to prosecute only some of crimes (the scope of its subject-matter jurisdiction) under certain circumstances (*ratione loci* and *tempori*). The fact that the characterization, i.e. the material contents of the crimes, is better described in a well-known instrument of International Law, even considered customary, does not affect the power to choose, when creating a new jurisdiction, as the SICTY, the specific conditions for the prosecution of those crimes. The Defence argument appears to part from a radically positivistic stand, not recognizing the Common Law, not even the competence, by reference, in continental law. In either case, the substantive

law invoked is not itself described in the mentions to its rules, but rather, avoiding dissent, accepted by reference to precedents or to other laws.

Even the claim that the Tribunal has no competence in determining the nature of the conflict, internal or international, as a consequence of the lack of incorporation of Protocol I of the Geneva Conventions in the SICTY, disregards the fact that in this case, acting under the UN Charter, it is for the UNSC to determine the existence of a threat to international peace and security, as already mentioned.

3.3. Lack of jurisdiction regarding laws of war;¹¹⁹

The Brief objects to the Tribunal's jurisdiction over violations of laws or customs of war, primarily based on the presumption that Article 3 of the SICTY does not relate to Article 2 of the Geneva Conventions but rather on the (1907) Hague Convention, which in turn would only apply to international conflicts (armed conflict between States).¹²⁰ But even when considering the Hague Conventions, the Defence could not ignore the potential wider understanding of the Martens Clause,¹²¹ of which, although still subject to debate, the Natural Law character of the Clause (Ticehurst, 1997),¹²² would justify its application to a variety of armed conflicts.¹²³ In this sense,

¹¹⁹ Trial Motion, Brief: 12.

¹²⁰ As we have seen before, the particulars of the novelty of the establishment of the Tribunal (as with the challenge to the Tribunal's legitimacy, rather than jurisdiction) are connected to the consolidated power of the UNSC to determine what can constitute a threat to international peace and security, regardless of the nature of the conflict (internal or international).

¹²¹ The Martens Clause, as included in the cited Convention (Respecting The Laws And Customs Of War On Land - Hague IV, 18 October 1907), reads: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

¹²² Ticehurst (1997), elaborates on the Natural Law character of the Clause when quoting Schachter (O. Schachter, *International Law in Theory and Practice*, Martinus Nijhoff, Dordrecht, 1991, p. 36):

"In contrast to positive law, natural law is universal, binding all people and all States. It is therefore a non-consensual law based upon the notion of the

the customary rules of war are inextricably intertwined with the origins of modern IHL,¹²⁴ and therefore not limited to international conflicts.

As a conclusion one might draw two objections to the Defence argument: (i) the internal or international nature of the conflict as irrelevant for this case, both by the UNSC powers to determine the existence of a threat to peace and security, and the wider interpretation on the Martens Clause; and (ii) but also because of the

prevalence of right and justice. Natural law was to a great extent displaced by the rise of positivist interpretations of international law. According to Schachter, '[i]t had become evident to international lawyers as it had to others that the States that made and applied law were not governed by morality or 'natural reason'; they acted for reasons of power and interest. It followed that law could only be ascertained and determined through the actual methods used by the States to give effect to their 'political wills'. However, the judgment of the Nuremberg Tribunal, which to a great extent relied on natural law to determine the culpability of the Nazi high command, confirmed the continuing validity of natural law as a basis for international law in the twentieth century."

This last thought serves also to object the Defence interpretation on the inspiration of the Nuremberg Military Tribunal in Article 3 of the ICTY. See Trial Motion (Brief: 12, point 10.1, *in fine*).

¹²³ Ticehurst (1997):

"Judge Shahabuddeen, (...) referring to the ICJ's Advisory Opinion, paragraphs 78 and 84, where the Court determined that the Martens Clause is a customary rule and is therefore of normative status. In other words, the Clause itself contains norms regulating State conduct."

Also, the same source, quoting the UN Report of the International Law Commission on the Work of its Forty-sixth Session, 2 May-22 July 1994, GAOR A/49/10, p. 317., reaffirms that

"[the Martens Clause] ... provides that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

¹²⁴ Ticehurst (1997) quoting J. Pictet (*Development and Principles of International Humanitarian Law*, Martinus Nijhoff and Henry Dunant Institute, Geneva, 1985, p. 62):

"The principles of humanity are interpreted as prohibiting means and methods of war which are not necessary for the attainment of a definite military advantage. Jean Pictet interpreted humanity to mean that '... capture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible.'"

A definition that would be consistent with a substantive rule when defining war crimes in the ICTY.

customary International Criminal Law that the Hague Convention became, therefore applicable outside the initial positivist perspective of its negotiation.

3.4. Lack of jurisdiction over violations of humanitarian law.¹²⁵

Although the Brief explicitly mentions “humanitarian law”, the arguments presented, under this particular question, point to the consideration of IHL.¹²⁶ In fact, when challenging Article 5 of the SICTY, again a challenge of jurisdiction more than a challenge of legitimacy of the Tribunal itself, the Defence confronts this rule with: (i) the Charter of the International Military Tribunal of Nuremberg, (ii) a UNGA Resolution¹²⁷ and (iii) the Geneva Conventions; so as to attempt to prove that this rule only applies to cases of international conflict.

¹²⁵ Trial Motion, Brief: 12-13.

¹²⁶ See Harvard's International Humanitarian Law Research Initiative introduction, available in: <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2083>:

“IHL is a branch of public international law (which is also known as the law of nations). The extent to which IHL relates to International Human Rights Law (IHRL) and the nature of that relationship are not uniformly agreed upon. The International Court of Justice (the UN's principal judicial organ) held in 1996 that assessment of whether the right not to be arbitrarily deprived of life, which is guaranteed in IHRL treaties, has been violated in an armed conflict must be determined by reference to IHL. In subsequent cases, the ICJ held that depending on the situation, certain rights may be exclusively matters of IHL, exclusively matters of IHRL, or matters of both branches of law.

International Criminal Law (ICL) – which may be defined as the body of rules that proscribes international crimes; imposes duties on states to investigate, prosecute, or extradite offenders; and regulates such judicial proceedings – serves as an enforcement regime for violations of IHL. Depending in part on their severity, violations of IHL may amount to war crimes. Other international crimes include crimes against humanity and genocide, though neither of those technically requires a link to an armed conflict, unlike war crimes, which do require a sufficient link to an armed conflict. War crimes include Grave Breaches of the Geneva Conventions as well as other serious violations of the laws and customs of war.”

¹²⁷ Erroneously quoted in the Brief as a 1948 Res. (UN Document A/RES/95/I), the resolution in question – “Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal”, was adopted in 1946, and is available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement>

The expression used by the Defence, dropping the “international” in “International Humanitarian Law”, seems to support the challenge based on the internal/international nature of the conflict. However, and in view of the customary sources of IHL, that absence might be understood differently, i.e. as a detour from the probable objection to this argument based precisely on that customary nature of IHL, which would reintroduce the “international” in the “humanitarian law” in the jurisdiction of the ICTY, thus understood, at least in its widest interpretation, as generally applicable to any armed conflict (see note¹¹³).

Regarding the war crimes, the Brief goes as far as claiming that the SICTY, broadening of the cases to which such rules may apply, ends up conflicting with the principle of *nulla poena sine lege*, i.e. the principle of the non retroactivity of criminal law. Such claim depends on two conditions: (i) the dependence of Article 5 interpretation on the quoted previous references (both Nuremberg and the 1948 UNGA Resolution, had as preconditions the existence of an international conflict); and (ii) on the absence of any other such rules that might enforce, and consequently legitimize the prosecution, of identical norms.

As earlier stated, the SICTY is, *per se*, an independent codification of ICL. Questionable as it might be in the creation of new rules which would in effect be retroactive – particularly within the scope of its retroactive enforcement – the positive recognition or clarification of pre-existent rules in ICL does not present any exception to its possible, and legitimate, enforcement. The, so often quoted, work of the ILC is a commonly recognized source of both clarification and support for the recognition of existing customary rules in International Law, whether or not adopted on a positive instrument.

On the contrary the Defence, by not calling “international” to humanitarian law, as does the Statute, seems to be trying to say that the Tribunal cannot enforce a non-existent law, i.e. as if humanitarian law had to be international to be applicable.

(C) Preliminary conclusions

The Brief presented in support of the *Motion* appears to hesitate between objectives rather than clearly stating them alternatively. The initial *Motion*, quite accurately titled “*Motion on the Jurisdiction of the Tribunal*”, is primarily aimed to submit questions on the rules applicable by the court, but it then takes a wide interpretation of such objective, namely by addressing both the legitimacy of the establishment of the Tribunal, as well as the Tribunal’s jurisdiction.

For the purpose of the current research, this latter question lies beyond our subject, as the legal debate on which rules to apply, or whether certain bodies of law can or cannot be applied by the Tribunal, pose no difference to the simplest version of the known principle of the “*compétence de la compétence*”, i.e. a legitimate court of law can, and often must,¹²⁸ be able to determine which laws it can apply and which laws are applicable to a certain case.

A wholly different question is posed by the challenge to the legitimacy of the establishment of the Tribunal itself, regardless of the jurisdiction it will or can apply. Therefore, a number of questions posed by the Defence, both in the initial *Motion* and supporting Brief, that is all those relating to the ICTY jurisdiction, are here considered only in their framing character.

However, the Brief does bring out a number of arguments challenging the Tribunals legitimacy, which can be divided in 3 groups. A first one including:

1. No establishment by Treaty;
2. No establishment by the UNGA;
3. Ill-founded establishment of the ICTY by the UNSC;
 - 3.1. No international conflict, as a pre-condition for the use of powers under Chapter VII of the UN Charter;
 - 3.2. No authority of the UNSC under Article 41 of the UN Charter;

¹²⁸ As per its specific role in the judicial order or as a consequence of the succession of laws.

- 3.3. No authority of the UNSC under other provision of the UN Charter;
- 3.4. No involvement or rather no authority of the UNSC in humanitarian law;
- 3.5. The limitations of a Subsidiary organ of the UNSC, as the ICTY;
- 3.6. Lack of exceptional circumstances;
- 3.7. The lack of authority of the UNSC over individuals.

A second question, primarily on jurisdiction but with possible connexion with a challenge to the legitimacy of the establishment of the ICTY, is the:

- 4. Primacy over domestic courts;
 - 4.1. Existence and capability of a domestic jurisdiction,
 - 4.2. Sovereignty of States,
 - 4.3. *Jus de non evocando*.

In the third, among the initial objectives of challenging the Tribunal's jurisdiction, and therefore outside the legitimization of the establishment of the Tribunal itself, the Brief still argues the:

- 5. Lack of subject-matter jurisdiction. Where, as discussed above, the Defence challenges certain Articles of the SICTY, namely Articles 2, 3 and 5 of the SICTY.

As a preliminary conclusion, one can note that only the arguments set in the first group, a) to c), might present a relevant challenge to the legitimacy of the establishment of the Tribunal. Consequently, arguments to which the Tribunal's review is of particular interest for the purpose of identifying a self-legitimacy discourse, as envisaged in this research. So as to clarify the arguments to be followed, they can be summarized as follows:

- 1. The question on the legitimacy of a ICT established without a Treaty;
- 2. The question on the legitimacy of a ICT not established by the UNGA;
- 3. The question on the legitimacy of a ICT established by the UNSC without the precondition of an international conflict;

4. The question on the lack of legitimacy under Article 41 of the UN Charter, for the UNSC to establish the ICTY;
5. The question on the lack of legitimacy under any other provision of the UN Charter, for the UNSC to establish the ICTY;
6. The question of lack of authority of the UNSC to deal with humanitarian law;
7. The question on the limits of a subsidiary organ of the UNSC, and in particular regarding a judicial organ as the ICTY, the lack of independence;
8. The lack of exceptional circumstances, presumably for an innovation such as the ICTY;
9. The lack of authority of the UNSC over individuals.

On a different level (although must probably discussed as the possibility of the State's will being known in the absence of a Treaty and the establishment by the UNSC and not the UNGA) also to be followed is the argument on:

10. The respect for the sovereignty of States and its jurisdiction.

Section II – The Prosecutor's Response

(A) Proceedings and submissions prior to the Decision

After the Defence *Motion* on the jurisdiction of the Tribunal had been filed, on 23 June 1995, and before its hearing (25 and 26 July), the Prosecution submitted its response, on 7 July. Furthermore the Trial Chamber received, ten days later, on 17 July, a Submission of the Government of the United States of America, as an *amicus curiae*, "*concerning certain arguments made by counsel for the accused in the case of the Prosecutor of the Tribunal v. Dusan Tadic*" (sic).

The Prosecutor's "*Response to the Motion of the Defence on the Jurisdiction of the Tribunal*", filed on 7 July 1995 is, as earlier stated, not a primary source for the current research as the Tribunal should, and in fact must, answer the Defence *Motion*, regardless of any other inputs, for it cannot be identified with the Tribunal's

discourse, nor is it a limitation to such possible discourse. The right to file a Response, as the will to submit an *amicus curiae* brief, enlightening or helpful as they may be, do not condition nor limit the Chambers Decision or speech therein.

The Chamber's Decision might therefore contain three types of speech:

- a) The ruling, with or without review, on the subject presented to it, i.e. the Defence *Motion*;
- b) The ruling, its grounds and reasoning, be they by:
 - b.1. The Chamber's own references, arguments or reasoning;
 - b.2. The Chambers adoption or rejection, as their own, of presented arguments:
 - b.2.1. From the Defence ;
 - b.2.2. From the Prosecutor;
 - b.2.3. From the submitted briefs by *amicus curiae*.

As far as the hearings are concerned, although not a primary source of our research, the dialogical debate therein could be important only inasmuch as it may reveal, at times, the central role of the legitimacy challenge even when timidly named as a challenge on the Tribunal's jurisdiction. Given the written statement of arguments, setting the grounds for the Decision, and the resources available to the Tribunal so as to produce that Decision, the judicial character of the hearings loses relevancy for the research, given the broader subjectivity of the spoken speech in the full transcripts. For its occasional value, in clarifying the intended meaning or as validation of our interpretation, only such excerpts of its contents will be mentioned, by reference and quotation, keeping a close connection with their exact context.¹²⁹

Again, on a search for a Legitimacy Discourse of the Tribunal, only the positions attributable to the Tribunal can constitute a solid ground of research. The fact that such positions include the adoption of others' opinions is for this purpose irrelevant as, on adopting them, the Tribunal is incorporating them into its discourse. The

¹²⁹ The full transcriptions are available in the ICTY page, after registration with the ICTY website in <http://icr.icty.org/>

only two possible exceptions (though for the same legal conditioning) have different results of relevance for the research:

- a) In the case of the Defence *Motion*, its framing and questioning may, but does not necessarily, limit the scope of the Tribunal's Decision, review or matters addressed. If the Trial Chamber must address all the challenges presented by the Defence, that is a good enough reason for reviewing the terms in which the *Motion* presents the Chamber with challenges. That, however, does not mean that the Chamber is limited in that speech and arguments: e.g., the sheer acknowledgement of lack of competence regarding any of those, might justify the lack of further review and analysis.
- b) In the case of the Prosecutor's *Response*, unlike the self-evident complementary nature of the *amicus curiae* submission, the explicit rejection, by the Prosecutor, of arguments set forth by the Defence could have a legal reading: that of rejecting possible relevant legal arguments as presented under a right to do so, thus surpassing, and possibly limiting, the discretion of the Tribunal (i.e., unlike with the complementary nature of the *amicus curiae* submissions).

However, such legal entanglements are of no relevance for this research, as the result of the researchable ground would still remain the same: the Tribunal's own discourse of legitimacy. Field for which the legal nature of the submission of arguments is mainly irrelevant, with a possible exception of the initial challenge on the legitimacy. We will therefore only consider the revision of the arguments presented in the Response regarding that first challenge to the legitimacy of the establishment of the ICTY, leaving aside the reasoning regarding the primacy of the Tribunal as the lack of subject-matter jurisdiction.¹³⁰

¹³⁰ Important as these might be, the argumentation on these two challenges is not so directly connected to a possible rejection of relevant legal arguments on the legitimacy of the Tribunal as to limit the review made by the Trial Chamber to reach a Decision.

Mutatis mutandis, the interventions of the Tribunal during the hearings are not, in themselves, an established position or opinion by the Tribunal. The possible need to clarify arguments presented, or the opportunity given to further elaborate or complement these, does not compromise any conclusion for the identification of the final position of the Tribunal based on its actions during the hearings. However, inasmuch as the Trial Chamber can comment, on a dialogical manner, with the actors of the case on certain arguments, its behaviour in those hearings could be reviewed. This, as in the documents filed by the Prosecutor or by the USA Government, will only be brought to light in the context of the research, if and when a possible (aprioristic) logical connection might be drawn with the final, and thus official, position of the Tribunal as set in the Decision.

(B) The Prosecutor's Response

"Response to the Motion of the Defence on the Jurisdiction of the Tribunal", filed on 7 July 1995, hereinafter *"Trial Response"* or *"Response"*.

The rather systematic way in which the Response begins by presenting its Contents (p. 2), especially after the presentation of the *"Summary of Arguments"* (pp. 5-9), where each topic is described with the anticipation of the position held therein, makes it almost as helpful as an abstract, a useful tool to synthesize the whole document.¹³¹

1. Jurisdiction of the ICTY.

Focusing our attention on the Prosecutor's *Trial Response* arguments most relevant to a possible contribution for a legitimacy discourse by the Tribunal, at the Trial Chamber, we can highlight a number of these, from a disconnected

¹³¹ For its value to frame the full extent of the Prosecution's position regarding the challenges to the ICTY jurisdiction, as presented by the Defence *Motion*, and given the above mentioned revealing position of the Response from its Contents and "Summary of arguments", which follow the Contents Table, we find it useful to reproduce it in full, under Appendix III.

perspective regarding the legal dialectical exchange of arguments within each particular issue. That is, although it is now rather clear that only the first part of the three challenges presented by the Defence *Motion* directly relate to the legitimacy of the establishment of the ICTY, we can list arguments that might add to this discussion regardless of the respective challenge intended to be responded to. Among these we can find different approaches:

1.1. The normative approach to the ICTY jurisdiction over UNSC Resolutions when highlighting:

- a) The lack of references, by the Defence, to authorities attributing the ICTY the power ("right" in the Prosecution's wording) of judicial review over UNSC actions, Resolutions in particular;¹³²
- b) That the SICTY does not indicate, not even implicitly, any intention to confer the power of judicial review of UNSC Resolutions to the ICTY;
- c) That the ICTY subject-matter jurisdiction does not extend to "general interpretations of the Charter" nor to the judicial review of UNSC powers;

1.2. The authority, and analogy, of the International Court of Justice (ICJ).

Referring the "categorical statements" of the ICJ¹³³ denying the existence of any power of judicial review of the UNSC actions.

The argument set by the Prosecution is that, based in the ICJ advisory opinions, the powers of judicial review of UNSC Resolutions had already been addressed, as a precedent (?).¹³⁴ According to this line of argumentation if the ICJ, a general permanent International Court, had already established the inexistence of such powers, it wasn't an ad-hoc Criminal Tribunal which could override such conclusions.

¹³² Tadić case, Trial, Prosecutor Response, II (A) 1., § 1 (Trial Response: 10).

¹³³ Trial Response: 10-11.

¹³⁴ The Prosecutor does not make it clear if the references to the ICJ are made as an *opinio juris* or with the value of a precedent, as in Common Law.

This interpretation may lead us to conclude that, for the Prosecutor, the advisory opinions of the ICJ are truly “precedents” which the ICTY cannot override. However arguable the issue may be, given the different jurisdictions, it appeals to the concept of precedent as a well established institution, in Common Law, from where to interpret and then construct a legitimacy discourse. As such, it offers the ICTY a cultural reference, upon which do decide its lack of competence to review UNSC Resolutions.

To support further this argumentation the Prosecutor’s Response includes throughout references, made to a number of cases before the ICJ, where the question of these judicial review powers are addressed.¹³⁵ It is here, and by the Prosecutor, that references are first made to certain cases in the ICJ, something that, despite its further discussion during the hearings of the *Motion*, is later referred to by the Trial Chamber, on the Decision, as an argument by the Defence.

1.3. The authority, and attempted analogy, of the International Military Tribunal for the Far East (IMTFE)¹³⁶

As a complement to the references to the “principal judicial organ of the United Nations” (the ICJ), the Prosecutor makes references to the IMTFE, and this Tribunal’s conclusions on the unreviewable nature of its legal acts of establishment. The reference made has a compelling argument given the ad-hoc nature of the IMTFE, implicitly drawing an analogy with the ICTY as another ad-hoc Tribunal. No reference is however made to the military nature of the first, nor the rather opposite proceeding leading to their establishment.¹³⁷

¹³⁵ In particular: (i) the “*Namibia advisory opinion*, I.C.J. Reps. 1971, at p.45, para.89”; (ii.) the “*Lockerbie case* (I.C.J. Reps. 1992, art p. 26)”; and (iii.) the “(*Expenses advisory Opinion*, I.C.J. Reps. 1962, at p. 168)”.

¹³⁶ Quoting from “(*Record of Proceedings of the international Military Tribunal for the Far East*, Judgment, at pp.48,435-48,437).”

¹³⁷ As the IMTFE was a recognizable military Tribunal set up by the conquering power (USA), although with the support of its allies, while the ICTY was established directly by the UNSC.

1.4. The UNSC actions on determining the existence of a threat to international peace and security, and measures relating to such threat.

The Response starts by asserting the political nature of the fulfilment of the conditions for the use of Chapter VII powers, by the UNSC. The main line of argumentation lies in the political nature of the acts of recognition of a threat to international peace and security, as well as the measures deemed appropriate under such circumstances. Although the Response goes on to describe the textual basis of the step-by-step approach of the UNSC,¹³⁸ the conclusion remains that the political nature of the questions posed to the UNSC are non-justiciable.

For this conclusion the Prosecutor's Response calls, again, on the ICJ opinions.¹³⁹ The conclusion proposes three key arguments: a) claiming the political nature of the determination of the existence of a threat to international peace and security, as well as b) which "measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied",¹⁴⁰ but also c) clarifying the understanding that the UNSC "enjoys wide political discretion" when acting on these power.

Thus, the said conclusion makes the decisions under Chapter VII of the UN Charter strange to juridical assessments originally arrived at in the UNSC debates. Although supporting these claims with further references to the ICJ works,¹⁴¹ the Prosecutor's wording can be understood as making a double assessment on the political nature of the UNSC action under Chapter VII: as a political act it is judicially unreviewable, and given its political nature, no juridical assessments are made or needed on those Decisions, making them objectively unreviewable, even

¹³⁸ Namely the connexion between the reports of violations of IHL, its character as a threat to international peace and security, and subsequent adoption of ad-hoc measures considered able to achieve and contribute to the restoration and maintenance of peace (Response, II, A, 2., §2).

¹³⁹ Tadić Case, Prosecutors Response, II, (A), 2., §3-5.

¹⁴⁰ *Ibid.*, on quoting the ICJ ("*Namibia advisory opinion*. at pp. 55")

¹⁴¹ By quoting from the *Lockerbie* case (*I.C.J. Reps.* 1992, at p.17 and p.66).

if such powers existed. Deepening its understanding of this argument, the Response, at the risk of compromising its own status, highlights the impossibility of “objective legal determination”¹⁴² of a “threat to international peace and security, as it “is a subjective concept”.¹⁴³ So as no doubt might be cast on the deep meaning or historical evolution of the concept (and we can not avoid thinking of the possibility of self-contained practices evolving into customary international law) the incapability of objective legal determination, of both any “threat to international peace and security” and “appropriate measures”, according to the Prosecutor, “is a matter depending on the interplay of States’ interests”¹⁴⁴ *Ipse dixit*... for what legal system pretends otherwise? Therein lies the ambition, or frailty, of the whole discourse.

1.5. The presumption of legality of measures adopted under Chapter VII.¹⁴⁵

Resorting to the *travaux préparatoires* of the UN Charter,¹⁴⁶ and again an ICJ advisory opinion,¹⁴⁷ the Response asserts a four steps frame so as to claim the presumption of legality of the ICTY:

- a) Firstly that the UN Charter aims at granting the widest discretion to the use of powers under Chapter VII, both in determining the conditions for its use and the appropriate measures to adopt (*travaux préparatoires*);
- b) Secondly asserting that the sole limit,¹⁴⁸ “only restriction”, to the UNSC powers under Chapter VII is¹⁴⁹ that it acts “in accordance with the purposes and

¹⁴² Response, II, (A) 2. §5, at p. 13.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ Response, II, (A) 3. pp.14-16.

¹⁴⁶ In particular: the work of Committee 1, as quoted in the Response (*The United Nations Conference on International Organization, Commission I*, Doc. 723, I/1/A/19, 1 June 1945, at p.700); and Committee 3 (*The United Nations Conference on International Organization, Commission III*, Doc. 134, III/3/3, 9 May 1945, at p. 785). Both quoted as “supplementary means of interpretations” of the UN Charter.

¹⁴⁷ *Expenses advisory Opinion*, at p. 168.

¹⁴⁸ Note the singular.

¹⁴⁹ As per Article 24 (2) of the UN Charter.

Principles of the United Nations”, these being¹⁵⁰ “To maintain international peace and security”;

- c) Thirdly, that the actions of the UNSC under Chapter VII, and with the same aim as the purposes and principles of the Charter, i.e., the maintenance of international peace and security “must be presumed to be legally valid”. (ICJ, *Expenses advisory opinion*);
- d) Finally, by considering that the UNSC was addressing a possible threat to international peace and security, thus opening the possibility for the use of broad powers under Chapter VII, and then explicitly recognizing such threat and aiming to adopt appropriate measures, which in the case included the establishment of the ICTY, the Prosecutor reaches the conclusion that that presumption of legality, of the measures under Chapter VII, so long as they are intended to restore international peace and security, as was the case with the ICTY, apply to the establishment of the Tribunal.

1.6. The lack of need for a Treaty.

Resorting to the same line of argumentation, and therefore reinforcing it, the *Response* claims that, as the establishment of the ICTY was a measure under Chapter VII, and therefore a legal one, no treaty was needed, but still arguing with different approaches that:

- a) The establishment of the ICTY followed very opened proceedings. The *Response* goes at lengths to show the validity of this argument by referring to the “*complex drafting process which involved the participation of at least thirty States (...) as well as ten non-governmental organizations. It was by no means an arbitrary or unilateral measure*”.¹⁵¹
- b) According to Articles 103 and 25 of the Charter,¹⁵² the actions of the UNSC supersede States' obligations under Treaties.

¹⁵⁰ As per Article 1 (1) of the UN Charter.

¹⁵¹ *Response*, II, (A) 4. §2, p.17.

¹⁵² Reinforced by a reference to the ICJ *Lockerbie* case (p.15)

- c) Finally, that the treaty approach, as set aside by the UNSG,¹⁵³ did not guarantee the effectiveness of the measure making it less than appropriate, particularly by the double uncertainty of the lengthy process of adoption (negotiation and ratification of the treaty) as well as the needed ratification by the States directly concerned.

With the exception of the mention to Articles 103 and 25 of the Charter, the Prosecutor's discourse ends pointing to the discretion of its own assessment by the evaluation of subjective concepts, i.e. the: participation of States (in the above mentioned way), effectiveness, appropriateness and even uncertainty regarding ratification.

One must remember that the uniqueness, the novelty, of the ICTY implies a path which misses the advantages of resourcing to older, well established legal institutions and extensive debates on the meaning of concepts. This wishfully legal speech of the Prosecutor, aimed to support the legitimacy of the ICTY, debates rather than affirms subjectively arguable concepts as the grounds to ascertain the appropriateness of novelty, in surpassing a Treaty in the establishment of an International Criminal Court empowered to prosecute individuals.

1.7. Lack of conflict between the establishment of the ICTY and the (then) prospective International Criminal Court (ICC).

The Prosecutor notes that the Defence argument, that the ICTY would undermine the initiatives for the establishment of a permanent international penal Tribunal (the now ICC), seems to be based upon the idea that a UNSC role "in the protection of humanitarian and human rights law",¹⁵⁴ particularly from an ad-hoc perspective, might harm the intention for the constitution of a more global and permanent criminal jurisdiction.

¹⁵³ And quoted in the response from UNSG Report, S/25704, p. 7, §20, and later, but still on the same topic, from Sharga & Zacklin (1994: 361) and Kolodkin (2002: 170 [1994: 386])

¹⁵⁴ Response, II, (A) 5., § 3, in fine, p. 19.

Counter arguing, the Response refers to the International Law Commission Draft Statute for an International Criminal Court,¹⁵⁵ on which ad-hoc cases are provided for, both in relation to States which are not part and referred by the UNSC. This possibility of an ad-hoc jurisdiction by the (then future) ICC, is then said to reinforce the powers of the UNSC under Chapter VII, to establish such jurisdiction (in the absence of the ICC, by the lawful establishment of the ICTY).

Although apparently, and inevitably, rhetorical (as it presumes the consequences of the establishment of the ICTY on a then not yet existing jurisdiction) this perspective ends addressing the key issue of the legitimacy of the ICTY: claiming "the central role of the Security Council in the protection of humanitarian and human rights law", implying the lawfulness of the establishment of the ICTY by the UNSC acting under Chapter VII. Even the common doubt about the imposition of an ad-hoc criminal jurisdiction is contemplated by the reference to the Draft Statute by the ILC.

1.8. On the relation between the powers of the UNSC and the UNGA.

The Response denies the primacy of the UNGA over the UNSC, by claiming the same statute for both organs.¹⁵⁶ Furthermore, the Prosecutor does not miss the distinction between articles 11 and 12 of the Charter (see Appendix I, 148-149), claiming the limitation to the UNGA powers when the UNSC "is exercising in respect of any dispute or situation the functions assigned to it in the present Charter".¹⁵⁷ Nor does it pass the opportunity of stressing the primacy of the UNSC in relation to the "exercise of powers for the maintenance of international peace and security" (Article 24).

¹⁵⁵ Report of the I.L.C. on the work of its forty-sixth session, U.N. Doc. A/49/10 (1994), particularly Article 23 of the draft Statute.

¹⁵⁶ Again with the resource of the ICJ advisory opinions (*Admissions* advisory opinion, I.C.J. Reps. 1950, p. 8)

¹⁵⁷ Response, II, (A) 6. § 2, p.20, quoting from Article 12 (1) of the Charter.

After these compelling arguments, the Prosecutor's Response then engages in a somewhat entangled defence of the participation of the UNGA in the ICTY. The *Response* loses its line of argumentation into procedural and lateral aspect of the functioning of the Tribunal. By mentioning the election of the judges of the ICTY, as the inclusion of ICTY expenses in the regular budget of the UN, both to be approved by the UNGA, and the annual report the President of the ICTY has to submit to both UNSC and UNGA. The main question, on the legitimacy (or legality), of the establishment of the ICTY by the UNSC was already set by the previous legal arguments. Rejecting the central role of the UNSC, or claiming a shared role with the UNGA, does not add strength to the legal basis for the UNSC actions under Chapter VII. By elaborating on these other topics in an otherwise well-structured legal speech, the Prosecutor weakens its discourse, with this pursuit of a hesitant line of argumentation.

1.9. On the non-extension of powers of the UNGA.

Yet again supported on a ICJ advisory opinion,¹⁵⁸ the *Response* denies the possibility raised by the Defence *Motion* of the extension of UNGA powers to adopt mandatory enforcement measures, namely the establishment of an International Tribunal. The argument rests on the sole competence of the UNSC to adopt measures which require enforcement by coercive action, i.e., Chapter VII of the Charter. Yet again a return to that well-structured line of argumentation based on the provisions of the Charter, i.e. the normative speech, but avoiding any novelty despite the uniqueness of the ICTY.

1.10. The violation of Humanitarian Law as a threat to international peace and security.¹⁵⁹

¹⁵⁸ *Expenses...*, p. 163.

¹⁵⁹ Response, II, (B), 1.

Changing its focus onto the validity of the ICTY as a measure under Chapter VII (and for such purpose objectively reviewing UNSC Res. 827) the Response dives into the particular circumstances, historical facts and perceptions of the events in the former Yugoslavia since 1991, aiming to provide proof for the reasonableness and lawfulness of the exercise of UNSC powers under Chapter VII.

In its reasoning the Response calls on the authoritative Experts Reports,¹⁶⁰ so as to support a two-step connection of the conflict with the concept of threat to international peace and security. The Experts' Reports, serve here to prove a) the ongoing ethnic cleansing, and b) that such ethnic cleansing was the basis, as goal to be achieved, of the conflict; practices here deemed to constitute a "serious violation of humanitarian law",¹⁶¹ which in turn "constitutes a threat to international peace and security within the meaning of Chapter VII".

Reasonable as it may seem, the sheer consideration, on a judicial environment, of the adequacy of facts to the fulfilment of the concept of "threat to international peace and security", and all the subsequent provision of powers in the Charter, mount to a review of the actions of the UNSC. Adequate as it seems to prove the material truth, if the UNSC Resolutions are judicially non-reviewable, the effort made by the Prosecutor could end proving counterproductive. In fact, by reviewing and arguing the fulfilment of the conditions for the UNSC to consider a given situation as a threat to international peace and security, the Response is indirectly recognizing the possibility of such Resolutions to be reviewed in a judicial proceeding.

¹⁶⁰ As quoted by the Prosecutor (Response, II, (B), 1.): "*Report on the situation of human rights in the territory of the former Yugoslavia*, U.N. Doc. E/CN.4/1993/50, p. 7, para.16 (1993)." And "*Tadeusz Mazowiecki, Sixth period report on the situation of human rights in the territory of the former Yugoslavia*, U.N. Doc. E/CN.4/1994/110, p. 44, para.283 (1994)."

¹⁶¹ The expression used by the Prosecutor, "violation of humanitarian law" (Response, II, (B), 1. § 2, in fine), is however slightly different from the one used in the first of the above mentioned Experts' Report (previous footnote), "massive violations of human rights and international humanitarian law".

The idealism of the speech, in support of the righteousness of the actions of the UNSC, seems to lose its references on the underlining debate on legitimacy of the powers at play. In this case, answering to the Defence *Motion* regarding specific conditions of the conflict, even if to contradict their conclusions, opens the reasonableness for its discussion in court: precisely the point aimed by the Defence in sustaining the ICTY implicit powers to review the lawfulness, and legitimacy, of its establishment by the UNSC.

1.11. Impunity and the restoration of peace and security.

Still driven by the wish to counter argue the Defence, the Prosecutor elaborates on the possibilities of the criminal prosecution to act as an impediment to the restoration of peace and security, as claimed by the Defence.

The expected conclusion of the *Response*, in denying such possibility, is mainly based on an inextricable relation¹⁶² between international peace and justice. An argument in which the Prosecutor does not hesitate to make (in our view political) considerations on the essentiality of individual responsibility for “countering the misinformation and indoctrination which breeds ethnic and religious hatred”.¹⁶³

Somewhat more relevant are the references summoned to support this conclusions (the UN Charter, the Universal Declaration of Human Rights, the Experts’ Reports¹⁶⁴ and doctrine)¹⁶⁵ as they call on the presumption that individual criminal responsibility in cases of ethnic divide, not only is connected both with justice and peace as it is also necessary to build international peace, i.e. the objective for which UNSC powers under Chapter VII are set. However, the calling of such

¹⁶² Response, II, (B), 2. § 1, p. 22.

¹⁶³ *Ibid.* § 3, p. 23.

¹⁶⁴ As quoted in the Response, from “Tadeusz Mazowiecki, *Second periodic report on the situation of human rights in the territory of the former Yugoslavia*, U.N. Doc. E/CN.4/1994/4, at p. 9, para. 43 (1993).”; and “Tadeusz Mazowiecki, *Sixth Eighth periodic report on the situation of human rights in the territory of the former Yugoslavia*, U.N. Doc. E/CN.4/1995/10, at p. 3, para. 11 (1994).”

¹⁶⁵ Meron (1993: 134), as quoted in the *Trial Response*.

authorities in this particular regard, translates the adoption by the Prosecutor of considerations of a political nature, an option that not only opens the otherwise normative discourse to the subjectivity of politics, but also appears to cast doubts on the certainty of the Prosecutor's cultural references in that particular period of History.

1.12. Humanitarian and Human Rights Law as a legitimate area of UNSC action.

The defence of the legitimacy of the UNSC actions regarding both Humanitarian, and Human Rights Law is, *ab initio*, pre-justified by the previous argument. For if serious violations of these laws constitute a threat to international peace and security, so are consequently justified the actions of the UNSC under Chapter VII to restore peace and security. The novelty¹⁶⁶ in the Response is the conclusion that "being an independent and impartial tribunal, the ICTY is in a position to apply international humanitarian law on a neutral and consistent basis."¹⁶⁷ A conclusion for which no further reasoning is offered immediately, leaving the doubts over a) the effectiveness of other previous courses of action, as over b) the independence and impartiality of the Tribunal, and c) the role of humanitarian organizations, such as the later-mentioned Red Cross, in the exercise of Humanitarian Law.

In fact the International Committee of the Red Cross (ICRC) is mentioned but with another purpose: so as to contradict the superficial reading by the Defence of the ICRC position, regarding the establishment of the ICTY. As earlier noted, the Defence fails to mention the support this international humanitarian organization extends towards the establishment of the ICTY, focusing its (Defence's) attention on a possible critique of the entanglement between humanitarianism and maintenance of international peace and security. Acutely, the Prosecutor's Response highlights the flaw, by bringing up the ICRC support for the ICTY which is welcomed as a "positive development [in] all efforts aimed at ensuring respect

¹⁶⁶ Other than references to UNSC actions (Resolutions) regarding previous situations – such as in Southern Rhodesia (1965/66), Iraq (1991), Somalia (1993) and Haiti (1993).

¹⁶⁷ Response, II, (B), 3. § 1, *in fine*, p. 23.

for International Humanitarian Law".¹⁶⁸ The specificity of the reference doubly founds the legitimacy (lawfulness) of the UNSC to take action in the protection of this body of Law: on the one hand it contradicts the Defence argument, on the other highlights the ICTY as a protection of Humanitarian Law, and a "concrete expression of (...) the legal obligation (...) undertake to ensure respect for these instruments [Geneva Conventions]".¹⁶⁹

This line of reasoning logically concludes for the non-collision of roles between the ICRC and the ICTY regarding Humanitarian Law, as the first basis its action on consent, but "there is nothing to suggest that this body of law excludes enforcement by non-consensual or coercive measures, or that such measures would in any way put into question the neutral character of this body of law."¹⁷⁰ The Prosecutor thus cleverly extends the welcoming of the enforcement of the Geneva Conventions, made by the ICRC, as a waiver to the legitimacy of the UNSC use of powers on the matter.

1.13. The UNSC authority over individuals.

This debate is somewhat less interesting for our research, as we focus on the legitimacy of the means chosen to subject individuals to their criminal responsibility (establishment of the ad-hoc Criminal Tribunal) and less on the relation of powers between the two poles (UNSC and individuals). From a simplified perspective, in the long relation between the UNSC and the individual, we are only interested in the possible discourse of the middle man (the ICTY), regarding its perception of legitimacy in the shorter relation of the ICTY with its creator, the UNSC.

¹⁶⁸ As per the quotation of the Prosecutor (Response, II, (B), 3. § 2): "(Some Preliminary remarks by the international Committee of the Red Cross on the Setting-up of an International Tribunal for the prosecution of persons responsible for serious Violations of International Humanitarian law Committed on the Territory of the Former Yugoslavia, DDM/JUR/422b, 25 March 1993, at paras. 1 &2)."

¹⁶⁹ *Ibid.*

¹⁷⁰ Response, II, (B), 3., § 3, p. 24.

Nevertheless, one can summarise the Prosecutor's Response position on this issue by noting its two arguments: a) that the individual responsibility for serious violations of International Humanitarian Law is a "well-established principle of international law"¹⁷¹ (even though, according to the reference quoted, one of customary origin, born in the Laws of War but "Similarly" applicable to "offences against the peace and security of mankind"),¹⁷² and b) that it is human individual conduct that allows the exteriorization of the action of States, and that for the enforcement of UNSC actions related thereto, attribution of individual responsibility is a fundamental feature to express such enforcement actions (i.e., implicitly, Chapter VII measures of a judicial nature).¹⁷³

1.14. No limitation to the establishment of a subsidiary organ of the UNSC with a judicial character.

Of far greater reach could be the argumentation of the Prosecution in this respect. In fact the legitimacy of the establishment of the ICTY is inextricably connected with the legitimacy of its creator to do so, i.e. for the UNSC to establish an ad-hoc subsidiary organ of a judicial character.

The *Response* lucubration presents two rather feeble lines of argumentation: a) one on the unpredictability of the evolution of constitutive texts, namely the Charter (thus opening the possibility of change, at least through interpretation, precedent

¹⁷¹ Response, II, (B), 4., § 1 & 2, p.24 – in this last paragraph by quoting from (sic): "Robert Y. Jennings & Arthur Watts (eds) 9th ed., 1 *Oppenheim's International Law* (1992), p. 17"

¹⁷² *Ibid.*

¹⁷³ In this not so attained argument, the *Response* calls on the authority of the Nuremberg Trial ("*Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, 14 Nov. 1945 – 1 Oct. 1946, I official Documents (1947), p. 223") to concretise abstract responsibility, i.e., to point to individuals to be prosecuted for the expression of the will of the State. Of greatest interest as it is, to concede to the temptation of embarking on a critique of the Prosecution's summoning of a Military Tribunal (set up by the victorious part of a war) on which challenges of legitimacy were not permitted, such critique is here off topic, as it presents no possible achievements on determining the possibility of an ICTY own legitimacy discourse.

and conventions, from what could be foreseen on its creation)¹⁷⁴ and b) the consistent interpretation of the Charter in the practice of the relevant organs of the UN.¹⁷⁵

If, on the first case, the argument for the reconnaissance of the expression of the will of the State is not only arguable, but irrelevant for the current research, the second calls on examples that could shed some light on the possible analogies to such unique exercise of powers, i.e., to find other possible examples of legitimacy in the establishment of ad-hoc International Criminal Tribunals by the UNSC. However, our high expectations fall through by the only two examples offered by the *Response*: a) the Kuwait Compensation Commission (aimed pecuniarily to compensate for losses)¹⁷⁶ and b) the Rwanda solution with the establishment of the ICTR, a later development then yet to face the same challenges of legitimacy as its twin brother ICTY was already facing.¹⁷⁷

Drawing proof of consistency in the interpretations, of the almost 5 decades old UNSC regarding the establishment of judicial subsidiary organs with a penal character, from a Compensations Committee and a posterior copycat of the ICTY itself (neither further apart then 26 months from the establishment of the ICTY)¹⁷⁸ is at least an unfortunate option to reinforce the argument.

¹⁷⁴ With a single reference when quoting from "J. Brierly, 'The Covenant and the Charter', 23 *British Yearbook of International Law* (1946), p. 83" to, on a presumption of posthumous prognosis, boldly conclude that the States parties "*implicitly accepted a liberal and contemporaneous interpretation (...) which allows the organs of the United Nations to adopt measures which may not have been expressly recognized (...) at the time of its conclusion*".

¹⁷⁵ The Prosecutor relies here (*Response*, II, (B), 5. § 4, p. 26) on a quotation from its reference to the ICJ and the Law of the Treaties: "(*Admissions case, I.C.J. Reps., 1950*, at pp. 8-9; see also *Vienna Convention on the Law of Treaties* (1969), article 31 (3)(b))".

¹⁷⁶ As quoted by the Prosecutor's reference (*Response*, II, (B), 5. § 5, p. 26): "U.N. Doc. S/RES/687, 3 April 1991, operative paras. 16-19)

¹⁷⁷ *Idem*, when referring to UNSC Res. 955(1994): "U.N., Doc. SC/RES/955, 8 November 1994".

¹⁷⁸ Kuwait on 3 April 1991, Yugoslavia on 25 May 1993, and Rwanda on 8 November 1994.

Facing the far-reaching field of argumentation on the evolution of the interpretation of the UN Charter, the *Response* appear to miss the trends of those times, i.e., the cultural references to consubstantiate a then contemporary reading of the Charter, so as to hold ground for its legal arguments. After opening the possibility of re-interpretation of the Charter, the Prosecutor was expected to elaborate on exactly that, by not doing so one might question his motives. Fear of the unknown? Uncertainty on the mainstream's leadership in the new world order between shrinking super-powers and a wishful Security Council? What was, then, legitimate?

1.15. On the independence and impartiality of a UNSC subsidiary judicial organ.

The Prosecution *Response* offers three quite separate lines of reasoning regarding this topic: a) the conditions for the independence as set in the statute (SICTY); b) the lack of relation between the proceedings of the ICTY and the restoration of peace, and also c) the broad discretion of the UNSC political powers (so as to deny the Defence accusations of discrimination justified by the lack of a "consistent and uniform legal basis"¹⁷⁹ in the repression of serious violations of international humanitarian law by the UNSC).

From all of these only the last one seems to present a potential input to a legitimacy discourse, inasmuch as it addresses, to denial, the discrimination charges on the uniqueness of the establishment of the ICTY.

2. Other challenges addressed in the Prosecutor's Response.

The Prosecutor's *Response* then addresses the challenge to the ICTY primary jurisdiction (primacy),¹⁸⁰ and to the Tribunal's subject-matter jurisdiction.¹⁸¹

¹⁷⁹ Response, II, (B), 6., § 4

¹⁸⁰ Response, II, (C), p. 28–35.

¹⁸¹ Response, III, (A), p. 36–46 (for Article 2 of the SICTY); Response, III, (B), p. 47–53 (for Article 3 of the SICTY); and also Response, III, (C), p. 53–59 (for Article 5 of the SICTY).

As earlier stated, when addressing the Defence *Motion* and Brief, the subject of these two types of challenge is of lesser interest for the framing in which a possible legitimacy discourse might be elaborated by the Trial Chamber. Even if some of the arguments presented within these other debates might be retrieved by the Chamber, they are only relevant if and inasmuch as they have a direct relation with the establishment of the ICTY, accordingly, any such arguments will only be here reviewed if and when adopted by the Tribunal in its Decision.

Some remarks, included in the Prosecutor's *Response*, consubstantiate this understanding:

2.1. Right in the beginning of the *Response*'s reasoning on the primacy of the ICTY, the Prosecutor makes it explicitly clear that: a) within this issue of primacy matters relating to the establishment of the ICTY were already addressed on the previous arguments; and b) the ICTY lacks the competence to review UNSC Resolutions. The uncommon bluntness of the opening remarks on the primacy can only be read as a condensate conclusion of the Prosecution on previous matters, the legitimacy of the ICTY:

"To the extent the issue of primacy over domestic courts relates to the scope of the security council powers in the establishment of the ICTY, reference is made to the above arguments, including the argument that the ICTY cannot review decisions of the Security Council. Any challenge to the establishment of the ICTY is a matter for the Security Council or other relevant organs of the United Nations." (Trial Response: 28)¹⁸²

¹⁸² For the sake of clarity on the apparent inconsistency of references, our reference (Author/Title, date: page) is here repeated according to the Prosecutor's *Response* system, as earlier quoted in this sub-title: *Response*, II, (C), § 1, p. 28.

Having made the point of returning to our general system of references, but still aiming to facilitate its search, we will keep the Prosecutor's system during the remaining review of its argumentation (so as to, regardless of possible secondary sources, keep and objective reference to the text).

A statement that reinforces our option of limiting the review, of additional material in the proceedings, to the central challenge on legitimacy.

2.2. With the sole purpose of register lines of argumentation, for possible further reference partial mentions are made to the contents of the remaining arguments regarding primacy, as present in the *Response* in specific issues, namely:

- a) That serious violations of humanitarian law are matters of universal jurisdiction. Decomposing the argument into four layers: that the community of sovereign States "may choose to vest their combined jurisdiction in an International Tribunal"; the crimes, by their nature, "are not crimes that are purely domestic"; that "In such circumstances, the sovereign rights of States cannot and do not take precedence over the right of the international community to act"; and finally that, on establishing the ICTY, "the Security Council, was acting on behalf of the member States of the United Nations" (Response, II, (C), 4., §1 & 2, p. 32-33).
- b) That the Defence argument on the principle of *jus de non evocando* does not affect the primacy of the ICTY, both because such principle "does not defeat the right of a State to confer jurisdiction on the ICTY" (thinking of the German case, where despite the constitutional norms referred to by the Defence, the ICTY jurisdiction was accepted), and because, by denying the universal character of this principle, the Prosecution considers that no challenge is made by a particular national jurisdiction, adding doubts on the lawfulness of such possibility (Response, II, (C), 5., p. 33-34).
- c) That in some cases, including serious violations of humanitarian law (and international human rights), "States have obligations towards the international Community as a whole. Such obligations *erga omnes* (...) require that the sovereign rights of States be subordinated to the common interest of the world community in the suppression of serious violations of

international human rights and humanitarian law through means such as the ICTY" (*Response*: 34).¹⁸³

- d) That the use of powers by the UNSC under Chapter VII of the Charter "overrides the sovereign rights of States". The claim is that the establishment of the ICTY is an enforcement measure under Chapter VII, which in turn, and by means of "Article 25 obligates the members of the United Nations (...) 'to carry out the decisions of the Security Council' including binding resolutions".¹⁸⁴ A conclusion further based upon the exception in Article 2 (7), *in fine* of the Charter, when referring to the principle of non intervention, by the UN, in matters essentially of domestic jurisdiction: "this principle shall not prejudice the application of enforcement measures under Chapter VII" (*Trial Response*: 35).

Section III – The USA Brief

The *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*" (sic), hereinafter "*amicus curiae* brief" or "*USA brief*".

(A) The *USA brief*, with the above mentioned limitations as a primary resource for our research, presents two different lines of argumentation:

1. A first approach, denying the ICTY competence to review UNSC actions, i.e. Resolutions, both when considering the existence of a threat to international peace and security (and therefore for the UNSC to act under Chapter VII) and

¹⁸³ In this reference the *Response* quotes from (sic): "(*Barcelona Traction Case*, I.C.J. Reps. 1970, at p.32); (See also Robert Y. Jennings & Arthur Watts (eds.) 9th ed., 1 *Oppenheim's International Law* (1992) at p.5), (*Response*: 34).

¹⁸⁴ References summoned in support of this argument include quotation from the: *Lockerbie case*, (I.C.J. Reps. 1992, p. 15) and Bruno Simma (ed., *The Charter of the United Nations: A Commentary*, 1994, p. 143).

to review the appropriateness of the measures taken, i.e. the establishment of the ICTY.¹⁸⁵

On a very short presentation,¹⁸⁶ when compared with the later reasoning on arguments already put aside as unreviewable, the *USA brief* claims that:

1.1. The legitimacy challenge must be addressed to the UNSC.

The ICTY, as a subsidiary organ, “cannot be asked to review and overrule the actions of its parent body”.¹⁸⁷ In support of the affirmation that “Within the U.N. system, challenges to the validity of the creation or mandate of a subsidiary organ must be directed to the principal organ which created it”,¹⁸⁸ the *USA brief* calls upon (the already mentioned, in the Prosecutor’s Response) positions of the ICJ¹⁸⁹ and the *travaux préparatoires* of the adoption of the SICTY by the UNSC¹⁹⁰ where, according to the USA, “the lines of argument raised by the Counsel for the Accused in the present case were considered and rejected by the [Security] Council at the time it created the Tribunal”.¹⁹¹

1.2. According to Chapter VII, the UNSC has “exclusive authority to determine the existence of a threat to international peace and security and to decide what measures shall be taken in response”.¹⁹²

1.3. The previously mentioned determinations of the UNSC, on the existence of a threat to international peace and security and on what measures to take in response, “are not subject to judicial review within the U.N. system”.¹⁹³ One understands for the lack of provision for such empowered organ (i.e. the lack

¹⁸⁵ Such is the case for the arguments presented in the first point of the *amicus curiae* submission, (USA brief: 1-4).

¹⁸⁶ Five paragraphs in little more than 3 pages (1-4), from a total of 38 pages.

¹⁸⁷ USA brief: 2.

¹⁸⁸ USA brief: 1.

¹⁸⁹ *Ibid*, n 1 references to the ICJ “*Namibia Advisory Opinion*”, “*Lockerbie case*” and “*Expenses Advisory Opinion*”.

¹⁹⁰ USA (brief: 2, n 3), references to: the “Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808” (S/25704); “*Note Verbale* from the Netherlands” (S/25716, 1993); and, “Letter from France” (S/25266 (1993)).

¹⁹¹ USA brief: 2.

¹⁹² USA brief: 2-3.

¹⁹³ USA brief: 3.

of provision of such powers in the ICTY Statute) and the previously mentioned¹⁹⁴ reluctance of the ICJ to assume such reviewing as to its competence.

1.4. Such determinations of the UNSC, on the existence of a threat to international peace and security and on what measures to take in response, “are of a policy and political character and are not susceptible to judicial resolutions”.¹⁹⁵ The apparently thin distinction from the previous argument is actually rather important, as it adds a (proposed) objective impediment, i.e. material impossibility, for a judicial organ to determine the fulfilment of necessary conditions for the powers unleashed by Chapter VII to become operative. In this sense, even if such power of judicial review of UNSC Resolutions were to exist, it would still be unable to decide on the appropriateness of the UNSC determination of the existence of a threat to international peace and security, as it was by nature a political question. Implicitly, the subjective judgement of the political organ (UNSC) is granted unlimited discretion.¹⁹⁶ History has proven more cautious, by retrieving the well-established Treaty proceeding in establishing the ICC, (to which the USA government, here *amicus curiae*, holds its reservations), but this particular argument, at that particular time, seemed to push the defence for the novelty of the International Criminal Tribunal (ICTY) to a point where its creator could not be contested. Was the UNSC to become the World Government?

2. A second approach, where despite the prior objection to the review, the *amicus curiae* presents arguments denying the claims of the Defence both regarding

¹⁹⁴ See USA (brief: 1, n 1).

¹⁹⁵ USA, brief: 4.

¹⁹⁶ Previous references (on discussing the Prosecutor's Response), on limits to this broad powers of the UNSC, as the then mentioned Principles of the Charter, would be of little use in the absence of an external power of review.

the lawfulness of the UNSC actions¹⁹⁷ and the subject-matter jurisdiction of the ICTY.¹⁹⁸

With our well-established subject of research (on a possible legitimacy discourse by the ICTY) the material arguments, as presented by the *amicus curiae*, on the characterization of the process leading to the recognition “of a threat to [international] peace” and security by the UNSC (*USA brief*: 5-9), the legitimacy of this latter’s involvement in humanitarian law (*USA brief*: 22-25), and the debate on the sovereignty of states (*USA brief*: 19-22), are all beyond the subject. The first for it would be the competence for the exercise of such powers that might matter for the research; the second as it is not the involvement of the UNSC in any body of International Law, but rather the creation of a specific judicial criminal organ, within that possible involvement, that might characterize the legitimacy of that establishment; the third as the relation between the UN organs and the sovereign States is a condition, rather than a source, of legitimacy for the establishment of the subsidiary organ under scrutiny.

The same reasons being valid to dismiss the critical review of the reasoning presented in all of point 3 of the *USA brief*.¹⁹⁷ In fact, the debate on the jurisdiction of an already established International Tribunal, interesting as it may be, is a debate that does not address the legitimacy of the establishment, but rather the framing of its powers. The two sets of arguments (*USA brief*: 5-24 and 25-38) are therefore here treated uniformly, as they both are aimed to answer the material challenges of the Defence, but those of which the previously mentioned line of argumentation denies the legitimacy of the judicial review, for which it now offers

¹⁹⁷ Namely arguments presented under n° 2. (a. to e.) of the *USA brief* (p. 5-25): (a.) regarding the existence of a threat to peace; (b.) the authority (of the UNSC) under Chapter VII to create a Tribunal; (c.) the independence of the Tribunal; (d.) the sovereignty of States; and (e.) the (UNSC) involvement in humanitarian law.

¹⁹⁸ Arguments presented under n° 3. (a. to d.) of the *USA brief* (p. 25-38): (a.) on whether there was an international armed conflict; (b.) on the grave breaches of the Geneva Conventions; (c.) on the jurisdiction over violations of laws or customs of war; and (d.) on the tribunal’s jurisdiction over crimes against humanity.

arguments. Reason for which, when focusing on the legitimacy discourse, one can split the contradictory lines of argumentation, i.e., the *USA brief* claims the non-judicial review (*USA brief*: 1-4), and then offers the Trial Chamber arguments (*USA brief*: 5-38) for such review.

The only possible research material¹⁹⁹ is consequently limited to: a) the authority of the UNSC under Chapter VII to create a Tribunal (*USA brief*, 2. b.);²⁰⁰ and b) the independence of the Tribunal (*USA brief*, 2. c.).²⁰¹ Even here only as a cautionary consideration of possible new arguments on legitimacy.

However, we find it useful for its introductory character, and as a guide for interpreting that subsequent argumentation, to refer the initial statement in the *USA brief* right after the first approach. In fact, the second part of the argumentation²⁰² – “The validity of the Security Council’s Decisions” (*USA brief*: 5-24) and “The Subject-matter Jurisdiction of the Tribunal” (*USA brief*: 25-38) – contains an affirmation supporting our conclusion:

“Although the Tribunal has, in our view, no authority to consider these challenges to the decisions of the Security Council, we would not wish to leave unchallenged for the record the arguments presented by the Counsel for the Accused. We address each in turn:” (*USA brief*: 5)

This “wish” will later be followed by the ICTY in the *Trial Decision*, where the Chamber, recognizing its lack of powers to review UNSC Resolutions, still addresses the challenge as it “considers that it would be inappropriate to dismiss without comment the accused’s contentions” (Decision: 4).

¹⁹⁹ Even though point 2. d. of the *USA brief* (*USA brief*: 19) responds to the Defence challenge on the primacy of the ICTY (referring the sovereignty of States) and thus not *prima facie* relevant for the legitimacy discourse research, a reference will be made to one of the arguments then presented by the *amicus curiae* (see *infra*, preliminary conclusions footnotes).

²⁰⁰ *USA brief*: 9-18.

²⁰¹ *USA brief*: 18-19.

²⁰² As per our division.

- 2.1. The long reasoning regarding the “Authority [of the UNSC] under Chapter VII to create a tribunal” (*USA brief*: 9-18) rests upon:
- a) The interpretation of Article 41 of the Charter (see Appendix I) as a broad discretionary power, where measures are listed only in an exemplary way, an argument for which the *amicus curiae* refers to a number of precedents of non mentioned measures in Article 41: no fly zones;²⁰³ creation of safe areas;²⁰⁴ humanitarian corridors;²⁰⁵ compensation for victims of armed attack;²⁰⁶ delimitation of borders;²⁰⁷ and prohibition of acquisition or possession of weapons of mass destruction.²⁰⁸
 - b) The interpretation of Article 29 as a broad discretionary power, where there is no limitation to the character of such subsidiary organs. An argument for which the *amicus curiae* refers, again, a number of precedents of the variety of subsidiary organs created by the UNSC: observer teams and peacekeeping forces;²⁰⁹ investigation commissions;²¹⁰ commissions for the enforcement of restriction on weapons and military activities;²¹¹ commissions charged with demarcation of boundaries;²¹² and committees charged with interpreting and administering sanctions regimes.²¹³ Separately (for its alleged “quasi-judicial functions”)²¹⁴ the *USA brief* also mentions “the U.N.

²⁰³ UNSC Res. 781 (1992) and Res. 786 (1992) on Bosnia and Herzegovina (*USA (brief*: 10, n 15).

²⁰⁴ UNSC Res. 819 (1993) and Res. 824 (1993), *idem*, footnote 16.

²⁰⁵ UNSC Res. 918 (1994), *ibid.*, footnote 17.

²⁰⁶ UNSC Res. 687 (1991), *ibid.*, footnote 18.

²⁰⁷ *Ibid.*

²⁰⁸ *Idem*, p.11, footnote 20.

²⁰⁹ *Idem*, footnote 21, but also Res. 758 (1992) and Res. 814 (1993), as also quoted by USA (*brief*: 11, n 21).

²¹⁰ UNSC Res.866 (1993), and Res. 955 (1994), as quoted by USA (*brief*: 11,n 22).

²¹¹ UNSC Res.687 (1991), and its implementation Report by the UNSG, as quoted by USA (*brief*: 12, n 23).

²¹² *Ibid.*, footnote 24.

²¹³ UNSC Res.661 (1990), Res. 724 (1991), Res. 748 (1992), and Res. 918 (1994), as quoted by USA (*brief*: 12, n 25).

²¹⁴ USA *brief*: 12.

Compensation Commission”²¹⁵ and the ICTR,²¹⁶ this last example of particular significance for its posterior establishment, to that of the discussed ICTY one.

- c) The appropriateness of the establishment of the ICTY, *as per* the threat to international peace and security character of the violations of international humanitarian law, themselves here seen by the *amicus curiae* as an “obstacle to peace (...) as they provide motivation for revenge and fuel (...) hatred among groups”,²¹⁷ thus concluding the pivotal role of individual responsibility, as provided by the ICTY, as a suitable measure for the restoration of international peace and security.
- d) Backtracking on its previous decision to address each issue of the Defence challenges, regardless of the prior denial of its judicial review, the *USA brief* begins to claim the “judgement of policy and politics”²¹⁸ character against the Defence argument that the establishment of the ICTY would “obstruct rather than assist in the peace process”.²¹⁹ Furthermore the *USA brief* goes as far as stating its understanding that such political judgements are “give[n] by the U.N. Charter to the Security Council, and there is no basis for a judicial body to questions that judgment”.²²⁰ Still the *amicus curiae* brief ends up addressing the material challenge, by denying its conclusions primarily based on the notion that the individual responsibility judgments, as committed to the ICTY, facilitate the peace negotiations as it has “relieved the peace negotiators of the difficult burden of negotiating arrangements for the prosecution of war criminals”.²²¹ A rather subjective conclusion by all means of legal interpretation and historical experience, especially without

²¹⁵ UNSC Res. 687 (1991) and Res. 692 (1991), as quoted by USA (brief: 12, n 26).

²¹⁶ UNSC Res.955 (1994), as quoted by USA (brief: 13, n 27).

²¹⁷ USA brief: 13.

²¹⁸ USA brief: 14.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ USA, brief: 15.

mentioning the possibility that the representatives of the States in peace talks could, themselves, be subjects of indictments.

- e) That the creation of the ICTY does not infringe the authority of the UNGA. A conclusion based upon the lack of Chapter VII powers by the UNGA, and if that would not be the case, upon the primacy conferred to the UNSC²²² for the exercise of Chapter VII powers under Article 12 (see Appendix I). Despite this reasoning, the *USA brief* still highlights, as per UNSC Res. 827, the “ample role for the Assembly in the creation and operation of the Tribunal, including the election of its judges and the approval of its funding”.²²³ Actions which, according to this presentation, “expressed its [the UNGA’s] full support for the Tribunal”.²²⁴ The argument, though sustainable when considering the legal framing of UN organs’ powers, is less compelling when levelling the exercise of accessory powers to the legitimacy of the establishment of the ICTY.²²⁵
- f) The Defence challenge on the lack of “exceptional circumstances”,²²⁶ is denied in the *USA brief*, with a double argument: identifying the “particular circumstances” mentioned in Res. 827 regarding the situation in the former Yugoslavia, with those “exceptional circumstances” as referred to by the Defence,²²⁷ but also by the summoning of a legal argument with political meaning, i.e., the legally established discretionary of the UNSC to deal with

²²² USA brief: 15-16.

²²³ USA brief: 16.

²²⁴ *Ibid.*

²²⁵ Another line of argumentation was also offered, regarding the composition of the UN organs (UNSC and UNGA), with the USA brief dismissing its relevance, as *per* the goals inherent to the granting of Chapter VII powers to the UNSC by the Charter (and thus implicitly accepted by member States, although such reason is not explicitly invoked by the *amicus curiae*).

²²⁶ As quoted by the *amicus curiae* (USA brief: 17), by reference to the possibility, raised by the Defence, that the exercise of (denied by the Defence) powers of the UNSC, did not arise from any “exceptional circumstances”.

²²⁷ An argument which, *ad absurdum*, would support the Defence claim of questioning the (initial, regular) competence of the UNSC to establish a Tribunal under Chapter VII powers.

each particular threat to international peace and security as it deems fit,²²⁸ even if by different actions and exercise of powers.²²⁹

- g) Somewhat in relation to this latter line of argumentation, the USA elaborates on considerations of the evolution of the "system of international law". Still denying the Defence attempt to compare the actions of the UNSC (regarding the cases of the former Yugoslavia versus past conflicts in Korea, Vietnam, Algeria Cambodia and Congo), the *amicus curiae* claims that, if those different approaches by the UNSC were to constitute a limitation to its future actions, that limitation could imperil the development and advancement of the International Law.²³⁰ An argument which implicitly recognises the novelty of the Tribunal, as well as lack of references to ground a discourse of legitimacy.

2.2. The reasoning regarding the "Independence of the Tribunal" (*USA brief*: 18-19) rests upon:

- a) The conclusion that (contrary to the Defence claim that the creation of the ICTY by the UNSC "impairs the independence of its judicial functions")²³¹ the independence of any judicial functions are not endangered by the political nature of its creator, as "all judicial bodies are created by political

²²⁸ "As a matter of law, there is no requirement under Chapter VII that the Council take similar action in dealing with all comparable threats to the peace, nor a prohibition on Council Action if it has failed to take such action in similar previous cases. The Council has the discretion, as it must in cases involving such great consequences, to judge in each particular case whether action is prudent and appropriate, based on its own evaluation of all relevant considerations" (*USA brief*: 17).

²²⁹ Further references are made to the possible consistency of the posterior evolutions, such as the creation of the ICTR, and the expression of a wishful thinking that such evolution could remain "consistent". See *USA (brief: 17, in fine)*.

²³⁰ (*USA brief*: 18): "It is unconvincing to suggest (...) that the Council's failure to take similar action with respect to conflicts of past decades (...) somehow estops it from acting now. Such a concept would condemn the international community to refrain from actions necessary to maintain the peace because such actions had not been taken in the past. It would effectively prevent the international community from developing and advancing the system of international law." (sic)

²³¹ *USA brief*: 18.

acts".²³² The key standard for the evaluation of the independence is then identified, in the USA brief, with the contents of the mandate and rules of those judicial organs,²³³ mandate and rules which, *in casu*, are no others than the UNSC Res. 827 and the RPE. A reasoning by which, in contradiction with the first line of argumentation (on the non-judicial reviewability of UNSC Resolutions), points to the review of Res. 827 (mandate: the establishment; and Rules: the SITCY) and eventually the RPE as sole mean to conclude for the independence of the ICTY.

b) Accordingly, and supporting our last conclusion, the *USA brief* then elaborates on the affirmation of the ICTY independence, by reference to specific Articles of the SICTY²³⁴ and the oath of office by the judges. The lack of reference to the RPE – approved by the judges – takes no strength to our conclusion that the *USA brief* implicitly recognizes the (judicial?) review of UNSC Res. 827 – establishment and adopted Statute of the ICTY – as the standard by which the independence of the ICTY can be measured. Inasmuch as the legitimacy of the Tribunal can depend on its independence, so this standard would become essential for the confirmation of the ICTY legitimacy.

(B) As preliminary conclusions one can highlight that, according to the *USA brief*:

1. The main argument presented rests upon the lack of competence for (any) judicial review of UNSC actions, *maxime* the ICTY incompetence to review UNSC Res. 827;
2. That even if that would not be the case, the UNSC has wide discretionary powers (considering Articles 29 and 41) to act under Chapter VII, namely in the consideration of each particular situation and broadness of possible

²³² *Ibid.*

²³³ *Ibid.*: [referring to judicial bodies] "...their degree of independence depends on the mandate and rules that govern their operations."

²³⁴ *Ibid.*, summoning Articles 12, 13, 16, 20, 21 and 26 of the SICTY.

- solutions to adopt, including an unlimited character of subsidiary organs to be created;
3. The political, and thus judicially non-reviewable, nature of UNSC decisions;
 4. The legitimacy of UNSC actions under Chapter VII, *vis-a-vis* the UNGA, as well as the implicit acceptance by UN member States of such framing of powers;²³⁵ raises the question, for the interpreter, whether the USA Government is, by this reasoning, accepting a broad power of intervention by the UNSC?
 5. The possibility of evolution of the “system of international law” by means of UNSC innovative actions;
 6. That the independence of the ICTY (without any reference to its connection with the legitimacy of the Tribunal), does not depend from the nature of the organ that established it, but rather from its legal framing, namely UNSC Res. 827 and the SITCY.

Section IV – The Trial Decision

In the Trial Chamber’s Decision of 10 August 1995 (*Trial Decision*) none of the three arguments of the Defence *Motion* were accepted, but on different grounds: a) on the illegal establishment of the Tribunal, i.e. on the legitimacy of the establishment of the ICTY, the Trial Chamber refused to rule, though presenting arguments on the matter; on both the b) wrongful primacy over national courts; and c) the lack of jurisdiction *ratione materiae*, the Trial Chamber dismissed the *Motion*.

²³⁵ In this regard, as a lateral reference, as we have already set aside the full argumentation on the sovereignty of States (USA Brief: 19-22), it might be worthwhile quoting the very first argument offered by the *amicus curiae* for the dismissal of the Defence claim over the sovereignty of States, even if presented in point 6. of the Defence brief, to challenge not the legitimacy but the primacy of the ICTY:

“The Tribunal was created pursuant to a treaty – the U.N. Charter – to which all relevant States are party. This acceptance of the Charter system was an exercise of the sovereignty of Member States and not an infringement upon it.”

(USA brief: 19).

- a) Regarding the illegal establishment of the Tribunal, the Trial Chamber refused to rule, considering that the *Motion* arguments “go, not so much to its [ICTY’s] jurisdiction, as to the unreviewable lawfulness of the actions of the Security Council” (Trial Decision: p.17).
- b) Regarding the wrongful primacy over national courts, the Trial Chamber dismissed the *Motion*, basing its decision in three arguments:
 - i. the primacy was established by a UNSC Resolution, therefore lacking (the ICTY), jurisdiction to review such Resolutions;²³⁶
 - ii. the accused lacks the legitimacy to contest a violation of sovereignty, both because:
 - he, the defendant, is not a State, sole legitimate author of a *Motion* for violation of sovereignty;²³⁷
 - the States directly involved, Bosnia-Herzegovina and Germany, accepted the primacy of the ICTY.²³⁸
 - iii. The crimes *sub judice* are international in nature,²³⁹ thus not subject to a specific national jurisdiction, and the UNSC action under Chapter VII of the Charter constitutes an explicit exception to the prohibition of intervention by the UN, as per Article 2(7) of the same Charter.
- c) Regarding the lack of jurisdiction *ratione materiae*, the Trial Chamber also dismissed the *Motion*.
 - i. In what refers to the grave breaches of the Geneva Conventions of 1949, the basis for such decision²⁴⁰ lay in the conviction that the crimes to be prosecuted are enumerated in Article 2 of the SICTY, where the reference to the Geneva Conventions is only contextual.
 - ii. In what refers to the violations of the laws or customs of war the Trial’s decision²⁴¹ is based upon the dismissal of the distinction

²³⁶ Trial Decision:17-18.

²³⁷ Trial Decision: 18.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ Trial Decision: 19-22.

²⁴¹ Trial Decision: 22-29.

between international and internal conflict, in so far as the Defence argued that only in an international conflict would such crimes be subject to this jurisdiction.

As earlier envisaged, in the Introduction as in Chapter I of this thesis, what is clear is the central role of the first challenge, formally on jurisdiction, for the analysis of the legitimacy discourse. With the framing of the case pointing towards the minor importance of the arguments relating to the third challenge, on subject-matter jurisdiction (Articles 2, 3 and 5 of the SICTY), and a lateral role of the second challenge, on the primacy of the ICTY, for the legitimacy discourse.

Although aware of this primary concern with the Decision reasoning facing the first Challenge (legitimacy), the sometimes intertwined arguments for the other two challenges justify, at times, references to those parts of the Decision, in particular in relation to the second Challenge (on the primacy), when it clarifies or reinforces the ICTY reasoning of its own legitimacy.

1. Illegal establishment of the Tribunal – laying the foundations of a legitimacy discourse.

On the challenge over the legitimacy of the ICTY, the Trial Chamber identifies the arguments of the Defence²⁴² with the questioning of the competence of the UNSC

²⁴² The Decision enumerates, systematically, and extensively, the challenge and its arguments, ten in total (Trial Decision: 3):

1. Before its creation an ad-hoc court was never envisaged;
2. No involvement of the UNGA;
3. UN Charter never intended the UNSC to establish a criminal tribunal;
4. Inconsistency of UNSC actions regarding other cases;
5. ICTY did not promote international peace;
6. UNSC could not create criminal liability on individuals;
7. Inexistence of any international emergency;
8. Incapability of a political organ (UNSC) to establish an independent tribunal (ICTY);
9. Defect in the creation of the ICTY *ex post facto*;
10. Primacy over national courts inherently wrong.

to (i) establish, and (ii) adopt the Statute of, the ICTY.²⁴³ In so doing the Chamber limits its review of this challenge of the *Trial Motion* to the possibility of reviewing the legality of UNSC Resolutions:

“Essential to these submissions is, of course, the concept that this Trial Chamber has the capacity to review and rule upon the legality of the acts of the Security Council in establishing the International Tribunal.”

(Trial Decision: 4)

Having identified the question to be answered, the *Trial Decision* does not argue any further so as to present the reasons for its (pre)announced decision:

“The Trial Chamber has heard out the Defence in its submissions involving judicial review of the actions of the Security Council. However, this International Tribunal is not a constitutional court set up to scrutinize the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal 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.”

(Trial Decision: 4)

Even if holding back on the affirmation of the “decision to be”, such an introduction to the main challenge amounts to a *questio iudicata*. Despite this introduction where the Trial Chamber clearly limits its own powers to the judicial review of criminal offences according to its Statute²⁴⁴ (mandate) therefore ascertaining that

²⁴³ According to the *Trial Decision* the *Trial Motion* sustains “that the action of the Security Council in establishing the International Tribunal and in adopting the Statute under which it functions is beyond power; hence the International Tribunal is not duly established by law and cannot try the accused” (Trial Decision: 3).

²⁴⁴ By the indirect reference to Article 1 of the SICTY, see *Trial Decision*: 4, § 4.

the challenges presented by the Defence are unavoidably connected with a power to review the legality of UNSC acts,²⁴⁵

"the Trial Chamber considers that it would be inappropriate to dismiss without comment the accused's contentions that the establishment of the International Tribunal [ICTY] by the Security Council was beyond power and an ill-founded political action, not reasonably aimed at restoring and maintaining peace, and that the International Tribunal is not duly established by law". (Trial Decision: 4)²⁴⁶

And no doubt about the object²⁴⁷ of this position can be raised, as it's the Decision that titles it "REASONS FOR DECISION" subdividing them into: "I. The Establishment of the International Tribunal; A. Legitimacy of creation" (Decision: 3).

Given the preannounced reason for not deciding on the lawfulness of its own establishment (deciding for its lack of competence to review the challenges to the establishment of the ICTY) it becomes apparently difficult to justify the need to comment on a subject it has no competence to review. In fact, and despite the uniqueness of the ICTY, there are only two possibilities:

1.1. There is a possibility of judicial review of UNSC Resolutions. In which case such judicial review – an essential feature to the balance of powers under a democratic Rule of Law comprising a separation of powers (Hamilton, 2003: 477)²⁴⁸ – can take two forms:

²⁴⁵ Trial Decision: 3-4.

²⁴⁶ Trial Decision:4, § 6. *in fine*, see also the equivalent reasoning in USA (brief: 5).

²⁴⁷ The context is addressed *infra*, when considering the *Trial Decision* introduction to this very quotation, of which the initial wording will be repeated.

²⁴⁸ Federalist 78, for the reversion from the Portuguese version, we follow Vanberg, also for our adhesion to his argument (Vanberg, 2005: 9):

"By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority [; such as, for example, that it may not approve laws which suspend civil rights, ex post facto laws, and alike.] Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."

- a) A Tribunal, at a Trial level, does have the power to review the legality (or better yet to hold a Constitutional review, with all variations therein)²⁴⁹ of any legal acts it has to apply, even if subject to a possible appeal; or
- b) There is such an organ or judicial body to which such challenges may be addressed *other* than the trial court, regardless if any possible suspensive effects on the proceedings.²⁵⁰

1.2. There is no possibility for judicial review, in which case we can envisage two other possibilities:

- a) The lack of competence, both to review or to refer such review, renders any comments of no know judicial value; or

²⁴⁹ Cavari (2004), our bold:

*"Constitutional Review, meaning the power of court to declare a statute legally null because it conflicts with a higher norm, bears tension with one of the main pillars of democratic idea, that of granting judges the authority to annul majority's decision. In spite of this tension, understanding the intricacies of constitutional democracy and the adoption of a constitution in most of the western democracies, we witness an ongoing spread of constitutional review, which differentiates in pattern and power. (...) I assume that the pattern finally adopted expresses the balance of powers within a given political arrangement. A pattern which will be of any deviation from this balance of power could in fact be adopted but might lead to a collision between the Constitutional Review Institute and the political-institutional structure. In order to find such a connection I present a **study of five countries representing different prototypes of constitutional review**: Declaring nullity by the regular court hierarchy (U.S.A); Declaring nullity in a constitutional court (Germany); Declaring nullity as a semi-official part of the legislative process by a constitutional council (France); Declaring nullity of legislation which is limited by an over-ride of the parliament (Canada); Declaring unconstitutionality without the authority to nullify (Britain)."*

²⁵⁰ For the purpose of this research it less interesting to ascertain if such a body (with competence for constitutional reviews) is of a judicial, legislative or political nature. For the same reason, the hierarchical relation, and proceedings, between the trial court an such organ does not seem to present relevant consequences to the discovery of a legitimacy discourse by the trial court itself. In fact, the only relevant issue might be summarized by answering a question on why would the trial court present arguments on the legitimacy of its own establishment: either it was entitle to do so, by a competence to review these acts of establishment, even if subject to an appeal decision; or it is presenting its view on an issue it lacks the competence to review.

- b) Despite the lack of competence (of the court or of any appeal organ) the Tribunal's opinion may be regarded, at least, as doctrine, i.e. *opinio juris*.

In both cases the possible value of the precedent (as understood in Common Law) might be argued. However, that could not be the initial intention of the Tribunal, for in such case it would be aware that a precedent is only set by ruling – which the Trial Chamber does not, by recognizing the lack of competence to proceed with the inherent review. Yet another possibility, by considering the recognition of the lack of competence as a ruling in itself, does not justify the argumentation presented (at least from a precedent point of view) on any of the two only possibilities.

First if considering that it incorporates a non-ruling. The recognition of the lack of competence states both the need to review UNSC Resolutions, so as to effectively address the challenges set by the Defence *Motion*, and the lack of competence to do so. Accordingly, the *Trial Decision* is not in this matter a ruling but rather a non-ruling, thus rendering unjustifiable the need for addressing the object of the challenges to the legitimacy of the establishment of the ICTY posed by the *Trial Motion* of the Defence.

Secondly, even if it were to be considered as a ruling, the *Trial Decision* could only be so in what relates to limiting the object of the challenges of the Defence *Trial Motion* to the Tribunal's legitimacy, presenting the needed argumentation to support the "ruling" on the lack of competence. Thus rendering unjustifiable the need to address the object of those challenges, i.e., the verification that the material questions posed laid beyond the competence of the Tribunal (that which might be considered as a ruling), would only justify the presentation of reasons to so consider, regardless of the merits of the object of the challenges themselves.

Either way, given the fact that the jurisdiction itself was novel and the Tadić case the first, it would be unlikely if not impossible to find such legal references as similar to the rule of precedent in Common Law. In fact, it took more than five

years for the ICTY even to pronounce on the matter of the value of the precedent, and even then to accept it with limitations.²⁵¹

Since the subject of the current research is not to scrutinize the powers of the UNSC (at least *per se*) nor the existence of an organ with such powers, but rather to examine the Tribunal's own speech in search for a self-legitimacy discourse, one can and in fact must concentrate on the above options a) and b), following the *Trial Decision's* proper rulings, i.e. decisions affecting the proceedings of the *Trial Motion*, formally challenging the Tribunal's jurisdiction, and *de facto* challenging its legitimacy²⁵² as well. According to these rulings, hypothesis a) i. does not operate, for lack of competence, and hypothesis a) ii. Should not either, as in such case the Tribunal would refer the *Trial Motion* to such organ, or at least mention this possibility in the comments it found "inappropriate" to skip.

In face of the remaining options, it would be unintelligible to confront the inefficacy of such comments according to option b) i., as the due justification of lack of competence would be enough for a judicial decision. Any other argument, namely the will to address the *Trial Motion* challenge regardless of its judicial effectiveness, could be said to outreach the judicial function, or worst, to incorporate a will to engage in rhetorical confrontation with the Defence. The proclaimed fairness and independence of the Tribunal are evidently incompatible with such an attitude. Yet,

²⁵¹ See HRW (2004: 263), and the reference therein to the Aleksovski case before the Appeals Chamber (24 March 2000).

²⁵² In the *Trial hearings* argumentation the entanglement between the concepts of jurisdiction and legitimacy become more obvious and Judge Stephen calls for a clarification.

"Judge Stephen: What you are really dealing with is not jurisdiction; it is the validity of the establishment of the Tribunal, is it not?" (Trial hearings: 210)

And later:

"Judge Stephen: Yes, so it is not at all the breath of our jurisdiction that you are challenging; it is the very existence of the tribunal and whether it was validly established?" (Trial hearings: 211)

To which the Defence ends concluding that those are, *in casu*, not separate matters, as the challenge on the ICTY jurisdiction implies, or might imply, questioning the legality, and thus the legitimacy, of the act of establishment, without which all jurisdiction is void (Trial hearings: 210-211).

as has been suggested on several occasions thus far, the legal minds behind such actions and attitudes operate in a manner culturally closed off from any thinking outside the discursive legalities that they continue to manipulate and deploy.

We are then left with the last hypothesis. The Tribunal (rendering explicit some implicit or customary rule; recognizing an ongoing legal debate; or ascertaining the self judicial framing upon which it recognizes its own powers) prolifically addressing the questions on its legitimacy, i.e., at minimum, the legality of its establishment.

Such an hypothesis might, for lack of an immediate alternative, make us realize that we are confronted with the first signs of evidence of an ad-hoc International Criminal Tribunal discourse of legitimacy. In fact the judicial function, in what relates to the solving of a case, does not seem to operate here, for the argumentation on the object of the challenges to the Tribunal's legitimacy, set forward by the Trial Chamber, as the *Trial Decision* itself recognizes, has no effective value to the case. Thus making it possible that the Tribunal's reasoning (speech), whatever the intention might be, incorporates the Tribunals understanding of the problem presented, i.e. a discourse on its own legitimacy. A statement of sort.

An apparently lateral point, presented by the *Trial Decision* as context and not as content, could otherwise prove our last hypothesis right: on the Tribunal's need, or the will to proclaim, a self-legitimizing discourse. As shy as with the unnecessary reasoning in an already adjudicated Decision, so does the Trial Chamber search for references, out of the legal and into political and cultural uncertain evolution of the 1990s, by ways of a mere introduction to the "appropriateness" of further comments on the Challenge of legitimacy, almost an excuse for its unasked leading role (the bearer of a new International Justice?):

"The force of criminal law draws its efficacy, in part, from the fact that it reflects a consensus on what is demanded of human behaviour. But it is of equal importance that a body that judges the criminality of this behaviour

should be viewed as legitimate. This is the first time that the international community has created a court with criminal jurisdiction. The establishment of the International tribunal [ICTY] has now spawned the creation of an ad-hoc Tribunal for Rwanda. Each of these ad-hoc Tribunals represents an important step towards the establishment of a permanent International Criminal Tribunal. In this context, the Trial Chamber considers that it would be inappropriate to dismiss without comment the accused's contentions..."

(Trial Decision: 4)²⁵³

The aim is then, according to the Trial Chamber, to (cor)respond to context. Not an internal judicial case context, but rather an ongoing, unreferenced and uncertain evolution of International Criminal Law. A changing world in which the ICTY, bearing the burden of Adam, "considers that it would be inappropriate" not to share the knowledge, *Even if unwillingly and full of caution.*

Clear is, however, that the recipient of the (ICTY) words is not the already dealt with causer of the case (Tadić), but rather that future messiah (ICC) already envisaged in the offspring (ICTR) of the messenger.

Even though following the same order of approach to the *Trial Decision* as to the *Defence Motion*, as a global speech, this first particular point is the primary source of research, having then to be closely explored so as to objectively identify what can only be understood as a possible legitimacy discourse and what content it may reveal. An assignment which importance can be gauged even from a quantitative perspective, as 40 out of the 83 paragraphs, of the "Reasons for [the] Decision" in the *Trial Decision*, relate directly with the "Legitimacy of creation" of the Tribunal", an issue the Trial Chamber finds to lack competence to review, a deep fall after temptation.

²⁵³ First half of § 6., of which the last part is quoted above.

2. The legitimacy discourse in the Trial Decision reasoning.

2.1. The first reason presented by the Trial Chamber relates to the power of the UNSC to establish the ICTY. The argument is set by initially invoking the UN Charter, namely Article 24 (1),²⁵⁴ in ascertaining the discharging of the UNSC powers regarding the maintenance of international peace and security, and stating that such powers are set out in Chapters VI, VII, VIII and XII.

The line of thought follows the teleological scope of the UNSC (maintenance of international peace and security) so as to find the Charter's rule(s) upon which such ethos converts into effective powers. Once recognized the link between duty and norm, in Article 24 (1) of the Charter,²⁵⁵ this translates into specific rules, Article 24 (2), on how such powers can be discharged (Chapters VI, VII, VIII and XII). Having been given the powers to intermediate between State and Peace, the Organ is vested in the hierarchy needed to act on behalf of its congregation. The argument thus marks out the legal norms that can be summoned by the UNSC to exercise the competent powers regarding peace and security, and avoiding references to further hypothesis, such as the need for other organs (UNGA) to be involved in this specific exercise of powers.

From the frame of rules found to be able to legally back the UNSC powers, the Trial Chamber then states the use, in this particular case, of powers under Chapter VII. This broad sense in which the norms are referred to has particular aim: to underline the wide scope of actions able of being included in the granting of the

²⁵⁴ See Appendix I.

²⁵⁵ See Appendix I, our bold: "Article 24 – Functions and Powers

1. In order to ensure prompt and effective action by the United Nations, **its Members confer on the Security Council** primary responsibility for the maintenance of international peace and security, **and agree** that in carrying out its duties under this responsibility **the Security Council acts on their behalf.**"

respective power. The Trial Chamber affirmatively recognizes both the discretion granted to the UNSC, and the “few limits on the exercise”²⁵⁶ of those powers.²⁵⁷

This broad discretion of powers is then taken by the Trial Chamber as a suggestion of non-reviewability of, *in caso*, the UNSC Resolutions. In a sense, all references become self-contained and self-explanatory, as the greater goal of international Peace not only entails the surrender of the will of the States to the UNSC, but also justifies its broadest, unquestionable and nearly unlimited powers, contrary to the Defence claim for material legitimacy,²⁵⁸ i.e.:

- a) by virtue of Article 24 (1) of the Charter, the States confer and recognize particular powers to the UNSC, for the maintenance of international peace and security;

²⁵⁶ Despite the references made to the *travaux préparatoires* (quoting from the Statement of the Rapporteur of the Committee III/3, Doc. 134, III/3/3, 11 U.N.C.I.O. Docs. 785, 1945) the Tribunal itself asserts that “the International Tribunal was established under Chapter VII. The Security Council has broad discretion in exercising its authority under Chapter VII and there are few limits on the exercise of that power” (Trial Decision; 5). Interestingly, on the nature of such limits, the Trial Chamber does not affirm by itself, but rather adopts by (the same) quotation, the view that these limits are reduced to “the sole reserve that it should act ‘in accordance with the purposes and principles of the [United Nations].’”

²⁵⁷ See Appendix I, our bold:

“Article 24 – Functions and Powers

(...)

- 2. 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.”

²⁵⁸ In the Trial hearings, after having set the ground for the ICTY to proceed with a possible consideration, whether in review or just by viewing, of the legality of its own establishment, the Defence, wishing to counter argue the Prosecution *Response*, denies the self-contained competence of the UNSC to determine its own competence. For the implications of the argument when later reversed unto the ICTY, and the bluntness of its presentation, we quote it as self-explanatory:

“The opinion put forward implicitly in the Prosecution’s argument, namely, that the Security Council is completely competent to determine its own competence – the Germans call this, as you know, the *Kompetenz-Kompetenz* – would render the UN Charter completely meaningless as a source of legal protection” (Trial hearings: 212).

- b) these particular powers of the UNSC are directly connected with a specific objective: international peace and security;
- c) The particular political nature of the powers makes them unreviewable;
- d) Only when a threat to that objective is recognized (a threat to international peace and security) may the UNSC embody those powers;
- e) Both the condition (threat) and the cause (powers) are contained in Chapter VII of the Charter;
- f) The ICTY was created by virtue of those very same immaculate powers in Chapter VII;
- g) Even if the ICTY had the competence to review actions of the UNSC, it would not be able to do so in this particular case, as the object of review would be a fruit of those special, unquestionable powers.

2.2. The Trial Chamber then turns into the Defence *Trial Motion* arguments regarding the fairness of the trial as a basic human right.²⁵⁹

Although mentioning the Defence's understanding of a fair trial as a basic human right,²⁶⁰ by reference to the need for a competent, independent²⁶¹ and impartial

²⁵⁹ Trial Decision: 5-6.

²⁶⁰ In the Trial hearings, the Defence argues that the right of the accused to challenge the legitimacy of the ICTY is in fact a basic human right:

"The Tribunal's competence to judge this question (...) derives, in the Defence's opinion, from the general principle of justice, that one of the preconditions that derives from the principle of justice that we have to comply with human rights is that a criminal court will be legitimately established. (...)

Then, in the light of these guarantees to a fair trial, it is a completely legitimate Defence to question the origin of the jurisdiction. If the establishment of a court were to be judge exclusively by the founder, in this case the Security Council, the guarantee to legality would be devoid of all meaning. Should the judge be bound by the founder's judgment (and purpose) concerning the legality of the establishment, the guarantee of independence would be limited to a considerable degree." (Trial hearings: 197-199).

²⁶¹ The Defence proceeds finding two relevant elements of this right to the case: (i) "independence of the court" and (ii) "establishment of the court by law" (Trial hearings: 199):

"The independence of the court is presented by the Defence as a precondition for a fair trial, but also as a legal ground for the competence of the ICTY to review the legality of

Tribunal established by law,²⁶² the Trial Chamber leaps unto the statement that “there can be no doubt that the international tribunal should seek to provide just such trial”.²⁶³ The fundament for such unquestionable engagement of the Tribunal being the “Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created”,²⁶⁴ by the Statute,²⁶⁵ that the trials are in fact public and fair, and the “scrupulous regard” taken by themselves, Judges, in framing its Rules of Procedure and Evidence (RPE).

There is immediately space for doubt, as the positivism of the argument might fall into a formal guarantee which could in turn be interpreted so as to abrogate the teleology of the rule. That not being the case, as per the non-subjective text of the norms in Article 21 of the SICTY,²⁶⁶ the lack of such explanation by the Trial Chamber on this “reason for decision”, either assumes the interpreters’ good-will towards the Tribunal understanding, or falls short of presenting a solid confirmation

its own establishment. In this sense, the neglect to consider a plea on the legality of the court would amount to the denial of a fair trial by an independent judge”

(Trial hearings: 206).

The independence is here underlined in support of the competence to review UNSC actions. Although apparently circumlocutory, the lack of any other such organs with competence to review the constitutional lawfulness of the act of establishment, the direct operativeness of the principles of International Criminal Law can justify the argument especially when based on human rights as the Defence did by recognizing one in the right to a fair trial.

On a wider perspective, the defence argues the possibility of the “testing” of the legitimacy of the ICTY against the framework of the UN Charter (Trial hearings: 214-215).

²⁶² Further reaffirming, now in the *Trial hearings*, the arguments presented in the Defence Brief, namely the understanding that the Tribunal’s jurisdiction, as set by SICTY Article 1, does not limit the broadening of competence (as per RPE 73 and 91). Mr. Wladimiroff, after being so questioned by the presiding judge (Gabrielle Kirk McDonald), admits that the competence of the ICTY to review its own legality “is not a *res judicata*. It is not a matter not to be discussed” (Trial hearings: 204). Although this specific competence “has not been provided with in the Statute [SICTY]. The Statute just leaves it open” (Trial hearings: 201).

²⁶³ Trial Decision: 5.

²⁶⁴ *Ibid.*

²⁶⁵ The Trial Chamber calls, as an example, on Article 21 (Rights of the accused) of the SICTY as the guarantee of the accused right to a fair trial, and on Article 20 (Commencement and conduct of trial proceedings), this so as to clarify the obligation of the Trial Chambers to ensure that the trial is fair.

²⁶⁶ See Appendix V.

of the material fairness of the trials. Precisely the point made by the Defence in the arguments debate during the hearings, and here ignored by the Chamber when invoking the formal structure of the guarantee rather than its material contents.

This is not however the most interesting question for now, as the summoning by the Trial Chamber of norms adopted by the UNSC, i.e. rules set in the SICTY, immediately raises the standards of interpretation towards the acts of the UNSC, namely its Resolutions, by which both the Tribunal was established and the Statute adopted, thus putting on the same footing the Law(s): Statute and establishment of the ICTY.

This argumentative path, concurrent with the recognition of the Tribunal's lack of competence to review UNSC Resolutions, has another possible interpretation: the equivalence in the hierarchy of legal instruments between the Statute and the establishment of the ICTY, setting aside possible dissent on the nature of the respective "norms". A result not avoidable with the argument that both acts were part of the same Resolution (827),²⁶⁷ in fact it is common for the UNSC to approve, adopt or decide different matters, relating to the same issue, in a single Resolution (thus the usual numerous paragraphs both of considerations and of the decision of each Resolution). Accordingly, it might be understood that the establishment of the ICTY²⁶⁸ and the Statute can embody different institutions of International criminal Law. That should, at least, be the intention of the adoption of the Statute, as the "prosecution of those responsible for serious violations of international humanitarian law" envisaged both by Resolution 808 and 827²⁶⁹ follow the principle of *nulla poena sine lege*, thus referring to a crime (violation of the norm) already

²⁶⁷ See Appendix IV.

²⁶⁸ Arguably established by Resolution 827, as the (UNSC) decision to engage in such path, in exercising powers under Chapter VII, was already taken in Resolution 808. In a certain way the formal confirmation of the decision to establish awaited the conclusion of the respective legal frame, the Statute.

²⁶⁹ See Appendix IV.

occurred *vis-à-vis* and already existing law (in the broadest sense).²⁷⁰ In this sense only the jurisdiction (court) where such crimes (law) are to be prosecuted is left open. Other options, or even the use of more vague terms, could open the possibility of prosecutions by *ex post facto* substantive laws, a result the UNSC clearly avoids.

On the contrary, the establishment of the Tribunal is, self evidently, a novelty. A novelty in International Criminal Law created *after* the crimes were committed. The novelty of the organ does not carry any consequence to the pre-existence of the norms it has to apply,²⁷¹ but unlike these it can be challenged on its own legality/legitimacy. Even the framing of the ICTY proceedings, from the Resolutions to the RPE, passing the Statute, tend to assure the agreement of the novel with the institution, the instrument to the task, the Tribunal to the existing norms to be applied. Such care does not, however, preclude the novelty of the jurisdiction, if the criminal law is older and well established so where other national jurisdictions, which previously faced numerous challenges both on their legitimacy and jurisdiction, while this new instrument of enforcement of International Criminal Law, the ICTY, had yet to prove its worthiness.

It is therefore quite limited the Trial Chamber's attempt to level the existing International Criminal Law that must be the core of the Statute, which at best operationalizes those norms, and the act of establishment of the ICTY. This conclusion is also backed by the Trial Chamber differentiation made in the same argument:

²⁷⁰ The reasoning of the decision follows the argumentative path of the *UNSG Report*, thus considering that the subjective International Criminal Law to be enforced is "beyond any doubt part of customary law" (UNSC Report: 9). For the current purpose it is immaterial to know if the norm derives from natural law, Treaty or is a customary one. The essential feature for this argument is the pre-existence of a norm, as the condition *sine qua none* for the violation to occur, thus making it possible the qualification of a crime, without the charge of the biased creation of new norms the accused had no knowledge at the time the facts occurred.

²⁷¹ UNSG Report: 8, § 29.

“it is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International tribunal be empowered to question the legality of the law which established it. The competence of the International tribunal is precise and narrowly defined; as described in Article 1 of its Statute”

(Trial Decision: 5-6).

Although the final sentence of this paragraph does appeal to the narrowness of the competence of the ICTY,²⁷² the above mentioned differentiation is made within the same object, the Statute. The Trial Chamber's earlier identification, between the conditions for a fair trial and both the Statute and the RPE, makes it now impossible not to understand the reference to the first part of the above quotation as the Statute, also mentioned at the end.

So for the Trial Chamber, both Statute and the establishment of the Tribunal seem to be levelled as acts of the UNSC, and the Statute's rules regarding the guarantees of a fair trial do not include the competence of the Tribunal to review UNSC Resolutions legality.

In a way, the *Trial Decision* reasoning seems to be using the positivism of the norm to include the political act of its own establishment. The clear conclusion legitimizes the Tribunal (to consider its structure appropriate for a fair trial)²⁷³ and limits its competence (so not to have competence to review the lawfulness of the act that created that “appropriate” structure) by reference to one single argument: the equivalent legal value of the full content UNSC Resolution 827, including: UNSG Report, establishment of ITCY and adoption of ICTY.

²⁷² “...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” (Trial Decision: 6). See also Appendix V, article 1 of the SICTY.

²⁷³ Trial Decision: 5, § 8.

2.3. The third line of reasoning²⁷⁴ is then devoted to this same theme of reviewability of UNSC Resolutions by the ICTY from yet another perspective. The Trial Chamber argues the intention of the Defence to “extend the competence of the International Tribunal [ICTY] to review the actions of the Security Council by reference to certain Rules of Procedure and Evidence [RPE] of the International Tribunal.”²⁷⁵

This proposed frame of reasons separates considerations on the RPE from the previous joint discussion of both Statute and establishment of the ICTY: yet another argument favouring the notion that as far as the Trial Chamber is concerned, Statute and establishment of the ICTY share the same legal hierarchy.

Here the Trial Chamber limits its argumentation to the Rules mentioned in the *Trial Motion*, Rule 73 (A) (i) and Rule 91.²⁷⁶

- a) The first of these Rules, 73 (A) (i), is set aside by the Chamber on the basis that such Rule relates to challenges to the Tribunal's jurisdiction and not on the legality of the UNSC action (Resolution), in establishing the ICTY, as the Defence claims.

This might very well be the first implicit recognition by the Tribunal that its legitimacy does not derive from a Rule (or Article from the Charter), a norm of some sort, directly related to jurisdiction.

Such finding also involves that the body of Law which defines what might be jurisdiction, International Criminal Law, is not of the essence to the Tribunal's legitimacy (at least legitimacy of establishment). We reach such conclusion as the challenges of the Defence, though named at the Tribunal's jurisdiction, do include challenges to its legitimacy, by questioning the legality of the establishment of the ICTY, thus, the reason the Trial Chamber presents here derives the legitimacy of

²⁷⁴ Trial Decision: 6.

²⁷⁵ *Ibid.*

²⁷⁶ See Appendix II.

establishment of the Tribunal from the legality of the UNSC Resolution (of a political nature), claiming this to be judicially unreviewable.

Given the Trial Chamber understanding of the *Motion*, even after considering that the ICTY does not have, *prima facie*, explicit competence to review the legality of its own establishment, as argued before, we are left with the hypothesis that it might extend its competence from either:

- i. the analogy to inherent powers, as already exercised by the Judges in the RPE by extending the ICTY competence regarding false testimony (*infra*, next argument on Rule 91); or
- ii. the logical argument of need, as by having competence to exercise a explicitly attributed power (i.e. the power to rule on motions challenging its jurisdiction as per Rule 73 (a) (i) of the RPE) the organ needs the lesser but not explicitly conferred powers so as to effectively exercise that first one (i.e. the competence to review the legality of the act of establishment of that very same jurisdiction).

The *Trial Decision* argues that the authority to investigate and rule on challenges of jurisdiction does not include the same “authority for engaging in an investigation, not into jurisdiction, but into the legality of the action of the Security Council in establishing the International Tribunal.”²⁷⁷ Again the Chamber concludes for a self-contained jurisdiction, as attributed by a higher power, where the jurisdiction is subject to challenges, but not that higher power, which thus lies beyond the competence of the court. As such, the legal speech indulges in the circumlocutory mutual legitimization of jurisdiction and Resolution, where the first has no power to question the second’s creation of the first.

Strange as it may seem the technical argument is quite common, it is actually a pre-condition for the separation of powers. However, in such cases there are cultural contexts of self-reconnaissance, i.e. the preconditions to view a jurisdiction

²⁷⁷ Trial Decision: 6.

as legitimate, as the Trial Chamber itself recognizes: "...it is of equal importance that a body that judges the criminality of this behaviour should be viewed as legitimate" (Trial Decision: 4).

Furthermore, at least for a democratic Rule of Law abiding State, that barrier that keeps the Judicial from the Executive can, most, and in fact is balanced by the Judicial competence to investigate the abuse of powers by the Executive (checks and balances), a detail the ICTY misses. The lack of tradition, as of cultural references, might help reviewing the *Trial Decision* as an almost impossible exercise of judgment, given the political acts themselves novel and unreferenced, it had to take as law, yet outside the normally already established context of a pre-existent legal order. In a sense, the lack of context, legal political and cultural, makes the Court overcautious on the grounds to found its judgements.

b) The Defence argument on the second Rule, 91 of the RPE,²⁷⁸ is addressed by the Trial Chamber in a very different manner.

As earlier mentioned, the question in discussion would be (should the Tribunal recognize its competence to do so) the possibility of extension of competence based on a case where such extension already occurs: liability to prosecution for false testimony under solemn declaration.²⁷⁹ In fact the "full extent of the competence of the International Tribunal" to which the Trial Chamber refers (Decision: 6, §8 *in fine*),²⁸⁰ does not include facts occurred outside the Former Yugoslavia, nor such offences as false testimony (SICTY, Articles 1 to 5), accordingly, when the Tribunal created its own Rules of Procedure and Evidence, it should also be limited by that competence as described in the Statute. By setting up a norm creating liability for actions committed outside the former Yugoslavia, the Tribunal is extending its jurisdiction as set forth in the Statute.

²⁷⁸ See Appendix II.

²⁷⁹ *Ibid.*, Article 91.

²⁸⁰ On a reference to Article 1 of the SICTY (see Appendix V).

The apparent paradox is surpassed by the Trial Chamber by claiming the “inherent authority of a Chamber to control its own proceedings”, i.e. raising the possible liability for actions within the proceedings, such as a testimony. This reasoning concludes that the jurisdiction of the Tribunal to prosecute certain crimes includes the jurisdiction over all of that prosecution in accordance with Article 15 of the SICTY. Interestingly no mention, other than the “mandate” of Article 15 of the SICTY, is made to a higher power (i.e. a UNSC Resolution) confirming, ratifying or recognising the Tribunal's own set up of the RPE. In agreement with the recognition of competence, the Chamber fails to affirm, or at least clarify, the ultimate source of its “legislative” powers on the matter. The inside containment of the power is laid to interpretation, as the *liability* referred to above, part of the proceedings as it may be, is still not in the mandate to prosecute given by the UNSC.

Given the previous copious resourcing to the unquestionable authority of the UNSC actions (i.e. Resolutions), and the equivalence implicitly recognized to the legal value of all elements in Res. 827 (among which the Statute), it was somewhat expected for that argument to be mentioned here. That would be the case should the *Trial Decision*, like previously, had found the *competence* of the ICTY to “extend” its competence in the RPE in the *jurisdiction* conferred for such particular task by the UNSC, i.e. a legitimacy link for such competence to “extend” the jurisdiction as by the connections of all elements between the norm (Rule 91 RPE) and the “legislator” (UNSC).²⁸¹

The reason invoked by the Trial Chamber (its inherent authority to control its proceedings) seems more aimed to deny the possibility of analogy, as proposed by in the *Motion*, and less keen on standing on the grounds which already appeared to be constructing an, although limited, discourse of legitimacy.

²⁸¹ I.e.: UNSC → Action under Chapter VII of the Un Charter UNSC → UNSC Res. 827, → UNSC Res. 827 inclusion of the Statute → Article 15 of the Statute → RPE → Article 91 RPE. UNSC Res. 827, → UNSC Res.827 inclusion of the Statute → Article 15 of the Statute → Creation of the RPE by the ICTY → Article 91 of the RPE.

The argument itself has no direct relevance for this research, but the willingness of the Trial Chamber to take a well known legal instrument of interpretation, such as the analogy, even if to contradict its occurrence, may well show its awareness of lack off such references in other arguments.²⁸²

2.4. The Trial Chamber then addresses another argument,²⁸³ claimed to be presented by the Defence, which is connected with references to positions of the International Court of Justice (ICJ).

The same final conclusion is also reached through reference to ICJ proceedings,²⁸⁴ as claimed to have been made by the Defence, i.e. the *Trial Decision* dismisses the Defence arguments.

However, such references are not found in the *Motion* nor supporting *Brief* (see supra *Trial Motion*). Despite the Defence *Trial Motion*'s indirect references to the possibility of establishment of the ICTY by a UN Charter amendment, and in this context a possible analogy with the ICJ provisions (Chapter XIV of the UN Charter), extensive and specific references to ICJ proceedings are in fact made but in the Prosecutor's *Trial Response*, which the Defence actually counter argues, dismissing them by differentiating the nature of both judicial bodies and claiming the specificity of the criminal procedure in the ICTY, against the advisory jurisdiction on the settlement of disputes by the ICJ.²⁸⁵

²⁸² i.e., should, as in this argument, the Chamber had the opportunity or the context references to do so, it might well have recourse to these references in its reasoning. By embarking in circumlocutory speeches on the unreviewable righteousness of UNSC Resolutions establishing the ICTY, yet taking this technical perspective here, it creates a dissonance in the discourse.

²⁸³ Trial Decision: 6-7.

²⁸⁴ Trial Decision: 6, and references therein to ICJ proceedings: "Expenses...", "Namibia..." and "Lockerbie" cases.

²⁸⁵ In this context, and by the clarity of the presentation, it is worthwhile to remember Mr. Wladimiroff preliminary intervention, by the Defence, in the public hearing of the *Motion* (*Motion Hearing*, open session, Affaire IT-94-1-PT, 193-194):

Nevertheless the Trial Chamber references to the cited ICJ cases,²⁸⁶ points towards the conclusion that the UNSC actions are judicially unreviewable. The Trial Chamber reasoning being that: on the first case ("Expenses") the ICJ stated that there "exists no procedure for determining the validity of acts of organs of the United Nations"²⁸⁷ (UNSC included);²⁸⁸ in the second case ("Namibia")²⁸⁹ the ICJ renewed the same statement, clarifying that such review was not within the Court's powers;²⁹⁰ and in the third ("Lockerbie"),²⁹¹ although through a quotation from a

"the argumentation of the prosecution in its response to our motion seems to be founded upon principles of international law without taking into account principles of criminal law.

It can do no harm to emphasise that the Tadic case is a criminal trial being heard by an exclusive criminal court and not a dispute between states before a court under international law.

Unlike international law, where the concepts and the customs are often defined quite vaguely and that, clearly, are approached more from a policy and, therefore, a political perspective than from a legal point of view, the criminal debate is sharply demarcated by demands of[f] legality and legitimacy. The Defence missed this aspect in the Prosecution's approach.

Furthermore, one should realise that a Tribunal [ICTY] cannot be compared to the International Court of Justice. We found a lot of references in the response of the Prosecution to rulings of the international Court, but we feel that since the Tribunal, unlike the International Court of Justice that can only give advisory opinions and decisions that do not directly affect an individual and that are not enforceable against individuals the Tribunal can impose a punishment that may be executed against the will of those concerned." (Trial hearings: 193-194).

²⁸⁶ Namely, as cited by the Chamber (Trial Decision: 10): Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (Advisory Opinion of 20 July) (the "Expenses Advisory Opinion"); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-west Africa) notwithstanding Security Council Resolution 276, 1971, I.C.J. 16, 45 (Advisory Opinion of 21 June) (the "Namibia Advisory Opinion"); and Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992, I.C.J. 114, 176 (Provisional Measures Order of 14 April) (the "Lockerbie decision").

²⁸⁷ It is also mentioned the reference made by the ICJ therein, to the *Travaux préparatoires* of the Charter, when proposals for such reviewing powers were rejected.

²⁸⁸ Trial Decision: 6-7.

²⁸⁹ Trial Decision: 7, see next footnote (Trial Hearings: 213-214).

²⁹⁰ For the Defence, the discharging of the ICTY duties would depend on the appropriateness of the measures *vis-à-vis* the appropriateness of the UNSC actions (Resolutions), quoting the Defence:

dissenting opinion,²⁹² the Trial Chamber calls on a statement that further explores the judicial unreviewable nature of the discretion of the UNSC, both in determining the existence of a threat to peace and in deciding which actions to take under Chapter VII.

2.5. The very brief reason under §13 of the *Trial Decision* is by no means less important, as the Decision not only concludes that those cited cases within the ICJ “clearly provide no basis” for the ICTY to review UNSC Resolutions, but further takes those same ICJ opinions to be “authorities to the contrary”.

This latter part of the conclusion assumes an importance given to the opinions of the ICJ by a Criminal Tribunal that can only be understood in one of two ways: (i) as adopting the common law feature of the precedent; or (ii) as recognizing these opinions to be, at least, *opinio juris*.

Either way such reason should support the absence of considerations by the ICTY (reasons for decision) on the merits of a challenge of legitimacy based on the judicial review of UNSC Resolutions. Precisely the opposite of what the Trial Chamber does in responding to each argument of the Defence, even after acknowledging its lack of competence.

The issue here might very well be the nature, scope or intention for (international) judicial bodies to elaborate on a subject beyond their powers. Should this lack of

“In the *Namibia* Advisory Opinion, after the Court [ICJ] had judged the basis of the resolution, the precise contents of the measures and their suitability was left to the political organ. I believe that in a case which is not of a purely international legal nature, as in this criminal case, what is at stake are not ‘usual measures’, but a special institution charged with the administration of criminal justice to individuals. That is quite a different position.

In that case the exact determination of the contents of the measures cannot be left exclusively to political organs. In the case of the Tribunal [ICTY], the question centers on the foundation of the measure that established it. Therefore, the legal review comes down to the question of whether the function exercised by the tribunal fits into the United Nations constitutional structure.” (Trial hearings: 213-214)

²⁹¹ *Ibid.*

²⁹² Judge Weeramantry dissenting opinion, but not dissenting in the object of the quotation.

possible judicial effects hold its grounds,²⁹³ and we might discover as an explanation, and predictably, the intention to create a self-legitimizing discourse, or at best an *opinio juris* from the subject²⁹⁴ on the legitimacy discourse arising from the establisher. Whatever the intention be, self created or recognition of intelligible legitimacy discourse, we start to lack possibilities of interpreting the reason for this reasoning on a subject outside the Tribunal's competence, other than the affirmation of the unprecedented legitimacy discourse itself.

2.6. The Trial Chamber then explicitly concludes²⁹⁵ that the Defence's submission envisages that the ICTY should review the actions of the UNSC.²⁹⁶

To such an end the Trial Chamber calls on "commentators"²⁹⁷ so as to justify its agreement with the suggestion that there are limits to the authority of the Security Council, in particular as a consequence of,

*"Article 24 (2), which provides that the Security Council:
shall act in accordance with the Purposes and Principles of the United Nations.
The specific powers appointed to the Security Council for the discharge of
these duties are laid down in Chapters VI, VII, VIII, and XIII."*

(Trial Decision: 7-8)

²⁹³ Thus not recognizing any form of expansion of the judicial powers to include the review of the legality of UNSC Resolutions, e.g. by ways of precedent (*a contrario sensu*).

²⁹⁴ In the sense of primary source.

²⁹⁵ Trial Decision: 7-8.

²⁹⁶ Despite the deep scope of the challenge, the Defence does not pursue the full power to review UNSC actions but rather the verification of the legality of the establishment of the ICTY. In the trial hearings a fine distinction is even presented by the Defence, referring to the ICJ Lockerbie case, between the viewing and reviewing: "they [ICJ] have viewed the matter but did not review it because there was no reason to." (Trial hearings: 208) Still a defence is made that the validity of the establishment (legitimacy) is "an aspect of the jurisdiction matter itself" (Trial hearings: 211).

²⁹⁷ Namely: D. W. Bowett, *The Law of International Institutions* 33 (1982), and Ian Brownlie, *The Decisions of Political Organs of the United Nations and the Rule of Law, in Essays in Honour of Wang Tieya* 95 (1992).

The interpretation the Trial Chamber engages in, as far as these limits to the UNSC are concerned, brings out as recognizable limits the prohibition of arbitrary actions or the instrumentalization of the Security Council own powers "for an ulterior purpose". Such limits to UNSC actions (here recognized by the same Trial Chamber which does not consider itself competent to review UNSC actions), are then argued to be a consequence of the nature of the Charter.²⁹⁸ The delegation of powers included in the Charter acts as a limit, i.e. the UNSC has, at best, the full extent of the powers included in the delegation by member States to the UN, represented by the Charter.²⁹⁹

In a parallel discourse with the first reason presented (on the UNSC power to establish the ICTY) here, as there, it is already clearly established the Trial Chamber position on its lack of competence; here, as there, the line of thought follows the teleological scope of the UNSC (maintenance of international peace and security) only now not so as to find the Charter's rules, upon which ethos converts into powers, but rather the means by which such powers come into being: the breath of God,³⁰⁰ in the form of the delegation of powers.

Again, the argument apparently admitting limitations to the actions of the UNSC, can be back read to the opposite meaning, i.e., if and when acting vested on the powers delegated to it by the Member States, the UNSC actions are binding *erga omnes*. Or, as earlier said on that first line of reasons of the *Trial Decision*, having been given the authority to intermediate between States and Peace, the Organ is vested in the powers needed to act on behalf of its congregation. If, then, that would avoid the involvement of the UNGA, in discharging the powers under

²⁹⁸ Trial Decision: 8.

²⁹⁹ On a more extreme view even the exercise of those delegated powers could be, as by a Treaty, only valid inasmuch as in the pursue of the purposes of the Treaty itself. A double limitation to the widening of UNSC powers: first contained within the delegated powers, and then constrained into their use only for the purposes of the Treaty.

³⁰⁰ The Trial Chamber, despite recognizing those few limits (later attempted to be proven respected) implicitly counter argues the argument by which "the Defence contends that the decisions of the Security Council are not 'sacrosanct'." (Trial Decision: 7).

Chapter VII, here the same reasoning avoids challenges to its exercise: for if the UNSC is pursuing its ethos (the self-referenced maintenance of international peace) it has those powers and is not violating those limits.³⁰¹

The circumlocution can be represented in a charter:

| | States | UNSC |
|--------------------------------|-----------------|------------------|
| Powers | Delegation → | Authority ↓ |
| Peace and security (threat) | Submission ↑ | Recognition ← |

2.7. After thus recognizing these limits – for the UNSC to act arbitrarily or in misuse of power – the Trial Chamber renews its lack of competence to review the actions of the UNSC,³⁰² – leaving the interpreter with the question of who could review the respect for, or violation of, those limits – but proceeds to a review of facts so as to justify the non violation of those limits.

The central role of the argument, both by questioning the actions of the UNSC and the appropriateness and legitimacy of the measure taken (i.e. the establishment of the ICTY), deserve the careful scrutiny of the Trial Chamber speech as, reaching this far in the hypothetical debate of the powers of the UNSC, it can now hardly avoid the abstraction of the legal debate to the concrete case. A result, proven or denied, most probably able to answer the questions posed in this dissertation.

³⁰¹ States → Delegation of Powers for → maintenance of international peace and security → Recognition of need to act → (by) → UNSC → Exercise of powers → (when) → threat to international peace and security → (for) → maintenance of international peace and security.

³⁰² Trial Decision: 16.

The Trial Chamber's hesitation on facing the challenge³⁰³ does not preclude it, nevertheless, to start elaborating in exactly that subject (the respect for the limits to UNSC actions), but only as own conclusions "proper" to be presented as reasons for the Decision, yet not binding given its lack of competence.

In a well intended interpretation, identifying this reasoning with what was said earlier about the ICJ (see *supra* 2.5.) we might let this note on the purpose of the reasoning aside for now, concentrating in the subject of the arguments presented.

The *Trial Decision* pursues the verification of the respect of the UNSC for these above mentioned limits: arbitrariness and misuse of power.³⁰⁴

The relevance of the Decision's speech in these Reasons for Decision, both for the boldness of the assessments made and the expressions used to that end, deserve a selected reading of the primary source, as a proof of the construction of a self-legitimizing discourse (our highlight):

"Although it is not for this Trial Chamber to judge the reasonableness of the acts of the Security Council, it is without doubt that, with respect to the former Yugoslavia, the Security Council did not act arbitrarily. To the

³⁰³ After explicitly questioned by the presiding judge on the appropriateness and criteria for a judicial review of political questions (as the recognition of a threat to peace), the Defence further explains its argument during the *Trial hearings*:

"it will be clear that the position of the Court [ICJ] is probably such that it is not competent to subject the decisions of UN-organs to a constitutional review automatically, as constitutional courts in certain member-states (such as Germany) can do. But if the question is raised explicitly, then the Court, as we see it, can answer legal questions regarding the powers of UN-organs, apparently with a view to the independent judgement of their legality. For reasons mentioned earlier, this cannot be less so in criminal law" (*Trial hearings*: 213).

The objective of the Defence being, having open the possibility of a judicial organ to consider the legality of UNSC actions (even if on a non review manner, i.e. without pronouncing on the merits and material options contained in the political questions, but limited to the legality of the exercise of powers) to highlight the special role of the ICTY as a subsidiary organ entrusted with the concrete application of the measures: the individual criminal liability.

³⁰⁴ *Trial Decision*: 8-10.

contrary, the Security Council's establishment of the International Tribunal represents **its informed judgement**, after **great deliberation**, that the violations of international humanitarian law were occurring in the former Yugoslavia and that **such violations created a threat to peace**."

(Trial Decision: 8) our bold.

The assertive manner in which the Trial Chamber describes the reasons for the UNSC establishment of the ICTY (Resolutions 808 and 827),³⁰⁵ further supported by the reference, on a selected analysis way, of the "careful, incremental approach"³⁰⁶ process followed by the UNSC to that end (from Resolution 764 until Resolution 827),³⁰⁷ can be interpreted as a review of the actions of the UNSC, in light of the earlier mentioned limits to the exercise of its powers.

A note must be made to the *Trial Decision* mentioning, within that incremental approach of the UNSC, of the receiving of the *Experts Report*, by the inherent adoption by the Trial Chamber, as legally established facts the findings of the *Experts Report*, as per its conclusion "that grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law had been committed (...) including willful killing, 'ethnic cleansing', mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests" (Trial Decision; 9).

³⁰⁵ See Appendix IV.

³⁰⁶ Trial Decision: 8, although by quotation references to external authorities (O'Brien, 1993: 639-642).

³⁰⁷ The *Trial Decision* enumerates a four-step approach by the UNSC (Trial Decision: 8-9):

- a) First by stressing the individual responsibility for grave breaches of the Geneva Conventions, as per Res. 764;
- b) Second, when the UNSC "publicized" that condemnation, by asking "States and other bodies to submit 'substantial information'" so as to consider additional measures, in Res. 771;
- c) Third, by the establishment of "the Commission of Experts to investigate these violations of international humanitarian law", by Res. 780.
- d) Fourth, by the UNSC decision (?) "that an international tribunal should be established", "by resolution 808" (Trial Decision; 9, § 1, in fine) and the consequent establishment of the ICTY in Res. 827.

This mention, in the context of a “comment” to the “accused’s contentions” in the legality of the Tribunal (Trial Decision: 4), clearly surpasses a mere explanation for a judicial decision, and enters the discursive domain of justification, i.e. facts considered proven in a judicial criminal proceeding. The detail of this reasoning, known to have no legally binding effect for the accused, seems deeply committed in the (judicially lateral) proof of the UNSC respect for the limits to act under Chapter VII, that very course of action which resulted in the (challenged) establishment of the ICTY. Inside the unnecessary global comments of the non-decision, the detail of the review of facts deemed capable to prove the legality of UNSC actions, “[a]lthough it is not for th[e] Trial Chamber to judge the reasonableness of the acts of the Security Council” (see quotation above), it does in fact review those actions. The aimed to be proven lawfulness of these actions mounting to the expected basis to consider the “appropriateness” of the Tribunal itself.

Willingly or not, this speech (constituting an objective review of the UNSC Resolutions, by a judicial organ which recognizes to have no such competence) focuses on the legitimacy of the establishment of the ICTY.

The Trial Chamber goes as far as clarifying how this reasoning, on the respect for the limits to the action of the UNSC, cannot be understood (our highlighted):

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

(Trial Decision: 9)

A speech that amount to the negation of the power to do what the Trial Chamber just did, when considering facts that might support the conclusion that the UNSC did not violate the limits to its powers in establishing the ICTY. To note that the *Trial Decision* is consistent with its recognized powers, and does not affirmatively conclude that such limits to the actions of the UNSC were not violated, it (the Trial Chamber) does only state so much as to conclude that the issue is of *no relevance* to the case, and that the Tribunal has *no powers to review* such possible violation.

What could, then, be the purpose of that previous reasoning of the facts leading to the exercise of Chapter VII powers as incorporated in Res. 827?

Could it be to consubstantiate a political opinion on the establishment of the ICTY? Or just to create such a discourse that, by ways of public attractiveness, could surpass any lack of recognizable, sound and well established references? The answer is never explicitly presented (other than that initial “appropriateness” of the comments). Yet, not as a part nor as a direct consequence of the same reasoning, but as an explicitly admitted additional comment, the *Trial Decision* considers that:

“One may add that in the present case **any submission to the contrary** [that the limits to the powers of the UNSC have not been violated] **becomes particularly unattractive** when, in the **notorious circumstances** of the former Yugoslavia, (...) **the Security Council has done no more than** take the step of ‘**ameliorating a threat to international peace and security**’ by providing for the prosecution of individuals who violate well-established international Law... [something] **best addressed by a judicial remedy**” (Trial Decision: 9), our bold.

Such a comment cannot, as intended by the Trial Chamber, be interpreted as an additional commentary, not in the context, not with this content. The comment “one may add” is actually the one by which the *Trial Decision* not only reviews the acts,

the Resolutions, of the UNSC,³⁰⁸ but furthermore, draws the conclusion (though only after the formal caution warning of non relevancy for the case and lack of powers to do so) that the acts of the Security Council are a proper measure to face a threat to international peace and security.

Such findings are also supported by the subsequent reasoning of the *Trial Decision*, where, indirectly answering the possible arbitrariness of the measure,³⁰⁹ i.e. the establishment of the ICTY, as the Trial Chamber differentiates

- a) the sources of substantive law on its jurisdiction *ratione materiae* (subject-matter jurisdiction), as pre-existent in customary law, from
- b) the means to prosecute under such law, i.e. the way to concretise the existent criminal liability, as the establishment of a court.

To then consider that that mean (establishment of the Tribunal) is not an “eccentric” or arbitrary measure, but rather a simple enactment of that pre-existent criminal liability, thus appropriate.

Yet again given the empirical approach of the research and the consubstantiation of the analysis in the primary sources, it is worthwhile with the excuse of the needed quotation of the last sentence, to quote the paragraph in question:

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

³⁰⁸ As previously done by considering the facts able to prove the non illegal use of powers (see the initial part of this very argument).

³⁰⁹ Previously identified by the *Trial Decision* as a possible limits to UNSC actions under Chapter VII.

fallacious proposition but will seldom provide a firm foundation for the criterion of a valid one.” (Trial Decision; 10), our bold.

As a partial conclusion from this long line of argumentation, and already answering some of the preliminary questions of this research,³¹⁰ one might say that from this set of reasons presented by the Trial Chamber in its Decision we can ascertain:

- a) that the ICTY Trial Chamber does in fact address the questions of the legitimacy of the Tribunal,
- b) that, while doing so the *Trial Decision* speech seems circumlocutory and limited to the invocation of the non-judicial acts of creation (UNSC Res.827); yet
- c) Recognizes the theoretical possibility of the existence of limits to the actions of the UNSC, namely arbitrariness and misuse of powers;
- d) Analyzes the proceedings of the UNSC leading to the establishment of the ICTY (Resolution 827);
- e) Concludes that no such limits were violated by the action taken by the UNSC in the case, thus materially reviewing UNSC actions; and
- f) Then consider that such review (just made) cannot be made by any judicial body, such as itself;
- g) Although warning for the irrelevance and non-binding character of comments, the speech includes conclusions that amount to a review of:
 - i. UNSC powers;
 - ii. UNSC determination of what is, *in casu*, a “threat to international peace and security”; and
 - iii. The appropriateness of the UNSC adopted measures facing the situation.

³¹⁰ Although addressed in the Conclusions, a note must already be made on the irrelevance of the legal hierarchy between the Decisions. Even if, as later said, the final word in the case is of the Appeals Chamber, the novelty of it all (Tribunal, Trial Chamber, Appeals Chamber, jurisdiction and challenges) can and must overcome the very same legally self-contained speech and, on the contrary, affirm the cultural perspective on the questioning of the entire discursive process of creating, *ab initio*, a self-legitimizing discourse.

2.8. UNSC Resolutions 808 and 827, who does what?

Interestingly, on another note, the Trial Chamber does not miss the opportunity, on an earlier and small play of words,³¹¹ within the particular mention to the four-step incremental approach of the UNSC, to retain the equal value of the decisions included in Res. 827:

“Finally, on 22 February 1993, **by resolution 808**, the Security Council **decided** that an international tribunal **should be established** and directed the Secretary-General to submit specific proposals for the implementation of that decision. On 25 May 1993, **in resolution 827**, the Security Council **adopted** the draft Statute and **thus established** the International Tribunal.”

(Trial Decision; 9), our bold.

Unlike its usual official speech on its establishment, the ICTY, is here vague enough about the relation of both Resolutions with the establishment of the Tribunal. In fact, our initial doubts on the particularly odd systematic reference to Res. 808 in the ICTY Statute, as published on its website (see *supra*, and Appendix V), seem now timidly founded by the Tribunal's discourse when addressing its own legitimacy.

The hesitation of the *Trial Decision* supports the critique to the concept that the ICTY was established by the UNSC in Res. 827. In fact, the contents of the UNSC Res. 808 were:

“The Security Council, (...)

1. Decides that an international tribunal shall be established (...);
2. Requests (...) a report (...) including specific proposals (...) for the effective and expeditious implementation of the decision contained in paragraph 1 above (...).”

³¹¹ Trial Decision: 9, §18, *in fine*.

And then, 92 days later, UNSC Resolution 827 reads:

“The Security Council, (...)

1. Approves the report of the Secretary-General; [S/25704]
2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia (...);”

(UNSC, Res. 827: 2)³¹³

As it is now clear, even the greater legitimizing references of the ICTY, the UNSC Resolutions, might be pointed for not using the clearest of speeches. The decision in Res., 808 can be said to include the political act of will of establishment, as it is only the implementation of an already taken decision which is yet to be presented and approved later. However, as a political organ that it is, and facing the novelty of the measure, the UNSC found it useful to (re)affirm that very same will in Res, 827, where the expression “Decides” is yet again used on the already known option on the measure to be implemented.

In such an interpretation, one might consider that the establishment (as manifestation of political will) of the ICTY is included in Res, 808, whereby Res. 827 only approves the ways of implementing such measure, namely by adopting its Statute. The issue is rather relevant given the Trial Chamber reasoning in conceding equal value to both the act of establishment (legitimacy of the establishment), and to the Statute (as conferred norms on jurisdiction), by including the approval of both in the same UNSC act, i.e. only in Res.827.

If from a strictly formal legal perspective both Resolutions, as forms of acts, do have the same value, from a material challenge perspective (a somewhat politico-cultural critique, as included on the *Trial Motion*) the prerequisites, conditions and

³¹² See Appendix IV.

³¹³ *Ibid.*

consequences of both decisions may differ, should they be included in the same or separate UNSC Resolutions. The act of establishment, as earlier confirmed, can be challenged on the basis of the *legality of the Tribunal*, whilst the Statute (without questioning the existence of the Tribunal itself) can find challenges to specific points of the *jurisdiction of the Tribunal*.

The *Trial Decision* discourse until now did recognize equal legal value to both issues, considering in its reasoning the fact that both were part of the same UNSC Resolution. The present hesitation may reveal the awareness of the court that both issues can be separately challenged, despite its continued circumlocutory speech on the mutual legitimizing roles of the establishment and of the Statute within the same higher instance by reference to a single Resolution (827).

2.9. The independence and impartiality of the Tribunal.³¹⁴

After closing the discussion on the respect for the limits to the actions of the UNSC, and therefore to the establishment of the Tribunal, the Trial Chamber turns its attention to the claims of possible interference by the UNSC in the judicial, criminal proceedings of the ICTY, and therefore in the independence of the Tribunal.

The non-essentiality of the argument, for the purposes of this dissertation, would, *per se* recommend setting it aside, however, considering the record interest for a ulterior motive (a mention to a form of legitimacy of exercise, rather the of constitution) we will summarise its contents.

The *Trial Decision* argues the comparison with national courts, subject to the (constitutionally established) political will of the legislator. As such, the possibility of national courts being abolished, though through constitutionally established and empowered organs, is somewhat presented as, *mutatis mutandis*, a non criteria for the arguing of the possible interference of the UNSC by its power to abolish the ICTY. Noteworthy the Trial Chamber recognizes such power as for the UNSC to

³¹⁴ Trial Decision: 10 and 14-15.

decide “the abolition of the International Tribunal, in midstream as it were, for wholly political reasons”.³¹⁵

Consequently, one may conclude that the Trial Chamber does reaffirm its recognition of the act of its establishment as a political act, thus unreviewable. However, in this particular case such a conclusion would yet again dissent any self-legitimizing discourse from the contents of that act, at least not without paradox.

If, then, there is no need, and in fact no justification, for the judicial review of the political act (i.e., the well-established and commonly shared politico-cultural references are self evident), why would the ICTY engage in such review?

The above-mentioned ulterior motive is argued much later in the *Trial Decision* (§ 32),³¹⁶ and relates no so much with the possibility of UNSC interference, but with the *ab initio* independence and impartiality of the ICTY.

The challenge is that the UNSC, while a political organ, cannot create an independent and impartial criminal court. Once again the Trial Chamber calls on national sovereignty for the comparison, as “criminal courts worldwide are the creations of legislatures, eminently political bodies”.³¹⁷ On its own, such argumentative path could, if reversed, amount to the Trial Chamber’s conclusion that the UNSC is a legislative organ. This question finds even more support given the example summoned by the *Trial Decision*, now regarding the UN organs (the *ICJ Effects* case):³¹⁸

³¹⁵ Trial Decision: 10.

³¹⁶ Trial Decision: 14-15.

³¹⁷ Trial Decision: 14.

³¹⁸ As earlier mentioned by the Prosecutor’s Response, “Effect of Awards” case, 1945, I.C.J. Advisory Opinion of 13 July.

"The Court (ICJ), (...), specifically held that a political organ of the United Nations – in that case, the General Assembly – could and had created 'an independent and truly judicial body'." (Trial Decision: 14)

The misfortunate example of the Trial Chamber further highlights the possible confrontation of UNSC and UNGA powers, a question by which the representativeness of sovereignties may question, if not the Executive, at least the legislative powers of the UNSC. The case is so that it is precisely one of the contentions of the Defence (the possible need for the involvement of the UNGA on the establishment of the ICTY), which is presented as an authority for the acceptance of the establishment of the Tribunal by a political organ, but just not quite the same one.

Apparently the *Trial Decision* does not consider it important to present more arguments on the matter, at least as far as its establishment is concerned. On the contrary, a whole new perspective is offered on the assessment of the independence and impartiality of the ICTY, when the Trial Chamber connects such assessment more with the *practice* than with the act of *establishment*:

"The question whether a court is independent and impartial depends not upon the body that creates it but upon its constitution, its judges and the way in which they function. The International Tribunal has, as its Statute and Rules attest, been constituted so as to ensure a fair trial to an accused and it is to be hoped that the way its Judges administer their jurisdiction will leave no room for complaints about lack of impartiality or want of independence."

(Trial Decision: 14-15)

Such reasoning opens the possibility for considerations of legitimacy of exercise, at the loss of the initial guarantee of legitimacy of title. If, on a national level context, there are cases where a (legally) illegitimate taking of power (coup, revolution) may, and in many cases does, lead to a legitimacy of exercise, those cases are appraised on the light of their fast tracking into constitutional normality and the

Rule of Law. Summoning, even inherently, such possibility in the international arena, especially in respect of a criminal jurisdiction, is the opposite of that path towards “constitutional normality” and Rule of Law.

For the purpose of the current research, it amounts to consider that the legitimacy discourse of the ICTY opens the possibility of illegal establishment, with a posterior legalization of the (already imposed) jurisdiction. From that perspective, either the ICTY might still be illegitimate, or the legitimacy of the UNSC use of powers is only assessable by its exercise, i.e. they are initially unlimited (which would contradict further reasoning by the same *Trial Decision* on: the delegation of powers by States; and the concurrent limits to UNSC actions, even under Chapter VII, namely the respect for the Principles and Purposes of the Charter), and only “reviewable” by the effective success of the measure taken to achieve the determined goals.

The discursive argument is, therefore, paradoxical, unless within a politico-cultural context where such *a priori* limits constitute a communal reference. A cultural context framing never to be referred by the *Trial Decision*.

2.10. On the “establishment by law.”

Systematically immediately after this last “ulterior” reasoning on the independence of the Tribunal (and therefore her considered, within context)³¹⁹ the *Trial Decision* addresses the Defence’s contention that the ICTY was not established by law. On the invocation of the International Convention on the Protection of Civil and Political Rights (ICCPR), an approach similar to a previous one (see *supra* Reasons for Decision review: 2.2, pp. 129-133, on the human rights),³²⁰ the Defence claims the unlawful prosecution of the accused.

According to the subject of this research, but also followed by the Trial Chamber, it is not the question of the respect for the “right” of the accused but the concept of

³¹⁹ Although not following the enumeration of the *Trial Decision*. As both lines of reasoning on the independence are separated by 4 pages (p. 10, § 20 and p. 14-15, § 32).

³²⁰ And the mentions in the footnotes therein to the *Trial hearings* (*supra* pp.129-133).

the “tribunal established by law” which is questioned, *vis-à-vis* that Convention. If, on the one hand, the question addresses the UNSC powers (both the respect for that Convention in the discharging of those powers, and the “legislative” nature of the establishment of the ICTY), it also questions the pre-existence of the Tribunal.

The first question is referred, in the *Trial Decision*, to that particular reasoning already made on the powers of the UNSC.³²¹ But the second is sharply contended with the rejection of proposals, at the time the Convention was being drafted, so as to substitute the reference to a “tribunal established by law” (Article 14 of the ICCPR), by a reference to a “pre-established” tribunal. Beyond the contention’s cutting reasoning, the *Trial Decision* does note, in favour of its own legitimacy, that all that is required is for a “tribunal to be legally constituted”.

At play, for the legitimacy discourse construction, is the relation between substantial law, i.e. the International Criminal Law, and the judicial structure, i.e. jurisdiction of prosecution, of those already established liabilities. In separating the two the *Trial Decision*’s discourse makes the ICTY’s legitimacy independent of any previous Law, but indelibly dependant on the legitimacy of the UNSC act of establishment (for the review of which it does not recognise competence).

2.11. Returning to the systematic framing of the Reasons for the Decision (yet directly connected with the here previous reason reviewed) a central argument in the legitimacy discourse is made, as the *Trial Decision* turns to the legality of the establishment of the ICTY by explicitly reviewing the fulfilment of the concepts mentioned in the proper procedure, i.e., the verification of the existence of the facts needed for the UNSC to be empowered to establish the ICTY (a legal formal review of UNSC Res.?).

³²¹ Here reviewed in 2.1., 2.6. and, partially in 2.7.

Given the interconnection of the issues reviewed under this line of reasoning, we must consider them under a single review.³²² The *Trial Decision*, on a string of considerations, starts by addressing the formal procedure then passing on to characterize the novelty, or not, of the measures and finally excluding the possibility of considering a review of the appropriateness of those measures. At no time, though, do these considerations fall out of the self-contained legal concepts, into a political or its socio-cultural context.

Initially the *Trial Decision* reaffirms the circumlocution of the exercise of UNSC powers under Chapter VII of the Charter so as to ground the legal establishment of the court. The by now well known argument being that:

- a) The Security Council found of the violations of international humanitarian law (IHL) in the former Yugoslavia;



- b) The UNSC considered those violations to constitute a threat to peace;



- c) Consequently the UNSC acted under Article 39 of the Charter;³²³



- d) Thus acting under Chapter VII;



- e) The UNSC had, then, to choose to take a measure "to maintain or restore international peace and security" (Article 41 or 42, or both);



- f) That measure was the establishment of the ICTY.

³²² Trial Decision: 10-11: the three arguments made under three paragraphs (21–23) all point towards a Trial Chamber review of the procedure, interpretation and limits to the UNSC act of establishment of the ICTY.

³²³ Article 39 opens Chapter VII of the Charter, empowering the UNSC to act either with military or non military measures, see Appendix I.

After such traditional legal speech, the Trial Chamber found it useful to stress that the objective of the measure taken was to “contribute to the restoration and maintenance of peace”. A dialogical link, between act and effect: the violated IHL (as threat), give rise to the ICTY, aimed at (restore peace by) prosecuting those violations.

The now finally obvious gap in this particular discourse is whether that measure is “appropriate” for its objective, as if it is not, a limit to UNSC actions³²⁴ was disrespected, namely an arbitrary use or even the misuse of powers.

The immediate question for the interpreter is on which grounds for those considerations, how, regardless of the political or judicial nature of the assessment, to consider the appropriateness of a measure towards its goal? Can a measure be considered appropriate regardless of the cultural context it is aimed at? Is the threat to peace of (un)revenged crimes equal regardless of place, religion and culture?

The Trial Chamber immediately avoids these questions, by passing such responsibility to the UNSC. First when stressing that it was the Security Council that considered that “in the ‘particular circumstances of the former Yugoslavia’ the establishment of the International Tribunal would contribute to the restoration and maintenance of peace”.³²⁵ Second, by considering that the action itself was not new, but only the means: “the course it took was novel only in the means adopted but not in the object sought to be attained”.³²⁶

To consider the actions of the UNSC for the restoration and maintenance of peace, and even within these those involving IHL concerns, as a single course of action is, at the very least, a rhetorical argument. As we know it was not simply the decision to adopt measures for the restoration and maintenance of peace that had been

³²⁴ As those previously considered limits to UNSC actions under Chapter VII.

³²⁵ Trial Decision: 10, also quoting UNSC Res. 827 (see Appendix IV).

³²⁶ *Idem*.

questioned, much more important (in particular given the context of the judicial proceedings at hand) was the novelty of the criminal judicial institution established as *measure*. On a judicial challenge to the legitimacy of the ICTY such reasoning is completely off-topic, with the exception of a finding of previous judicial measures with the same origin and purpose, i.e. measures of the UNSC under Chapter VII.

Apparently disconnected from the rhetoric involved (when considering the ICTY a “not new” course of action of the UNSC) the “object to be attained”, counter intuitively for the interpreter, is not the “restoration and maintenance of peace” but addressing IHL issues. The slight self-denial (as the legal speech so far would stop on the use of Chapter VII powers), points to the base of the invocation of powers, i.e. the politically determined substance of the “Threat”: the violation of International Humanitarian Law. The detour from the previous containment has a purpose: the circumlocution on the novelty of the actions of the UNSC. Well beyond straight forward legal basis and discourse regarding the establishment of Tribunals, the Trial Chamber finds that:

“The Security Council has on a number of occasions addressed humanitarian law issues in the context of threats to the peace, has called upon States to comply with obligations imposed by humanitarian law and has on occasion taken steps to ensure such compliance.” (Trial Decision: 10)

The *Trial Decision* then tries to reinforce the argument by naming examples, none of which, as easily presumed, the establishment of a Criminal Tribunal. Not really none, between the examples presented there is in fact one other International Criminal Tribunal, the one for Rwanda, an offspring, of sorts, from the ICTY itself.³²⁷

³²⁷ The examples given are:

“It has done so, for example, in relation to Southern Rhodesia in 1965 and 1966, South Africa in 1977, Lebanon on a number of occasions in the 1980's, Iran and Iraq in 1987, Iraq again in 1991, Haiti and Somalia in 1993 and, of course, Rwanda in 1994. In the last of these, the establishment of the Rwanda Tribunal by the

Although it was already known that no such example prior to the establishment of the ICTY could be given, the argumentative path followed here can only be understood as an attempt to equalize completely different measures based only in two facts: that those measures were taken by the UNSC for the restoration or maintenance of peace; and that they addressed international humanitarian law. Precisely the point of doubt reached above on the reasonableness of considering that the UNSC action was not new, but only the means.

Preventing newly arising questions, on the nature of the threats and the appropriateness of the measures, the *Trial Decision* then returns to the safe haven of the non-judiciable nature of the concepts it was so ostensive in extensively use: the nature of the threat (just previously identified as arising from an issue of IHL); and the appropriateness of the measure (just undifferentiated from any other with addressing that sort of threat).

The Decision here affirms the reasons as to why the contents of those concepts cannot be reviewed:

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

(Trial Decision: 11), our bold.

security Council followed its findings that the conflict there involved violations of humanitarian law and was a threat to the peace.”

(Trial Decision: 10-11)

This full string of arguments, self referential as they are, show and thus seem to prove our initial questions. First as they do address the legitimacy of the Tribunal, both when identifying it with as enforcement measure of the UNSC, under Chapter VII powers addressing IHL, and then when attempting to compare it to other such measures. Second as they review (here not the actions but) the powers of the UNSC, when considering the enactment of those powers beyond judicial review, namely for their political nature. Furthermore, the Trial Chamber integrates in its discourse a tentative ruling: that “no judicial body (...) can or should review” the appropriateness of UNSC measures.

2.12. On a different string of arguments, the Trial Decision presents its reasoning on the validity of the UNSC Resolution.³²⁸

Summarizing the circumlocutory and self-referential legitimacy discourse, the Trial Chamber states that despite the fact that, ultimately, the legitimacy of the (establishment of) the ICTY depends upon the UNSC consideration on the existence of a threat to peace, such consideration is fact-based.

A statement which made it materially possible to be scrutinized by the review of those facts, however, the Chamber dismisses such possibility by arguing that those very facts are of a political nature. The discourse becomes illogical, as either the UNSC determination of a threat is fact-based and thus verifiable, or it is based on political considerations and, as per the establishment of an impossible jurisdiction, translates into constitutional powers. This last option, apparently consistent with the reasoning on the States’ delegation of powers to the UNSC, would actually imply the consequent limitations or submission: the UNSC could only act inasmuch as the States allow, or the States would render (and not just partially delegate) their sovereignty to the UNSC.

³²⁸ Trial Decision: 11. These arguments are presented under the consideration, by the Trial Chamber of the concept of non-justiciability.

The argument enters an unsurpassable option without contradiction, a tension present even in the Decision quotations or authorities:

“The validity of the decision of the Security Council to establish the International Tribunal rests on its finding that the events in the former Yugoslavia constituted a threat to the peace. This finding is necessarily fact-based and raises political, non-judiciable issues. (...) such decision ‘entails a **factual** and **political** judgement and not a legal one’. (The *Lockerbie* decision at 176) (...) ‘a threat to international peace and security is **not a fixed standard** which can be easily and automatically applied’. (David L. Johnson, (...)). The factual and political nature of an Article 39 determination (...) makes it inherently inappropriate for any review by this Trial Chamber.”

(Trial Decision: 11), our bold.

The breach in the apparently self-contained discourse is clearly the consideration of the concept of *facts*. If those facts regarding the determination of a threat to peace are political, that reference would be enough for the legal discourse, thus abstaining from any mention to the material context as assessed by the UNSC. But the Trial Chamber, by making references and even arguing throughout this reasons for decision some of those material facts, enters the domain of uncertainty, as these later are not possible to be considered without a politico-cultural context.

We can then confirm the tension of the discourse, when it swivels between fact and norm, i.e. between the self-referential legal speeches, proper of a community shared politico-cultural context, and the need for partial consideration of a worldview as per the absence of such pre-established and accepted references, as is the case of this novel jurisdiction.

That much seems also to be inherent to the Trial Decision reasoning when, in contradiction with the examples given in the last string of arguments (so as to attempt to prove the lack of novelty of the UNSC action) contradicts the Defence's

claim of lack of consistency (by the UNSC), with the argument that “the International Tribunal is the first of its kind to be created”.³²⁹ Furthermore claiming, unlike then, that such novelty “cannot in itself be of any relevance in determining the legality of its (the UNSC’s) action in this case.”

The until now only apparent contradiction becomes proven, at least regarding the establishment of the ICTY: as a novelty, thus needing a specific legitimacy discourse; or just as another measure of the same kind as (previous) others. The *Trial Decision* passes the hesitation into irreconcilable inconsistency.

Intrinsic to the difficulty the Trial Chamber faces is the lack of shared politico-cultural references, for if the full span of powers of the UNSC were already well known, or were there such culturally implicit limitations of power, such difficulty would be surpassed precisely by that shared understanding of references. The elsewhere self-evident truths are here unframed questions on the legitimacy of powers and their exercise.

2.13. On the inclusion of a judicial body in the measures of Article 41 of the Charter.³³⁰

Besides the legal debate³³¹ on the nature of the listed measures in Article 41 (either exhaustive or merely exemplificatory) the most relevant issue for the purpose of this research are the Trial Chamber considerations on why the establishment of the ICTY is not excluded from the provisions of this Article.

The *Trial Decision*, as usual, reaffirms the “wide powers” of the UNSC under Chapter VII, but reversing the approach. The Trial Chamber embarks on reasoning, not on why the ICTY is included, but rather that it is not excluded from

³²⁹ Trial Decision: 12.

³³⁰ Trial Decision: 12-13.

³³¹ Idem, although the general *opinio juris* affirmatively concludes for its non-exhaustive nature, the general character of the measures listed (of an economic and political nature) can find contentions that measures of no other kind are contemplated in the Article.

Article 41. Forgetting (or not so much) the already established non-judiciable reviewability of political considerations, the wording of the *Trial Decision* is illustrative of the tension of the (un)shared politico-cultural references, completely abandoning a political stand-off, impartial, position leaping into preconceptions as established references:

“(...) no good reason has been advanced why Article 41 should be read as excluding the step, **very appropriate** in the **circumstances**, of creation the International Tribunal to deal with the **notorious situation** existing in the former Yugoslavia. This is a situation **clearly** suited to adjudication by a tribunal (...). This is not, as the Defence puts it, a question of the Security Council doing anything it likes, it is a seemingly **entirely appropriate** reaction to a situation in which international peace is **clearly** endangered.”

(Trial Decision: 12), our bold.

More interestingly, this primary source of research textually confirms, by the presumed references on the basis of its conclusions, its review of concepts and considerations already stated as of a political nature, i.e. the material review of UNSC actions (Resolutions).

Concepts and considerations directly connected with the actions of the UNSC, as the qualification of “the circumstances” and the threat by which “international peace is clearly endangered” are, as earlier stated in the same discourse “pre-eminently a matter for the Security Council and for it alone and no judicial body, certainly not this Trial chamber, can or should review that step”.³³²

Deepening the already proven contradiction in the last line of arguments presented, the *Trial Decision* renews it by contending (now regarding the appropriateness of the ICTY as a measure under Article 41 to restore peace) with

³³² Trial Decision: 11.

the novelty of the Tribunal so as to consider “premature at this initial stage”³³³ any assessment of the effectiveness of the measure for its aim.³³⁴

Although inherently still questioning its competence to review this appropriateness of the measure *vis-à-vis* the threat, the sheer consideration of the initial stage of functioning as impeditive for the assessment, opens the material possibility that in the (then) future, now past, facts could, at least from that discursive path, make such a review possible. An argument which indicates (from a non-binding perspective, but aiming to build an *opinio juris*) that such a review of the appropriateness of measures adopted by the UNSC is materially possible.

This conclusion is yet again confirmed when, now referring to the then present “premature stage”, the

“Trial Chamber agrees that due to the nature of the conflict, an adjudicatory body is a particularly **appropriate measure** to achieve lasting peace in the former Yugoslavia” (Trial Decision: 14), our bold.

2.14. On the Tribunal as subsidiary organ of the UNSC.

As for the Defence's contention that a judicial body could not be a subsidiary organ, as per Article 29 of the Charter (see Appendix I), the Trial Decision's reasoning is threefold:

- a) Regarding the claim that a Tribunal could not be an additional body, the Trial Chamber claims that “Article 29 is expressed in the broadest of terms and

³³³ Trial Decision: 13.

³³⁴ The *Trial Decision* does, however, mention references to support the UNSC consideration of the ICTY as a measure which would help in the restoration of peace: (i) the possible deterrent effect (by reference to the records of the discussions of the UNSC on both Res. 808 and 827,); and (ii) the possible assistance effect, by the example given to the whole region, and the defusing of tensions (by reference to some States' statements on the matter and a commentator – *in casu*, Meron (1993: 122, 134)).

nothing appears to limit its scope to non-judicial organs.”³³⁵ An argument that overlooks the nature of the organ (as envisaged by the Defence) to restrain the consideration of the question to the formal legalistic interpretation of the norm.

It is true that the norm may have an ample content, but it is the missing context that allows the interpreter, given his politico-cultural references, to consider, or not, inherent limits to that norm. For example, should a national Executive establish, as its own subsidiary organ, a “private” jurisdiction (thus outside the Judiciary, in a regime of separation of powers and Rule of Law) and such action would, or could, be considered as illegitimate, a misuse, if not an abuse, of powers. *Mutatis mutandis*, and given the *Trial Decision* proclaimed limits to UNSC actions, even under Chapter VII, there are constitutional contexts where such establishment might be considered inappropriate.

In refusing this considerations, even if only *arguendo*, the *Trial Decision* makes it clear the intentional lack of culturally contextualized references, upon which to form opinions and considerations.

- b) Yet another independent reasoning is presented by the formal legal, but now more systematic, interpretation. The *Trial Decision* implicitly dismisses the question by referring that the ICTY “as the Statute of the International Tribunal declares in its opening paragraph”³³⁶ was not created under Chapter VI,³³⁷ as per the summoned Article 29, but under Chapter VII of the Charter. The argument implies that Chapter VII, as special norms, are generally above eventual limitations of the Charter. However the mentioned exception in Article 24 (2) (the respect for the Principles and Purposes of the Charter) already admitted by the Trial Chamber, would have equal value as Article 29 is in the same Chapter V. The legal speech apparently hesitates in the justification for

³³⁵ Trial Decision: 15.

³³⁶ *Idem*.

³³⁷ Although Chapter VI is mentioned in the *Trial Decision*, it refers in fact to Chapter V.

not considering the inherent concepts, and limits, to the positivism of the adopted approach.

- c) Finally, by renewing the reference to the ICJ *Effects* case, the *Trial Decision* contends that

“if the General Assembly has the authority to create a subsidiary judicial body, then surely the Security Council can create such a body in the exercise of its wide discretion to act under Chapter VII.”

(Trial Decision: 16)

Besides the point of the criminal jurisdiction (that truly a novelty) the renewal of the reference to that particular case, instead of founding the legitimacy of the ICTY, questions the lack of involvement of the UNGA.

2.15. On the UNSC “indirect imposition of criminal liability upon individuals”.³³⁸

The *Trial Decision* speech here is more internally coherent, although maybe because the creation of a jurisdiction is not in itself part of the reasoning. The case is made for the legitimacy of the UNSC to act upon individuals, leaving the judicial measure to a secondary debate.

According to the central logic of the argument, the UNSC conclusion is that the threat to peace in consideration arises from violations of IHL (thus crimes) perpetrated by individuals, making it consequently needed for the UNSC actions to affect that threat, and those individuals.

Despite this rather straightforward logical argument, the Trial Chamber decided to introduce two disruptive mentions to the reasoning:

- a) The appropriateness and necessity of such UNSC action upon individuals “through the International Tribunal”. As such characterizing the concrete measure adopted (as mean to act upon individuals) i.e. the establishment of the ICTY. The added comment is, for our research, another proof of the

³³⁸ Trial Decision: 16.

ICTY review of the appropriateness of the actions of the UNSC – and one which by its contents, and considering its recognition of lack of competence, translates an improper self-legitimizing discourse.

- b) The case of the sanctions imposed upon Libya, by UNSC Resolutions 731 and 748, seeking the extradition of suspects of the Lockerbie bombing. In the argument the Trial Chamber's reference to the "mandatory commercial and diplomatic sanctions" although rightfully considered as being "in substance, acting upon individuals" are the exact opposite of the measure here questioned.

As is known, the purpose of the UNSC actions, even if aimed to try those individuals, was not to create an international jurisdiction (or prosecution), but conversely to restate the due respect for national jurisdictions, namely the "right" of the United Kingdom jurisdiction to prosecute and trial the accused. The example could well be put forward by the Defence, in particular when considering the primacy issue, but also as a challenge to the appropriateness of the measure in question: the establishment of the ICTY.

2.16. *Jus de non evocando* or the surrender of sovereignty?

Facing the question on this legal principle, under which an accused should not be tried by "some special tribunal set up for that particular purpose"³³⁹ (as in the ICTY) the *Trial Decision*, as far as the legitimacy is concerned,³⁴⁰ is here two-fold:

- a) The reasoning starts by implicitly contesting the universal character of the principle. It would therefore be applicable in some States, but not to the UN. Although a lesser and not explored argument of the Decision, the question is quite pertinent for this research, for as, if the Trial Chamber says, this

³³⁹ Trial Decision: 16.

³⁴⁰ In this paragraph the *Trial Decision* also mentions the applicability of the same reasoning towards its conclusions on primacy (not here considered for its lateral role in the legitimacy discourse). The Decision also raises the question, without concluding any answer, of the dubious standing (*locus standi*) of the accused to raise a question on sovereignty.

principle is (only) “a feature of a number of national constitutions”, then the politico-cultural context of the norm is admitted to be central for its interpretation.

Conversely, only globally accepted legal norms can be viewed as internationally legitimate. Given the previous argumentation towards the identification of the act of establishment of the ICTY with a legislative act, the creation of the Tribunal, i.e. UNSC Res. 827, would have to translate a similar acceptance.

- b) The main argument, though, is that the principle has no application to the case. A conclusion the *Trial Decision* reaches by returning to a self-referential legal speech. The argument is set that, by the exception contained in Article 2 (7) ³⁴¹ of the Charter (*in fine*), actions under Chapter VII imply a “surrender of sovereignty” by member States. A surrender the Trial Chamber considers well established by the adoption of the Charter, namely including that mentioned exception.

This is the missing link between the discursive mentions to the UNSC and this very organ's origin of power. Mentioned on a less direct challenge to both the ICTY and the UNSC powers, it remains, nonetheless, a part of the *Trial Decision* discourse clearly pointing to the supra-national, rather than inter-national, character of at least some powers of the UNSC.

2.17. The reasons for the not involvement of the UN General Assembly.

Ostensibly ignoring the point raised, on the possibility that the establishment of the ICTY by the UNGA might be convalidated by the representativeness of the organ, the *Trial Decision* limits its review of the question to the possibility of amendment of the Charter. The political contextual resemblance of the UNGA with a representative political organ, as of the UNSC with an Executive one, is overlooked both as a non-reference, and as a circumlocutory speech of self reference.

³⁴¹ See Appendix I.

The Trial Chamber starts by appearing to understand the issue only from a legal procedural perspective, namely by claiming that “the submission (...) can only have any meaning if what is suggested is (...) an amendment of the Charter”. As it is clear from the beginning (*Trial Motion*), the very legitimacy of the exercise of powers by UN organs is confronted with their nature and character, as one of acceptance, by States, or one of imposition, by the UNSC. In between lies the representative nature of the UNGA, a context here forgotten in favour of a legalistic discourse.

Furthermore, stepping up to the self legitimization, the *Trial Decision* considers other options to itself (now restricted to an amendment of the Charter) as “unnecessary, as it is impractical as a measure appropriate by way of a response to the current situation in the former Yugoslavia”.³⁴² Reasons with a strong appeal to the reviewability of the “appropriateness” of UNSC measure, but also, when considering a given context (“the current situation in the former Yugoslavia”), the possible judicial review of the UNSC determination of a threat to peace and security, for if the “situation” is considered by the Tribunal, it implies its valuation, as here expressly stated.

2.18. Restating case conclusions so as not to pronounce on legitimacy.³⁴³

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

³⁴² Trial Decision: 17.

³⁴³ *Ibid.* Note: the argument immediately before this conclusion of reasons on the legitimacy challenge, faces the claim on the disadvantage for the accused of not being tried (in the already initiated proceedings) in Germany. Briefly, it relates to the possibility, under German Law, to have yet another instance of recourse – the Human rights Committee. Considering, as the Trial Decision does, that such question does not relate to a challenge on the ICTY legitimacy, it is not here included.

jurisdiction, as to the unreviewable lawfulness of the actions of the Security Council.” (Trial Decision: 17)

As concluding remarks on the legitimacy challenge, the *Trial Decision*, yet again, takes refuge in the legalistic consideration of competence, regardless of the politico-cultural references, able to give context, and thus meaning to the norms.

Section V – The Appeal Chamber Decision

Since the Appeal’s Decision – ICTY, Appeals Chamber, 02 October 1995, hereinafter *Appeal Decision* – reviews most of the argumentation present in the *Trial Decision* on the same matter, we will privilege the novelties or argumentation changes in the established position of the Tribunal, i.e. the final Decision, as put forward in the *Appeal Decision*,³⁴⁴ in what is more directly connected with the subject of our research: the legitimacy discourse.

Assured that the framing of the legal questions posed is already reviewed in previous Chapters, that is, when extensively reviewing the initial materials (*Trial Motion, Trial Response and USA brief*), we can now focus more carefully on only those new arguments on legitimacy, on a close and careful analysis of the discourse in question.

Even though *a latere*, it might be worth noting that the presiding judge was A. Cassesse, accompanied by four others: Li, Deschênes, Abi-Saab and Sidhwa. All of the latter felt the need to further publicise their view on the passing of such judgement, therefore appending separate opinions (Li, Abi-Saab and Sidhwa) and a declaration (Deschênes), A. Cassesse, on the contrary, kept his renowned *opinio juris* work.

The *Appeal Decision* itself encompasses four separate decisions:

- a) Decision on the competence on legality, votes: 4 to 1, Li against;

³⁴⁴ The singular is used for the purpose of clarifying this specific Decision of the Appeals Chamber.

- b) Decision to dismiss the (legality) plea, votes: Unanimous;
- c) Decision to dismiss the challenge on the primacy of the ICTY, votes: Unanimous;
- d) Decision that the ICTY has subject-matter jurisdiction over the case, votes: 4 to 1, Sidhwa against.

The Appeal Chamber was presented with the, already known at Trial level, Defence *Motion* challenging the legitimacy (formally the jurisdiction) of the Tribunal to prosecute the (Tadić) case. By keeping the exact same challenges the Appeal had to be based on a legal questioning of the *Trial Decision*, consequently the Defence's alleged "error of law on the part of the Trial Chamber"³⁴⁵ as a resource to pass on to Appeal all the challenges presented at Trial:

- a) Illegal foundation of the Tribunal, as legitimacy of establishment;
- b) Wrongful primacy of the Tribunal over national courts;
- c) Lack of jurisdiction *ratione materiae*.

However, as the Appeal of interlocutory motions are only admissible if challenging the jurisdiction, it was contested as to whether that first challenge was properly on jurisdiction or (as it is) on legitimacy, thus opening the legal normative discourse to questioning the validity of the Appeal Motion.³⁴⁶ That was the contents of the fourth decision in the *Appeal Decision*, yet in fact the first.

³⁴⁵ Appeal Decision: 1. For clarity and consistency, references will privilege its mentioning in the *Appeal Decision*, whereby the Appeal Chamber does, at times, rephrases the reference made, such is, e.g. the case here as the *Appeal Motion* reads: "by error of judgment on the relevant questions of law" (Appeal Motion: 2), or case (IT-94-1-AR72) p. 5423. Still for the above-mentioned reason, we will follow the *Appeal Decision*'s wording and reference.

³⁴⁶ i.e., an interlocutory motion is not the trial, but a previous contention. So as not to admit the indefinite deferral, or procrastination, of the trial itself, many are the limitations, in most legal orders, to the admission of Appeals on interlocutory motions. However, the dismissal of one of these motions on the grounds of lack of competence, or regarding the tribunal's jurisdiction, is widely considered to be a needed exception – as its non hearing would allow for the trial to proceed, only for later to be found that there was no jurisdiction to begin the

In respect of the last two challenges, it is now evident that they are of secondary importance to this thesis, which is also the case with this new question on the admission of the Appeal. Such must, in fact, be our conclusion, as otherwise it would mean an unwilling new entanglement within the legalistic discourse, when it is clear that: the ICTY Appeal Chamber separates both questions; the new jurisdiction review is in fact a procedural issue, here only relevant, if stopping the main challenge, which it does not; and only if denied competence, would the question become relevant.

1. Reasons for the Appeal Chamber Decision on the illegal establishment of the Tribunal

Unlike the *Trial Decision*, where arguments are, at times, scattered throughout the reasoning process,³⁴⁷ the *Appeal Decision* follows a much more systematic structure, by addressing each line or argumentation on a self-contained set of alleged reasons. A structure also adopted in this current review, namely:

1.1. Meaning of Jurisdiction.

1.2. Admissibility of Plea based on the invalidity of the establishment of the International Tribunal.

1.3. The issue of constitutionality.

1.1. Meaning of Jurisdiction.

This shorter reasoning contradicts the *Trial Decision* concept of jurisdiction by enlarging its scope but also, and much more relevant for this thesis, by reference to the politico-cultural context so as to interpret the concept.

At stake is the Trial Chamber decision to disqualify, and not dismiss, the challenge, when considering that the legitimacy of the establishment of the ICTY was beyond

Trial in the first place. As such, here only relevant if denying the Appeal Chamber of pronouncing on the legitimacy issue itself, which is not the case.

³⁴⁷ See above, e.g. (9) and (11) of our previous Section.

a challenge on jurisdiction. On the contrary, the *Appeal Decision* argues that such interpretation misunderstands jurisdiction as competence instead of power. This argument, as here explored, substantiates the first appeal of the ICTY discourse to external references and departs from the normativism adopted before. It is not so much the legal definition which interests us the most, but the contextual framing of the issue, reinforced by the affirmation of politico-cultural references:

“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...”³⁴⁸ (Appeal Decision: 5), our bold.

So as to make it clear the full extent of the needed references in the ICTY, for the interpretation of the concept, the *Appeal Decision* confronts the conditions and context of national and international Tribunals. According to the Decision, those first may (“perhaps”)³⁴⁹ work with that other narrower concept of jurisdiction on:

“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” (Appeal Decision: 6), our bold.

The International Tribunals’ context is presented, conversely, both as one where “every tribunal is a self contained system”, and as a consequence of the lacking of “a centralized structure”³⁵⁰ in International Law. This more than explicit context driven interpretation, calls on the very superstructure of, or lack of, International

³⁴⁸ To note, for future reference, the meaning of the expression “competence”, as here used by the *Appeal Decision*.

³⁴⁹ Appeal Decision: 6.

³⁵⁰ Idem.

Law so as to point out the need effectively to bring the transcendent into the situated, the norm to its context of application. Inherent in this discourse is also the consideration for the international Judiciary to be aware of the lack, limitation or multi-polarity, of the other traditional powers (Executive and Legislative).

These contextual references permitted the *Appeal Decision*, now referring exclusively to International Tribunals, to ascertain the hierarchical primacy of the judicial *character* (and the power therein) of these organs over any limitations from the principle of legality, i.e. these Tribunals are not confined to *apply* the law as it exists. They must be first and foremost, judicial in character before considering any such limits:

“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’”. (Appeal Decision: 6)

Returning to the case under appeal, the Decision explains why such context implies the admissibility of a challenge to the ICTY legitimacy, as that (Trial Chamber's) narrow concept of jurisdiction (of the positivism of the jurisdiction-creating norm, i.e., Res. 827 and the SICTY) needs a higher and legitimate judicial power to apply it. To this end the *Appeal Decision* considers the challenge to the legitimacy of the ICTY, as preliminary to any other jurisdictional challenges.

1.2. Admissibility of Plea based on the invalidity of the establishment of the International Tribunal.

Following the claim from the Prosecutor,³⁵¹ the *Appeal Decision* subdivides this reasoning into questioning the existence of the ICTY jurisdiction, on the one hand, and questioning whether the case *sub judice* amounts to a political, non-judiciable issue, on the other.

³⁵¹ Appeal Decision (6), in reference to the Trial Response (10-14).

a) Does the International tribunal have jurisdiction?³⁵²

As we already know (despite Judge Li's dissenting opinion, see *infra*) the *Appeal Decision* considers that it does. The reasoning by which it reaches such conclusion, although apparently consistent with the previous line of argumentation,³⁵³ reaches far beyond, and in fact in the opposite direction, of the *Trial Decision*. Keeping that contextual interpretation, it so auspiciously was following, the distinction now made, between incidental and primary jurisdiction, counter-intuitively gives a primary role to the first.

According to the Appeals Chamber the primary, original or substantive jurisdiction strictly adopted by the Trial Chamber is more limited, as this one, yes, depends on the provision of norms (the intrinsically current positivism from acts of establishment) while the second, inherent, or should we even say immanent, *is* already, as a characteristic (condition and power) of the very judicial character of the organ: Tribunal. As such, the Appeals Chamber claims this latter's pre-existence and having not to be created, could by the contrary be limited: contrary to the primary jurisdiction, which is only what it is, as created; whereby the primary jurisdiction begins to exist, through a positive act, the incidental one is or might be limited, as a positivist constriction on a pre-existing power.

Major among the powers included in the incidental jurisdiction is, as per the Appeals Chamber decision and the politico-cultural references made in support, the Tribunal's power to determine its own competence:

"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,

³⁵² Appeal Decision: 7.

³⁵³ The argument made on the "special" nature of the judicial bodies created by UN organs is, for the purpose of this thesis, besides the point (Appeal Decision: 7). It is so though, only inasmuch as the underlining conceptual frame is exactly the same as the here reviewed: the primacy of the "Character" of the international judiciary, and its inherent powers.

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..."

(Appeal Decision: 8), our bold.

This otherwise welcomed external references are now apparently shifting towards not only a self-legitimizing, but also a self-empowering discourse. A question the interpreter does not have time to formulate, as the Appeals Chamber proceeds on claiming that this principle is "not merely a power" is in fact the exercise of a duty, "the first obligation of the Court (...) is to ascertain its own competence".³⁵⁴ In a sense the opposition of a certain idealism (of perpetual peace? of world legal order?) contradicting the sceptic positivism, yet self-preserving normativism, of the previous Decision, now not inherently, under review.

We do however note the contradiction to the meaning of the expression "competence" here and when earlier addressing the meaning of jurisdiction (see footnote to the first quotation in 1). Also to note the possible confrontation of meaning through translation, by the contextually selective approach of the *Appeal Decision*: as per the English "Jurisdiction" becoming the meaning of the translation of the French "compétence" or the German "Kompetenz".

We do not argue the correct interpretation of a legally shared meaning by different translations; rather, the previous politico-cultural references of the *Appeal Decision* are proven to go beyond the legalistic self-contained discourse, even that which (international in nature) is sectional, or sectarian, in character. Or is it? The current reasoning, logical as it flows, is narrowing the context of where to borrow references from, and if the worldview is wider, the legal context does appear to be hermeneutically more limited.

The return to the Law is then proven (although somewhat more from Natural Law and thus less positive, with the empowerment, of sorts, of the judges directly by *jus*

³⁵⁴ Appeal Decision (8), on quoting Judge Cordova (1956, I.C.J. Reps., 77, 163).

cogens, without the intermediation of (hetero)representations), as the *Appeal Decision*, bowing to the possibility of limitation of such powers, states that it can only happen positively. Further contending that such a formal act, “an express provision”,³⁵⁵ may have two sources: the arbitration agreement, thus outside the legal hierarchy established or yet to be established; or in the “constitutive instruments”. The contention, limiting the limiting possibilities, is yet again conditional as, for the Appeals Chamber, those constitutive acts of establishment, would in turn be limited to limit this competence, i.e. inherent jurisdiction, by respecting the judicial character, and independence, of the Tribunals. In the ICTY, and for the clarification of any non-legalistic contextual interpretations, it affirms:

“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.” (Appeal Decision: 9)

The Decision closes this particular argument on jurisdiction with an incidental approach to a later argument (on the nature and reviewability of UNSC acts) contending that the exercise of this inherent jurisdiction does not make the ICTY into a constitutional body, nor is it for this Tribunal to review UNSC actions, but it is, under the discharging of these inherent powers, for the same ICTY, to “examine the legality of its establishment by the Security Council”,³⁵⁶ although “solely for the purpose of ascertaining its own ‘primary’ jurisdiction”. One thing and its opposite and, yet again, in relation. In relation, as the Decision (not entirely capable of surpassing the paradox) has found not a frontier, a limit,³⁵⁷ where two natures meet, but an overlapping where the same act is duty and prohibition.

³⁵⁵ Appeals Decision: 9.

³⁵⁶ Appeal Decision: 9.

³⁵⁷ As did Judge Li, see *infra* separate opinion.

The tension is only partially defused, still unresolved, by weighing the discretion of the UNSC against the "*compétence*" of the ICTY, the wider the first, the narrower the second. A warning of sorts?

b) Is the question at issue political and as such non-justiciable?

On a very short reasoning, of half a page, the Appeals Chamber dismisses the non-judicial nature of the issue for being a "political question". Although turning, as the Trial Chamber before, to the safe-haven of self-referenced legal speech, namely by both quoting, in adoption, and arguing, in support, with ICJ cases,³⁵⁸ the *Appeal Decision* still envisages, unsuccessfully, external references: in this particular argument, *via* the mentioning of the historical acceptance, and more contemporary obsolescence. Not convincingly, for the key issue of the judicial reviewability of political acts, it is however noteworthy the subjective speech adopted (and inverted commas in disputable concepts like "sovereignty" or "national honour") by means of which the Decision apparently wants to remain open to historical, political, and also judicial references:

"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, very rarely, in contentious proceedings as well." (Appeal Decision, 11)

The self-evident point of subjective use of references, e.g. the unshared world view of concepts of "sovereignty" of "national honour" are highlighted here by the confrontation with a detachment from the "old" and "rare", eccentric? Not quite. It is taken (at face value) as eminent (contemporary) truth, able to found the three-line conclusion dismissing that the ICTY could be "barred from examination of the

³⁵⁸ Appeal Decision: 10-11, and the references therein to the ICJ "Expenses" case and subsequent Advisory opinion.

Defence plea by the so-called 'political' or 'non-justiciable' nature of the issue it raises", ³⁵⁹ nothing more than the legality, and legitimacy, of the prerequisites for the establishment of the ICTY itself.

1.3. The issue of constitutionality.

The *Appeal Decision* aggregates under this heading all the argumentation regarding the limits of the powers of the UNSC, namely when acting under Chapter VII of the Charter. At odds, as the reader knows by now, are the concepts of "threat to peace and security" so as to justify the use of powers under Chapter VII, but also the appropriateness, is such characteristic is needed given the wide discretion of the UNSC, of the measures chosen, in particular the ICTY possible contribution for the restoration or maintenance of peace.

Despite the *Appeal Decision* structure, followed so far, the various arguments in this same "issue" justify a separate enumeration for this particular review.

a) The power of the UNSC to invoke Chapter VII

Despite the possible path of external references in this broad, rather subjective, issue of considering what is a threat to international peace and security (and one is aware of the careful systematic characterization of the "situations justifying resort to the powers provided for in Chapter VII", ³⁶⁰ of lesser value for this research) the Appeals Chamber keeps most of the Trial Chamber line of argumentation.

A self-referential normativism, as per the references to the Articles of the Charter, is broken only twice.

Once to input the political framework of the UN, regarding the issue of the non-unlimited powers of the UNSC, to retrieve the already known three arguments: the "very wide" discretion of actions under Article 39; the due respect for the Purposes

³⁵⁹ Appeal Decision: 11.

³⁶⁰ Appeal Decision: 14, and the references therein to "threat to peace", "breach of peace" and "act of aggression".

and Principles of the Charter; and, although from a somewhat more global, UN institutionally centred perspective, “the limits of the jurisdiction of the Organization”,³⁶¹ a novel way of referring to the delegation/surrender of sovereignty by member States.

And then, yet without ever deciding for a characterization (and thus formally avoiding a material review), to include facts from the conflict in the former Yugoslavia.³⁶² The reference, though, is to the existence of “a” conflict, surpassing, by alternative reaching the same result, the opportunity to review the UNSC determination of a threat to peace. The result is achieved by return to logical, yet legalistic and self-centred, argumentation, for as there was a conflict, it was either: international, and able to justify the UNSC determination of a “breach of peace”, thus invoking Chapter VII; or internal and could be characterized as a “threat to peace” with the same result.

b) The range of measures envisaged under Chapter VII

The issue is not reviewed by the *Appeal Decision* in any new argumentation. Other than the invocation of the Charter’s norms, proper to legitimize the use of powers, the Appeals Chamber enters the circumlocution where the linking concept between norms has no external context, but the “wide margin of discretion” in the measures adopted.³⁶³

In this particular case, and given the discursive path of the *Appeal Decision* so far, the reader might well expect, at the very least, the listing of other possible measures the epigraph suggest. The lack thereof constitutes a great flaw in the Decision discourse, not only for that normativism, but for the loss of internal contextual logic.

c) The establishment of the ICTY as a measure under Chapter VII.

³⁶¹ Appeal Decision: 13.

³⁶² Appeal Decision: 14.

³⁶³ Appeal Decision: 15.

Yet again the *Appeal Decision* closes its discourse around the pre-announced and self-referential concepts, without any politico-cultural reference. One would think, having such impetus for that initial consideration of the “character” of the Judiciary as by the references therein, at least now, regarding its own establishment, and the necessary basis of a legitimacy discourse, that the Appeals Chamber would extensively cross-reference norms-concepts-facts-contexts.

On the contrary the speech centres on the repeatedly referenced legal argument that the UNSC “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”.³⁶⁴

d) What article, of Chapter VII, serves as basis for the ICTY?

After extensively arguing the unfittingness of the ICTY in Articles 40 (as the ICTY is not meant as provisional measure) and 42 (for it obviously is of a non-military nature), the *Appeal Decision* faces the contention of the non-inclusion of the ICTY in Article 41 both for “non-intended” and for the economic and political nature of the examples given in the Article. Additionally the question of whether these (Article 41) measures are necessarily to be imposed by Members States, and not the UN itself, was raised.

Dismissing the first of these claims with the same argument as the Trial Chamber (the exemplifying nature of the listing of measures, thus rendering it impossible to ascertain any “intention” of specific measures), the *Appeal Decision* loses an opportunity to list, at least, new examples of non-ordinary measures the UNSC had, or theoretically could take under this norm. Such an exercise, worthy of a “self-contained legal system”, could live up to build upon the difficult task of representing commonly shared references or elevate the debate on the matter.

³⁶⁴ Appeal Decision: 16.

In an attempted escape from the self contained legal speech, the effort made in the “literal analysis”³⁶⁵ is limited to the sectioning of the prescriptions of the Article, i.e. the singularization of the contents of the norms; in no way adding to the much needed pursue of external contexts, while debating specific arguments, so as to gradually build up a context frame capable of supporting an equally singularized discourse of legitimacy.

e) Can the UNSC establish a subsidiary judicial organ?

Rather than the issue, the *Appeal Decision* faces its questioning. Claiming the untenableness of the claim for a “fundamental misunderstanding of the constitutional set-up of the Charter”.³⁶⁶ For the sole purpose of proving the lack of external, contextualized, cultural or political references (as the UNSC functioning structure is addressed from a legal, procedural, perspective), we can point out that in this reasoning the Appeals Chamber’s only novelty is to consider that the UNSC in the discharging of its own functions (towards the maintenance of peace) does not have to have the powers of the subsidiary organs it creates. These are understood by the Appeals Chamber to be instrumental for the exercise of a “principal function of maintenance of peace and security”.³⁶⁷

The examples given, though referentially reassuring, keep the internally contained speech: the setting up, by the UNGA of military forces, thus proving beyond doubt the possibility of an organ (UNGA) without a specific power (military) to create instrumental, subsidiary, organs with such (military) powers.

f) Was the establishment of the Tribunal an appropriate measure?

Our already known claim against the “appropriateness” of the measure (i.e. the ICTY as measure to promote peace) is addressed in the *Appeal Decision* by adoption of the *Trial Decision*’s main argument but denying its conclusions.

³⁶⁵ Appeal Decision: 18.

³⁶⁶ Idem.

³⁶⁷ Appeal Decision: 19.

On the one hand the Appeals Chamber confirms that “Article 39 leaves the choice of means and their evaluation to the Security Council”,³⁶⁸ further (re)stating that the UNSC “enjoys wide discretionary powers in this regard”.

Interestingly, the reasoning goes on to contend that:

“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” (Appeal Decision, 19)

Although laying the argument for its evaluation facing the peace and security situation in the former Yugoslavia, still this reasoning denies, even if for an ulterior motive and purpose, the Trial Chamber claim on the legitimacy of exercise when reviewing the Defence’s argument on the independence of the ICTY.

Nonetheless the *Appeal Decision* conclusion here, in the argument of the appropriateness of the measure, seems much more directed towards the next one:

“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.” (Appeal Decision), our bold.

1.4. Was the establishment of the ICTY contrary to the Principle “established by law”?

As just quoted, the Appeals Chamber had already answered the question beforehand, however, keeping its will to address the challenge and its claims, the Appeals Chamber does review this particular one by stating, and reasoning on, the possible meaning of the expression “established by law”.³⁶⁹

³⁶⁸ *Idem*.

³⁶⁹ Appeal Decision: 20-24, to further note that the main argument presented by the Defence was based on the provisions of the ICCPR (see above, Sections VI and IX).

After quoting not only the International Covenant on Civil and Political Rights, but also the European Convention on Human Rights and the American Convention on Human Rights, the *Appeal Decision* claims not to be satisfied, i.e. not convinced, that these instruments apply to the ICTY, the underlining argument being twofold:

- The conventions, as signed by States, would not apply *per se* to an international organization such as the UN; and
- The goal of the conventions, being identified on a national context with preventing an Executive discretion in the administration of Justice, does not apply to the UN, given the lack of definition of the traditional (national) separation of powers.

Interestingly, the two arguments when, as here, read together can easily be misinterpreted as opening the possibility for the UN to be above the law (of conventions) and not abiding by the principle of separation of powers. If the first conclusion is set aside by another reasoning of the Appeals Chamber, this last one is not, as is clearly stated:

“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 (...) There is, however, no legislature, in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.”

(Appeal Decision: 21), our bold.

The autonomous and self-contained system earlier envisaged by the Appeals Chamber to describe International Tribunals is here again called upon to exonerate the UN (with all of its organs) from compliance with the highest standards of the Rule of Law. Although the final conclusion does not maintain this possibility *de*

facto, it does so for another set of reasons, thus keeping this argument. For the purpose of this thesis, one has to note that:

- The Appeals Chamber does review the powers of UN organs;
- Characterizing them, if only negatively; and
- Supports the interpretation that the “world community”, i.e. the UN, is not limited by international conventions.

Returning to the main argument of the *Appeal Decision*, it proposes three possible meanings to content of the expression Tribunal “established by law”:

a) Established by a legislature

Although mentioning the European Convention on Human Rights, as favouring this interpretation,³⁷⁰ the Appeals Chamber dismisses the application of this meaning, as proposed by the Defence, as a “mere executive order”. The reason (reviewed above) is that such meaning implies a guarantee against Executive discretion in a system of separation of powers, a feature the UN structure lacks.

b) Established by a body with power to take binding decisions

To this possible other meaning, the Appeals Chamber compares such a non-parliamentary organ with the UNSC “when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25”.³⁷¹

Contending the argument that the UN, lacking the separation of powers and therefore a proper Legislature, could not have established the ICTY, at least without amending the Charter, the *Appeal Decision* concludes that, on the contrary, the UNSC is in fact empowered to do so. The argument being that such power is legitimate when the UNSC is acting pursuant to an authority found within its constitution, i.e. Chapter VII of the Charter, “in the light of its determination that

³⁷⁰ Appeal Decision: 21.

³⁷¹ Appeal Decision: 22.

there exists a threat to the peace". Such reasoning, parting from a possible application of general principles, concedes with the self-referential procedural explanation which allows the UNSC to determine the conditions (threat to peace) to be vested in special powers (Chapter VII).

The underlined circumlocutory legitimacy is then tentatively justified with the argument of the support of the UNGA, as "representative organ", to the establishment of the ICTY. An argument directly in contradiction with the prior dismissal of the application of national concepts of structures power (i.e. the existence of a Legislature). In this sense the *Appeal Decision* misses the external politico-cultural references to explain the meaning of the argument.

c) Established in accordance with the rule of law

Not considering the formal legitimacy of creation, but rather the contents (leaving it to be known if implying an *ex post* assessment of legitimacy of exercise), the *Appeal Decision* takes up the above-mentioned norms from conventions, and endorses an interpretation that the principle of a Tribunal "established by law" means, in International Law, a principle rather than a positive norm. As such, it is not that any conventional norm applies to the ICTY on the matter, but, so as to respect this principle:

"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." (Appeal Decision: 22-23), our bold.

The reference to "proper international standards" and "internationally recognized" was a promising prelude for the possibility of grounding the transcendence of the "norm" by reference to specific context(s). However, not really backtracking, but rather reinforcing its periodical return to the safe-haven of the legalistic circumlocution (i.e. the singularity unity of itself), the Appeals Chamber, as the Trial

Chamber, recognizes itself in the requirements of the principle (fairness, justice, and even-handedness) and limits the external recognition to the norm (as “internationally recognized” are the “human rights instruments” and not the “human rights” themselves).³⁷²

To such end, at which we too are arriving, the *Appeal Decision* calls only, in self-sufficiency, upon the norms of its Statute, and of the RPE (as established by the judges themselves), to conclude – as we do by agreeing with the Tribunal’s vision of International Tribunals as “self-contained systems” (it regarding the authorities to respect, us regarding the references of a discourse of legitimacy):

“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’.” (Appeal Decision: 24)

2. Separate opinion(s)

The *Appeal Decision* includes three separate opinions appended (Judges Li, Abi-Saab and Sidhwa) and a declaration (Judge Deschênes).³⁷³ Again, considering its relevance for the object of the research, the argumentation on the questions of legitimacy in the official discourse of the Tribunal, we cannot but take into consideration that facing those four challenges, the *Appeal Decision* was, on the issue of legitimacy, unanimous. Thus rendering beyond secondary for this thesis the arguments included in those separate opinions, even when addressing that very question of legitimacy.

³⁷² Appeal Decision 23-24. Noteworthy are the mentions to the Human Rights Committee (as per the ICCPR), which, on another context (primacy), was envisaged by the Defence as a guarantee of appeal, if in trial in Germany, and denied by the ICTY.

³⁷³ Judge Deschênes declaration focuses in the usage of both official languages of the Tribunal (English and French), and the disadvantages inherent to its non-observance. As it does not include any comment on the object of the Appeal Decision (but rather in the “risk” for French speaking jurists “while awaiting an official text to which they are entitled”) it will not be included in the current research.

Despite this conclusion, one cannot ignore that the first question (only presented before the Appeal Chamber) on the jurisdiction of the Appeals Chamber to hear the Appeal, may in one of the cases hold its grounds for a reinterpretation of the vote on the second challenge (on the legitimacy of Tribunal). Such was the case of Judge Li, as by voting against the decision “that the International Tribunal is empowered to pronounce upon the plea challenging the legality of the establishment”³⁷⁴ of the ICTY, made it necessary for his vote (in favour, as all the others) to be reinterpreted on dismissing the plea on the legitimacy of the ICTY.

2.1. Judge Haopei Li separate opinion.³⁷⁵

Judge Li presented his disagreement with the Decision on three legal questions:

- a) Examination of the legality of the establishment of the Tribunal;
- b) Subject-matter jurisdiction of the Tribunal under Article 3 of the SICTY;
- c) Characterization of the conflict in the former Yugoslavia.

On the legality of the establishment of the ICTY, Judge Li argues that the “Kompetenz-kompetenz” does not allow the Tribunal to consider any legal challenge to the UNSC Res. which establishes it. The key point being that the “jurisdiction to determine its own jurisdiction” stops just *before* the legislative power, i.e., the ICTY can review and draw up the boundaries of its jurisdiction as derived from such instruments that lay beyond its review.

In such case, the ICTY could only scrutinize and decide on the jurisdiction it may pass judgement on, according to a given instrument. So, even though the ICTY would have competence to say what was in the Res. and Statute, it could never question, nor for that matter even consider, the legality of such instrument.

³⁷⁴ Appeal Decision: 75.

³⁷⁵ Li opinion: 2. The reasoning on the legitimacy is limited to the two first paragraphs of the cited page. Although the Li opinion goes on in reasoning on the subject-matter jurisdiction and on characterization of the conflict, such argumentation, will not be here reviewed as is beyond the point of our research.

In certain legal traditions this argument can be referred to those cases where the legality of the norm has a special jurisdiction, there a court can determine which laws to apply, or even which legal body is included within its jurisdiction, but any challenge to those norms is reviewed as an appeal, *ab initio*, therefore outside that court's jurisdiction. A legality challenge would obstacle to the appreciation of the case before the court until a decision is reached in another instance. Other traditions give the (first instance) court the possibility (jurisdiction) to review such challenges, even when the decisions are subject to appeal.

A very interesting note by Judge Li refers to the establishment of the ICTY "by resolution 808", a statement which could contradict other views of the Tribunal, when affirming its establishment under Res. 827.

In a parallel line of argumentation, Judge Li dismisses the possibility of the ICTY to review the "political question" of whether the conflict in the former Yugoslavia was indeed a threat to international peace and security (thus reinforcing his first argument by taking its full theoretical consequences): if the Tribunal does not have jurisdiction over the UNSC Resolutions, then such a review would be improper.

However, Judge Li carries on considering the implications of such jurisdiction limitation (on UNSC Resolutions) and considers, from a strictly legal, or rather jurisdictional, point of view that the ICTY lack of competence to review the Resolution which established it, was by itself cause for dismissing the appeal. The solution would be a negative review of competence, similar to the *Trial Decision*.

In conclusion, the argument is that without competence over the legality of the Resolution, the Tribunal could not engage in the review of the legality of its own establishment.

CHAPTER IV – CONCLUSIONS

What then by way of conclusion? To draw succinct lessons from what is, in the end, an invitation to look critically, and in a cultural and ever political context, at a notoriously, indeed, deliberately, over-complicated set of legalistic disputations, would be inadvisable.

However, as the structure and organization of this thesis have shown, the Duško Tadić case has been used as, and can fairly claimed to be, symptomatic and emblematic. Symptomatic of certain problematic legal processes; emblematic of the sadly un-admitted, even if tacitly recognized, morass wherein and whereby legal discourses become inexorably enmeshed with the cultural pressures of vested political interests.

What can be said, at least, in summary, of the various aspects of the Tadić case as, of necessity, presented in this thesis?

In the first Section of Chapter I the reader is invited to ponder on how to approach such an elusive subject as the discourse of self-legitimacy. Not the legitimacy itself, nor its theoretical debates, not even its perceived, and shared, consistency within a community, but its representation by, and on, a particular international judicial context.

In Section II of the same Chapter, the issues raised concerned the multitude of objects from where to limit the subject within the international criminal judiciary, their singularity – via, unlike others in the international stage, its direct consequences upon individuals – and the relation, and relevance, between them.

In the last Section of Chapter I, what was problematized were the chosen criteria of relevance, testing, already in practice, the ground for delimiting the focus of our analysis. A task pursued both with the objectiveness of the observation of facts (the chronological perspective) and the careful scrutiny of the more challenging examples.

In the beginning of the second Chapter we have examined the stage (ICTY), its frame structure and self representation, where the case to be reviewed occurred. An assignment proven to present as many doubts as answers, yet capable of opening the research to the external context of that particular institution: from the international political environment under its creation to the perceived relevance given by ICTY to a particular public representation.

In the second Section of the same Chapter, the key concern was to establish a solid ground to the context previously described. Already in a legal context, it was not only the nature of the norms setting the boundaries of our case study which was made explicit, but also the why and when such a legal framework was established.

In the first Section of Chapter III, in the dense legal context of the case-study, at stake was the reviewing of the Duško Tadić Defence's interlocutory Motion on jurisdiction. The legitimacy challenge, as effectively posed before the ICTY, and in responding to which the tribunal would have to look itself in the mirror.

In Section II of the same Chapter, the validity of the challenge was subjected to rigorous analysis, both by considering, but furthermore by reviewing, the Prosecutor's answer to the Motion of the Defence, its discourse and implications.

In Section III of Chapter III, echoing concerns raised on several previous occasions, an external input, the USA Brief, as *amicus curiae*, was also reviewed, not just so as to consider all filed material of the case, as we did, but also broadening the spectrum of possible references upon which the discourse of legitimacy could have had been built.

In Section IV of the same Chapter, and by now in a manner familiar to the reader, serious concerns arose regarding the capability of the ICTY to construct the, claimed, discourse of self-legitimization. Here, at the review of the first *Decision*, at

the Trial Chambers, a pattern started to emerge, a certain willingness for outreach yet an incapability of incorporating such external references.

Finally, in Section V, the whole question, in retrospect, of the validity, standing and eventual justifiability of the discourses legally deployed is raised as an issue that could never be other than culturally saturated. Nonetheless, and thus, a failure of coherence can now be acknowledged, and conceded, to be the inevitable (organizing) principle of a patchwork quilt of interfering discourses.

The willingness of the Appeals Chamber to engage in external references, as contextual interpretation, rather than opening the legalistic discourse, has proven it still incapable, at least in the absence of a “centralized structure”, of constructing a commonly shared, an internally coherent legitimacy discourse.

In a way, the Trial Chamber says that it lacks not only the competence, but also the capacity (*locus standi*) to review UNSC Resolutions, such being the consequence of the strictly self-contained and self-referential discourses adopted in the *Trial Decision*. Or does it? The occasional temptation firmly to ground its conclusions in an open field of references, as was, for example, the reasoning around the applicability of the legal technical instrument of “analogy”, as presented by the Defence (regarding Article 91 of the RPE), seems to lay bare the lack of other such well-established grounds for legitimacy when addressing the more central arguments of the challenge.

The Appeal Chamber, on the contrary, implicitly recognizes the “right” (as *locus standi* – i.e. capacity), but... just missing the competence. In order to pass judgement it seems to be limited to the procedural confirmation of UNSC powers; or of the verification of the *de facto* conditions, as pre-requisites, for such powers? It thereby avoids any judicial (binding) decision on the matter, however, as proven in the review of the *Appeal Decision*, the “appropriateness” to consider arguments (be they binding or otherwise) passes from Trial to Appeal Chambers, as an urgency of self-legitimization.

Already aware of the need to seek solid grounds, the uncommon “world jurisdiction” aspired to by the Tribunal, does refer to external, that is, extra-legal, concepts, yet, it is still incapable, in itself, of building upon these. It further misses the “world view” of cross-cultural references and consequences, thus proceeding on its own *a lumine motus*.

APPENDIX I – THE CHARTER OF THE UNITED NATIONS

Relevant or mentioned rules³⁷⁶

CHAPTER I: PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following *Principles*.

1. The Organization is based on the principle of the sovereign equality of all its Members.

³⁷⁶ Our highlight, *passim*.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. 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 or shall require the Members to submit such matters to settlement under the present Charter; but *this principle shall not prejudice the application of enforcement measures under Chapter VII.*

(...)

CHAPTER IV: THE GENERAL ASSEMBLY

(...)

Article 10 – Functions and powers.

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, *except as provided in Article 12*, may

make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.
2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, *except as provided in Article 12*, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.
3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.
4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the

maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

(...)

CHAPTER V: THE SECURITY COUNCIL

(...)

Article 24 – Functions and Powers

1. In order to ensure prompt and effective action by the United Nations, *its Members confer on the Security Council* primary responsibility for the maintenance of international peace and security, *and agree that* in carrying out its duties under this responsibility *the Security Council acts on their behalf*.
2. 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.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations *agree to accept and carry out* the decisions of the Security Council in accordance with the present Charter.

(...)

Article 29

The Security Council may establish such *subsidiary organs* as it deems necessary for the performance of its functions.

(...)

Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

(...)

CHAPTER VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

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.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

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

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it *may take such action by air, sea, or land forces as may be necessary* to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

(...)

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

(...)

CHAPTER XIV: INTERNATIONAL COURT OF JUSTICE**Article 92**

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

APPENDIX II – ICTY Rules of Procedure and Evidence.

Relevant Rules, 1995 version vs. Current version.

| A. Relevant Rules of the RPE version at the time of the <i>Motion</i> on the jurisdiction of the tribunal (ICTY) – from the filing of the <i>Motion</i> (23 June 1995) to the Appeal Chamber Decision (2 October 1995).³⁷⁷ | B. Relevant Rules of the current version³⁷⁸ of the RPE: |
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| <p style="text-align: center;">Rule 73</p> <p style="text-align: center;">Preliminary Motions by Accused</p> <p>(A) Preliminary motions by the accused shall include:</p> <ul style="list-style-type: none"> (i) objections based on lack of jurisdiction; (ii) objections based on defects in the form of the indictment; (iii) applications for the exclusion of evidence obtained from the accused or having belonged to him; (iv) applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Sub-rule 82 (B); (v) Objections based on the denial of request for assignment of counsel. | <p style="text-align: center;">Rule 72</p> <p style="text-align: center;">Preliminary Motions³⁷⁹</p> <p>(A) Preliminary motions, being motions which:</p> <ul style="list-style-type: none"> (i) challenge jurisdiction; (ii) allege defects in the form of the indictment; (iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B); or (iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C) |

³⁷⁷ RPE as at the date of the Trial Decision (original version adopted on 11 February 1994, amended 5 May 1994, further amended 4 October 1994, revised 30 January 1995, amended 3 May 1995 and further amended 15 June 1995), the same version was in place at the date of the Appeal Chamber Decision, from 2 October 1995, as the following amendment to the RPE is dated from 6 October 1995.

³⁷⁸ NOTE: Rule 73 is currently Rule 72 (revised on 20 October and 12 November 1997).

³⁷⁹ Adopted 11 Feb 1994, revised 30 Jan 1995, amended 25 June 1996, 5 July 1996, 25 July 1997, revised 12 Nov 1997, amended 10 July 1998, 4 Dec 1998, 17 Nov 1999, 1 Dec 2000, 13 Dec 2000, 23 Apr 2002, 21 July 2005, and 12 July 2007.

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| <p>(B) Any of the motions by the accused referred to in Sub-rule (A) shall be brought within sixty days after his initial appearance, and in any case before the hearing on the merits.</p> <p>(C) Failure to apply within the time-limit prescribed shall constitute a waiver of the right. Upon a showing of good cause, the Trial Chamber may grant relief from the waiver.</p> | <p>shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. Subject to any order made by a Judge or the Trial Chamber, where permanent counsel has not yet been assigned to or retained by the accused, or where the accused has not yet elected in writing to conduct his or her defence in accordance with Rule 45 (F), the thirty-day time-limit under this Rule shall not run, notwithstanding the disclosure to the defence of the material and statements referred to in Rule 66 (A)(i), until permanent counsel has been assigned to the accused.</p> <p style="text-align: right;"><i>(Amended 12 July 2007)</i></p> <p>(B) Decisions on preliminary motions are without interlocutory appeal save</p> <p>(i) in the case of motions challenging jurisdiction;</p> <p style="text-align: right;"><i>(Amended 25 June 1996 and 5 July 1996, amended 23 Apr 2002)</i></p> <p>(ii) in other cases where certification has been granted by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the</p> |
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proceedings.

(Amended 25 June and 5 July 1996, 25 July 1997, revised 12 Nov 1997, amended 23 Apr 2002)

(Revised 30 Jan 1995, revised 12 Nov 1997)

(C) Appeals under paragraph (B)(i) shall be filed within fifteen days and requests for certification under paragraph (B)(ii) shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless:

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.

(Revised 12 Nov 1997, amended 10 July 1998, 17 Nov 1999, 1 and 13 Dec 2000, and 23 Apr 2002)

(D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

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| | <p>(i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;</p> <p>(ii) the territories indicated in Articles 1, 8 and 9 of the Statute;</p> <p>(iii) the period indicated in Articles 1, 8 and 9 of the Statute;</p> <p>(iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.</p> <p>(Amended 1 and 13 Dec 2000)</p> |
| <p>Rule 91</p> <p>False Testimony under Solemn Declaration</p> <p>(A) A Chamber, on its own initiative or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.</p> <p>(B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony.</p> | <p>Rule 91</p> <p>False Testimony under Solemn Declaration</p> <p>(A) A Chamber, <i>proprio motu</i> or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.</p> <p>(Amended 25 July 1997)</p> <p>(B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:</p> <p>(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or</p> <p>(Amended 13 Dec 2001)</p> <p>(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an <i>amicus curiae</i> to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.</p> <p>(Amended 13 Dec 2001)</p> <p>(C) If the Chamber considers that there are sufficient grounds to proceed</p> |

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| <p>(C) The rules of procedure and evidence in Parts Four to Eight shall apply <i>mutatis mutandis</i> to proceedings under this Rule.</p> <p>(D) No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.</p> <p>(E) The maximum penalty for false testimony under solemn declaration shall be a fine of US\$10,000 or a term of imprisonment of twelve months, or both. The payment of any fine imposed shall be made to the Registrar to be held in the account referred to in Sub-rule 77(E).</p> | <p>against a person for giving false testimony, the Chamber may:</p> <p>(i) in circumstances described in paragraph (B)(i), direct the Prosecutor to prosecute the matter; or</p> <p>(ii) in circumstances described in paragraph (B)(ii), issue an order in lieu of an indictment and direct <i>amicus curiae</i> to prosecute the matter.</p> <p>(Amended 13 Dec 2001)</p> <p>(D) The rules of procedure and evidence in Parts Four to Eight shall apply <i>mutatis mutandis</i> to proceedings under this Rule.</p> <p>(E) Any person indicted for or charged with false testimony shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.</p> <p>(Amended 13 Dec 2001)</p> <p>(F) No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.</p> <p>(G) The maximum penalty for false testimony under solemn declaration shall be a fine of 100,000 Euros or a term of imprisonment of seven years, or both. The payment of any fine imposed shall be paid to the Registrar to be held in the account referred to in Rule 77 (H).</p> <p>(Amended 18 Jan 1996, 25 July 1997, 12 Nov 1997, 4 Dec 1998, 1 and 13 Dec 2000, and 13 Dec 2001)</p> <p>(H) Paragraphs (B) to (G) apply <i>mutatis mutandis</i> to a person who knowingly and willingly makes a false statement in a written statement taken</p> |
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| | <p>in accordance with Rule 92 <i>bis</i> or Rule 92 <i>quater</i> which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal.</p> <p><i>(Amended 17 Nov 1999, 1 and 13 Dec 2000, 13 Dec 2001, and 13 Sept 2006)</i></p> <p>(I) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless</p> <p>(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or</p> <p>(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.</p> <p><i>(Amended 1 and 13 Dec 2000)</i></p> |
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APPENDIX III – “Summary of arguments” in the Persecution Response to the Defence *Motion* on the legitimacy of the ICTY, as filed before the Trial Chamber.³⁸⁰

“SUMMARY OF ARGUMENTS

II. The establishment of the ICTY is a legitimate exercise of Security Council powers under Chapter VII of the United Nations Charter

A. The establishment of the ICTY is within the powers of the Security Council

1. Judicial review over Security Council powers
2. Review of determinations by the Security Council relating to the existence of a threat to international peace and security, and the measures to be adopted
3. The powers of the Security Council are broad and permissive, giving rise to a presumption of legality with respect to measures adopted under Chapter VII
4. Being an enforcement measure under Chapter VII, no treaty is required for the establishment of the ICTY
5. The establishment of the ICTY is not in conflict with the prospective establishment of a permanent international penal tribunal
6. The powers of the General Assembly and Security Council are not mutually exclusive
7. Unlike the Security Council, the powers of the General Assembly do not extend to the adoption of binding enforcement measures

B. The establishment of the ICTY is a valid measure under Chapter VII of the Charter

1. The serious violations of humanitarian law committed in the territory of the former Yugoslavia since 1991 constitute a threat to international peace and security within the meaning of Chapter VII

³⁸⁰ Highlighted in the original.

2. Impunity for serious violations of international humanitarian law is an impediment to the restoration of peace and security in the territory of the former Yugoslavia
3. The protection of humanitarian and human rights law is a legitimate area of Security Council action
4. The Security Council has authority over individuals with respect to serious violations of humanitarian law
5. Nothing in the Charter precludes the establishment of a subsidiary judicial organ by the Security Council
6. The establishment of a subsidiary judicial organ by the Security Council does not affect its independence or impartiality

C. The ICTY has primary jurisdiction to try this case and all cases alleging violations within the subject-matter jurisdiction of the ICTY Statute

1. The accused has no standing to raise the issue of primacy over domestic courts
2. The Governments of the Republic of Bosnia and Herzegovina and the Federal Republic of Germany have accepted the primary jurisdiction of the ICTY
3. As an entity without international recognition, the so-called 'Bosnian Serb Republic' cannot invoke the sovereign rights of States
4. The serious violations of humanitarian law within the subject-matter jurisdiction of the ICTY are matters of universal jurisdiction which may be vested in an international jurisdiction
5. *Jus de non evocando* does not defeat the right of a State to confer jurisdiction on the ICTY
6. The serious violations of humanitarian law within the subject-matter jurisdiction of the ICTY give rise to obligations *erga omnes* which justify collective measures by the international community overriding State sovereignty

7. Chapter VII action by the Security Council overrides the sovereign rights of States
8. The exercise of primary jurisdiction by the ICTY does not infringe the rights of the accused, and is warranted by the universal interests threatened by the crimes committed by the accused, and by the right of the international community to repress such crimes in an international jurisdiction

III. Applicability of the subject-matter jurisdiction

A. The ICTY has the power to prosecute the accused under Article 2 of the Statute on the grounds that all relevant times the requirements for the applicability of the Grave Breaches provisions of the 1949 Geneva Conventions were satisfied

1. The organs of the United Nations, the Security Council in particular, regard the conflict in the Bosnia and Herzegovina as an international armed conflict
2. An international armed conflict existed in Bosnia and Herzegovina at all relevant times during which the accused is alleged to have committed Grave Breaches of the 1949 Geneva Conventions
3. Once the Geneva Conventions of 1949 become applicable, there is a presumption that they continue to be applicable in the absence of evidence to the contrary
4. The applicability of the Geneva Conventions of 1949 does not terminate with the cessation of hostilities
5. The parties to the conflict in BiH have agreed to apply the Grave Breaches provisions by means of special agreements pursuant to common Article 3 of the Geneva Conventions of 1949
6. The parties to the conflict in BiH are bound by the Grave Breaches provisions of the Geneva Conventions of 1949 by virtue of unilateral declarations

7. The Federal Republic of Yugoslavia (Serbia and Montenegro) has implicitly agreed that the conflict in BiH is international in character

B. The ICTY has the power to prosecute the accused under Article 3 of the Statute for committing Violations of the Laws or Customs of War in an armed conflict, whether international or internal in character

1. The term 'laws or customs of war' in Article 3 of the ICTY Statute applies to both international and internal armed conflicts
2. Since the enumerated acts under Article 3 are illustrative and not exhaustive, the ICTY has jurisdiction to apply the minimum standards contained in Article 3 common to the 1949 Geneva Conventions, by virtue of its status as a norm of international customary law as well as the treaty obligations of the former Yugoslavia and its relevant successor States, and insofar as they constitute serious violations of humanitarian law and of the laws or customs of war under Articles 1 and 3 of the Statute respectively
3. The minimum standards contained in Article 3 common to the 1949 Geneva Conventions are applicable to both international and internal armed conflicts and, therefore, it is unnecessary for the ICTY to inquire into the characterization of the armed conflict in the former Yugoslavia
4. Application of the minimum standards contained in Article 3 common to the 1949 Geneva Conventions does not violate the principle *nullum crimen sine lege* insofar as it is a norm of international customary law and a binding treaty obligation of the former Yugoslavia and its relevant successor States

C. The ICTY has the power to prosecute the accused under Article 5 of the ICTY Statute insofar as crimes against humanity do not

require a nexus with an armed conflict, whether international or internal in character

1. The requirement of a nexus with armed conflict under Article 6 (c) of the *Nuremberg Charter* is an artificial link, peculiar to the jurisdiction of the Nuremberg Tribunal, and is not indicative of the underlying principles of international law
2. The *Law No. 10 of the Control Council for Germany* did not require a nexus with armed conflict, whether international or internal in character
3. Under contemporary international law, it is well-established that crimes against humanity do not require a nexus with an armed conflict, whether international or internal in character
4. Elementary considerations of humanity cannot be violated in armed conflict, whether international or internal in character
5. The definition of crimes against humanity in Article 5 of the ICTY Statute is in full conformity with the principle *nullum crimen sine lege*"

APPENDIX IV – UNSC Resolutions 808 and 827

UNITED NATIONS

Security Council

S/RES/808 (1993)

RESOLUTION 808 (1993)

Adopted by the Security Council at its 3175th meeting,

on 22 February 1993

The Security Council,

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

Recalling paragraph 10 of its resolution 764 (1992) of 13 July 1992, in which it reaffirmed that all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches,

Recalling also its resolution 771 (1992) of 13 August 1992, in which, *inter alia*, it demanded that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law,

Recalling further its resolution 780 (1992) of 6 October 1992, in which it requested the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolutions 771 (1992) and 780 (1992), together with such further information as the Commission of Experts may obtain, with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia,

Having considered the interim report of the Commission of Experts established by resolution 780 (1992) (S/25274), in which the Commission observed that a decision to establish an *ad-hoc* international tribunal in relation to events in the territory of the former Yugoslavia would be consistent with the direction of its work,

Expressing once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of "ethnic cleansing",

Determining that this situation constitutes 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 of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

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

Noting also with grave concern the "report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia" (S/25240, Annex 1),

Noting further the report of the committee of jurists submitted by France (S/25266), the report of the commission of jurists submitted by Italy (S/25300), and the report transmitted by the Permanent Representatives of Sweden on behalf of the Chairman-in-Office of the Conference on Security and Cooperation in Europe (CSCE) (S/25307),

1. Decides 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;
2. Requests the Secretary-General to submit for consideration by the Council at the earliest possible date, and if possible no later than 60 days after the adoption of the present resolution, a report on all the aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision contained in paragraph 1 above, taking into account suggestions put forward in this regard by Member States;
3. Decides to remain actively seized of the matter.

UNITED NATIONS

Security Council

S/RES/827 (1993)

RESOLUTION 827 (1993)

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,

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.

APPENDIX V – Relevant quotations and articles, as published in the ICTY website,
of the version of the:

“UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR
THE FORMER YUGOSLAVIA

(...)

(Not an official document. This compilation is based on original United Nations
resolutions.)

(...)

UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE
FORMER YUGOSLAVIA

RESOLUTION 808 (1993)

RESOLUTION 827 (1993)

RESOLUTION 1166 (1998)

Annex

RESOLUTION 1329 (2000)

(...)

ICTY RELATED RESOLUTIONS

Resolutions with no amendments to the Statute, but relevant to the ICTY.

RESOLUTION 1503 (2003)

(...)

UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE
FORMER YUGOSLAVIA

(ADOPTED 25 MAY 1993 BY RESOLUTION 827)

(AS AMENDED 13 MAY 1998 BY RESOLUTION 1166)

(AS AMENDED 30 NOVEMBER 2000 BY RESOLUTION 1329)

(AS AMENDED 17 MAY 2002 BY RESOLUTION 1411)

(AS AMENDED 14 AUGUST 2002 BY RESOLUTION 1431)

(AS AMENDED 19 MAY 2003 BY RESOLUTION 1481)

(AS AMENDED 20 APRIL 2005 BY RESOLUTION 1597)

(AS AMENDED 28 FEBRUARY 2006 BY RESOLUTION 1660)

(AS AMENDED 29 SEPTEMBER 2008 BY RESOLUTION 1837)

(AS AMENDED 7 JULY 2009 BY RESOLUTION 1877)

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal

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

Article 2

Grave breaches of the Geneva Conventions of 1949

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

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

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

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or 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.

(...)

Article 5

Crimes against humanity

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

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;

- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

Article 6

Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

(...)

Article 8

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9

Concurrent jurisdiction

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

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

Article 10

Non-bis-in-idem

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

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

- (a) the act for which he or she was tried was characterized as an ordinary crime; or
- (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

(...)

Article 13 bis

Election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(...)

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. (...)

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.

(...)

Article 13 ter

Election and appointment of ad litem judges

1. The ad litem judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(...)

Article 15

Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

(...)

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21

Rights of the accused

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

- (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) to be tried without undue delay;
- (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
- (g) not to be compelled to testify against himself or to confess guilt.

(...)

Article 25

Appellate proceedings

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

- (a) an error on a question of law invalidating the decision; or
- (b) an error of fact which has occasioned a miscarriage of justice.

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

(...)

Article 29

Co-operation and judicial assistance

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(...)

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal.

(...)

Article 32

Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

(...)

Article 34

Annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

BIBLIOGRAPHY:

Akhavan, P. (1998) "Justice in The Hague, Peace in the former Yugoslavia? A Commentary on the United Nations war Crimes Tribunal", *Human Rights Quarterly*, n. 20, p. 737-816.

Alvarez, José E.

- (1996) "Nuremberg Revisited: The Tadic Case", in *European Journal of International Law*, Issue Vol. 7 (1996) No. 2, (pp 245-264).
- (2006, paperback) *International Organizations as Law-makers*, Oxford University Press, New York.

Ascensão, José de Oliveira. (1993) *O DIREITO, Introdução e Teoria Geral, Uma Perspectiva Luso-Brasileira*, 7ª Ed., Almedina, Lisboa.

Bassiouni, M. Cherif. *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, Boston.

Bantekas, Ilias. (2010) *International Criminal Law*, 4th ed., Hart Publishing, Oxford.

Bedjaoui, M. (1994), *The New World Order and the Security Council, Testing the Legality of its Acts*, Martinus Nijhoff Publishers, Dordrecht.

Birkhäuser, Noah. (1989) "Sanctions of the Security Council Against Individuals – Some Human Rights Problems", in *Netherlands Yearbook of International Law*, vol. 20, Asser Press. At: <http://www.statewatch.org/terrorlists/docs/Birkhauser.PDF>

Bodley, A. (1999), "Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the former Yugoslavia", *New York University Journal of International law and Politics*, n 31, p. 417-471.

Brunnée, Jutta. and Toope, J. Stephen. (2010), *Legitimacy and Legality in International Law*, Cambridge University Press, Cambridge.

Cassese, Antonio.

- (1998) "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", in *European Journal of International Law*, Issue Vol. 9, No. 1, (pp 2-17).
- (2003), *International Criminal Law*, Oxford University Press, Gosport, UK.
- (2007), "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", in *European Journal of International Law*, Issue Vol. 18, No. 4, (pp. 649-668).
- (2009), (ed.) et al. *The Oxford Companion to International Criminal Justice*, Oxford University Press, New York.

Cavari, Amnon. "Between Law and Politics: Constitutional Review of Legislation", unpublished paper presented at the annual meeting of the The Law and Society Association, Chicago, May 27, 2004, partially available in:

http://www.allacademic.com/one/www/www/index.php?cmd=www_search&offset=0&limit=5&multi_search_search_mode=publication&multi_search_publication_fulltext_mod=fulltext&textfield_submit=true&search_module=multi_search&search=Search&search_field=title_idx&fulltext_search=Between+Law+and+Politics%3A++Constitutional+Review+of+Legislation

Clark, Ian. (2005) *Legitimacy in International Society*, Oxford University Press, Oxford.

Clark, Roger S. and Sann, Madeleine. ed.s (2002) *The Prosecution of International Crimes – A Critical Study of the International Tribunal for the Former Yugoslavia*, Transaction Publishers, New Jersey.

Cryer, Robert.

- (2005) *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge (10 February 2011 reprint).

- (2010) Friman, Håkan., Robinson, Darryl. and Wilmshurst, Elisabeth. *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge.

Dinh, Nguyen Quoc., Daillier, Patrick. & Pellet, Alain. (2003) *Direito Internacional Público*, 2nd ed., Fundação Calouste Gulbenkian, Lisboa, (translation by Coelho, Vítor Marques. from *Droit International Public*, 7^e ed., Librairie Général de Droit et de Jurisprudence, E.J.A., Paris, 2002).

Gallant, Kenneth S. (2010, paperback), *The Principle of Legality in International and Comparative Criminal Law*, Cambridge University Press, Cambridge.

Green, L.C. (1993) *The contemporary law of armed conflicts*, Manchester University Press, Manchester.

Greenwood, Christopher. (1996) "International Humanitarian Law and the Tadic Case", in *European Journal of International Law*, Issue Vol. 7, No. 2, (pp 265-283).

Hamilton, Alexander., Madison, James. & Jay, John. (2003) *O Federalista*, Edições Colibri, translation, introduction and notes by Viriato Soromenho-Marques & João Duarte, Lisboa.

HRC – Human Rights Watch. (2004), *Genocide, War Crimes, and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia*, Human Rights Watch, USA.

Hurd, Ian. (2007) *After Anarchy*, Princeton University Press, New Jersey.

Hurd, Ian. & Cronin, Bruce. (2008), (eds) *The UN Security Council and the Politics of International Authority*, Routledge, Oxon, UK.

ICRC – International Committee of the Red Cross (1993), *Some Preliminary Remarks by the International Committee of the Red Cross on the setting-up of an*

international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia (United Nations Security Council Resolution 808 (1993) Adopted on 22 February 1993), DDM/JUR/422b, 25 March 1993.

ICTY – All documents available in the ICTY online legal Library (<http://www.icty.org/sections/LegalLibrary>) or, by case, included in "The Cases" in (<http://www.icty.org/action/cases/4>). Some references to court records available only after (free) registration with the ICTY at <<http://icr.icty.org/>>:

8. ***Abi-saab, opinion***, "Separate opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995 (IT-94-1-AR72, p. D6403-D6397);
9. ***Appeal Decision***, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", issued on 2 October 1995 (IT-94-1-AR72, p. D6491-D6413).
10. ***Appeal hearings***, including:
 - "Hearing of the Interlocutory Appeal on Jurisdiction" from the 7 September 1995, document dated 16 October 1995 (IT-94-1-AR72, p. D6693-D6543); and
 - "Hearing of the Interlocutory Appeal on Jurisdiction" from the 8 September 1995, document dated 9 October 1995 (IT-94-1-AR72, p. D6539-D6502).
11. ***Appeal Motion***,³⁸¹ including:
 - "Notice of Appeal", filed in 14 August 1995 (IT-94-1-T, p. D5086)

³⁸¹ At the Appeal level the *Tadić* case, was, for the purpose of the appeal on the interlocutory Motion, renumbered – from the (IT-94-1-T) general reference to (IT-94-1-AR72), a numbering not affecting only the first document, the Defence "Notice of Appeal".

- “Brief to support the Notice of (interlocutory) Appeal”, filed on 25 August 1995 (IT-94-1-AR72, p. D5424-D5415);
- “Brief to support the Notice of (interlocutory) Appeal, dated 25 August 1995, but filed on 6 September 1995, (IT-94-1-AR72, p. D5927-D5923); and
- “Index of sources cited by the defence counsel during the Appeals Chambers hearing (8 September 1995) on the interlocutory appeal on the jurisdiction of the I.C.T.Y”, filed in 11 September 1995 (IT-94-1-AR72, p. D6218-D6216).

12. **Appeal Response**, including

- “Prosecution Response to the Defence Interlocutory Appeal Brief”, filed on 1 September 1995 (IT-94-1-AR72, p. D5898-D5885); and
- “Index of Sources and Authorities cited in the Prosecution response to the Appeal Motion of the Defence on the Jurisdiction of the ICTY”, filed in 1 September 1995 (IT-94-1-AR72, p. D5884-D5881).

13. **JSF Brief**, “Amicus Curiae Brief from Jurists Sans Frontiers”, filed in 6 September 1995 (IT-94-1-AR72, p. D17/5687BIS – D1/5687BIS);

14. **Li opinion**, “Separate opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction”, 2 October 1995 (IT-94-1-AR72, p. D6412-D6404);

15. **RPE**, “Rules Of Procedure And Evidence”, as adopted on 11 February 1994, and amended on

- 1994 (5 May and 4 October);
- 1995 (30 January, 3 May, 15 June and 6 October);
- 1996 (18 January, 23 April, 25 June and 5 July, and 3 December);

- 1997 (25 July and revised 12 November);
- 1998 (10 July and 4 December);
- 1999 (25 February, 2 July and 17 November);
- 2000 (14 July 2000, 1 and 13 December 2000);
- 2001 (12 April, 12 July 2001, 13 December, incorporating IT/32/Rev. 22/Corr.1);
- 2002 (23 April, 12 July, 10 October and 12 December);
- 2003 (24 June, 17 July and 12 December);
- 2004 (6 April, 10 June, 28 July and 8 December);
- 2005 (11 February, 11 March and 21 July);
- 2006 (29 March 2006, 30 May and 13 September);
- 2007 (12 July);
- 2008 (28 February and 4 November); and
- 2009 (22 July and 10 December).

16. **Sidhwa, *opinion***, “Separate opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction”, 2 October 1995 (IT-94-1-AR72, p. D6396-D6319);

17. **SICTY**, Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993 by Resolution 827, and amended on:

- 13 May 1998 (Res. 1166),
- 30 November 2000 (Res. 1329),
- 17 May 2002 (Res. 1411),
- 14 August 2002 (Res. 1431),
- 19 May 2003 (Res. 1481),
- 20 April 2005 (Res. 1597),
- 28 February 2006 (Res. 1660),
- 29 September 2008 (Res. 1837) and
- 7 July 2009 (Res. 1877).

18. **Tadić case**, case IT-94-1, Duško Tadić: (<http://www.icty.org/case/tadic/4>)
19. **Trial Decision**, "Decision on the Defence Motion on Jurisdiction", issued on 10 August 1995 (IT-94-1-T, p. D5011-D4979).
20. **Trial hearings**, including:
- "Transcription of the Motion Hearing, Tuesday, 25 July 1995", p. 189-345 (case No. IT-94-1-T); and
 - "Transcription of the Motion Hearing, Wednesday, 26 July 1995", (IT-94-1-T, p. D5397-D5263).
21. **Trial Motion**, material presented by the Defence of Duško Tadić, before the ICTY, in the "motion on the Jurisdiction of the Tribunal, including:
- "Motion on the Jurisdiction of the Tribunal", filed on the 23 June 1995 (IT-94-1-T, p. D2201-D2202); and
 - "Brief to support the Motion on the Jurisdiction of the Tribunal", filed on the 23 June 1995 (IT-94-1-T, p. D2188-D2200).
22. **Trial Response**, materials presented by the Prosecution, in response to the Defence *Trial Motion*, including:
- "Response to the Motion of the Defence on the Jurisdiction of the Tribunal", filed on 7 July 1995 (IT-94-1-T, p. D2476-D2418);
 - "Index of Sources and Authorities cited in the Prosecution Response to the Motion of the Defence on the Jurisdiction of the ICTY", filed on 7 July 1995 (IT-94-1-T, p. D2417-D2406);
 - "Corrections to the Prosecutor's response to the Motion of the Defence on the Jurisdiction of the Tribunal, Amended Index of documents, and Annex of Documents", filed on 20 July 1995 (IT-94-1-T, p. D4390-D4389);

23. **USA brief**, "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", filed on 17 July 1995. (IT-94-1-T, p. D4369-D4332)

Kerr, Rachel. (2004) *The International Criminal Tribunal For The Former Yugoslavia. An Exercise in Law, Politics and Diplomacy*, Oxford University Press, Oxford.

Kissinger, Henry.

- (1996) *Diplomacia*, Lisboa: Gradiva, Lisboa (translated by Ana Cecilia Simões et al. from *Diplomacy*, © 1994, by Henry A. Kissinger).
- (2001) "The Pitfalls of Universal Jurisdiction", in *Foreign Affairs*, Vol. 80, n.º 4, New York, Council on Foreign Relations: July/August 2001.
- (2003) *Precisará a América de uma Política Externa?*, Gradiva, Lisboa (translated by O'Brien, Fernanda. et al. from *Does America Need a Foreign Policy?*, © Henry H. Kissinger, 2002).

Kolodkin, Ronam A., (1994) "An ad-hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia", in *Criminal Law Forum*, Volume 5, Numbers 2-3, pp. 381-399. Here referenced in its later publication in (Clark, 2002: 165-183)

Macedo, Stephen. (ed), (2006), *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes Under International Law*, PENN – University of Pennsylvania Press, Philadelphia.

Meron, Theodor.

- (1987), "The Geneva Conventions as Customary Law", in *The American Journal of International Law*, Vol.81, p. 348-370;

- (1993), "The Case for War Crimes trials in Yugoslavia", in *Foreign Affairs*, Vol. 72 No. 3, Summer 1993, p. 122-135.
- (1994), "War Crimes in Yugoslavia and the Development of International Law", in *American Journal Of International Law*, Vol. 88, p. 78-87.

Mettraux, Guénaél. (2005) *International Crimes and the Ad-Hoc Tribunals*, Oxford University Press, Oxford (paperback ed. 2006).

Nation, R Craig. (2003) *War in the Balkans 1991-2002*, Carlisle Barracks PA: US Army War College Strategic Studies Institute, 388+ pp. ISBN 1-58487-134-2. In: <http://www.strategicstudiesinstitute.army.mil/pdffiles/00117.pdf>

O'Brien, James C. (1993), "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", in *American Journal of International Law*, Vol. 87, 1993, p.639-659.

Queiroz, Cristina. (2009) *Direito Internacional e Relações Internacionais*, Coimbra Editora. Coimbra.

Romano, Cesare

- (2004) - **P.R., Nollkaemper, Andre.** and **Kleffner, Jann K.** (eds), *Internationalized Criminal Courts and tribunals: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford University Press, Oxford;
- (2010) – **Mackenzie, Ruth.** and **Shany Yuvi.** with **Sands, Philippe.** *Manual on International Courts and Tribunals*, second edition, Oxford University Press, Oxford.

Roth, Kenneth. "The Case For Universal Jurisdiction", in *Foreign Affairs*, September/October 2001.

Simpson, Gerry. (2007) *Law, War & Crime*, Polity Press, New Hampshire, (2008 reprint).

Schabas, William A. (2006) *The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, Cambridge.

Schmitt, Carl. (2004) *Legality and Legitimacy*, 3rd printing, 2007, Duke University Press, Durham, (translation by John P. McCormick, from the originals *Legalität und Legitimität*, Duncker und Humblot, Munich and Leipzig, 1932, and *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954: Materialien zu einer Verfassungslehre*, Duncker und Humboldt, Berlin, 1958).

Schutte, J. J. E. (1995), "On the Tribunal's jurisdiction *ratione materiae*", paper delivered at the Conference on the International Criminal Court for the Former Yugoslavia, held at The Hague on the 16 February 1995. Available in the **ICTY** website (<http://www.icty.org/sections/LegalLibrary>), and in the Tadić case, in Appeal level materials (IT-94-1-AR72, p. D6149-D6147).

Shaw, Malcolm N. (2003) *International Law*, Cambridge University Press, 5th ed., 2003, reprint 2004, Cambridge, UK.

Shraga, Daphna. & Zacklin, Ralph.

- (1994) "The International Criminal Tribunal for the Former Yugoslavia", in *European Journal of International Law*, Issue Vol. 5, No. 1, (pp 360-380).
- (1996) "The International Criminal Tribunal for Rwanda", in *European Journal of International Law*, Issue Vol. 7, No. 4, (pp. 501-518).

Slje, Ronald C. & Schaack, Beth Van. (2009) *International Criminal Law: essentials*, Aspen Publishers, New York.

Ticehurst, Rupert. (1997) "The Martens Clause and the Laws of Armed Conflict", in *International Review of the Red Cross*, n. 317, p.125–134. Available in: <http://www.icrc.org/eng/resources/documents/misc/57jnhy.htm>

UN – United Nations documents, as found or searchable by given document reference at <http://www.un.org/en/documents/index.shtml>:

– **UNSG – Secretary General:**

- **Conference Report**, “Report of the Secretary-General on the activities of the International Conference on the former Yugoslavia”, dated 2 February 1993 (S/25221);
- **Experts Report**, “Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)”, dated 26 January 1993 and published as Annex I to the “Letter dated 9 February 1993 from the Secretary-General addressed to the President of the Security Council”, UN document dated 10 February 1993 (S/25274);
- **UNSG Report**, “Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)”, dated 3 May 1993 (S/25704);
- **Experts final report**, “Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)”, from April 1994 and published as Annex to the “Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council”, UN document dated 27 May 1994 (S/1994/674);

– **UNSC – Security Council:**

- Res. 757, adopted on 30 May 1992;
- Res. 771, adopted on 13 August 1992;
- Res. 776, adopted on 14 September 1992;
- Res. 777, adopted on 19 September 1992;
- Res. 780, adopted on 6 October 1992;
- Res. 781, adopted on 9 October 1992;
- Res. 786, adopted on 10 November 1992;
- Res. 787, adopted on 16 November 1992;
- Res. 795, adopted on 11 December 1992;

- Res. 798, adopted on 18 December 1992;
- Res. 808, adopted on 22 February 1993;
- Res. 820, adopted on 17 April 1993;
- Res. 821, adopted on 28 April 1993;
- Res. 827, adopted on 25 May 1993;
- Res. 877, adopted on 21 October 1993;
- Res. 918, adopted on 17 May 1994;
- Res. 935, adopted on 1 July 1994;
- Res. 936, adopted on 8 July 1994;
- Res. 941, adopted on 23 September 1994;
- Res. 942, adopted on 23 September 1994;
- Res. 955, adopted on 8 November 1994;
- Res. 1019, adopted on 9 November 1995;
- Res. 1034, adopted on 21 December 1995;
- Res. 1166, adopted on 13 May 1998;
- Res. 1329, adopted on 30 November 2000;
- Res. 1411, adopted on 17 May 2002;
- Res. 1431, adopted on 14 August 2002;
- Res. 1481, adopted on 19 May 2003;
- Res. 1597, adopted on 20 April 2005;
- Res. 1660, adopted on 28 February 2006;
- Res. 1837, adopted on 29 September 2008;
- Res. 1877, adopted on 7 July 2009.

– **UN, Others:**

- Letter from the permanent representative of France to the UNSG, dated 10 February 1993 (S/25266);
- Letter from the permanent representative of Italy to the UNSG, dated 16 February 1993 (S/25300);

- Letter from the permanent representative of Sweden (on behalf of the CSCE) to the UNSG, dated 18 February 1993 (S/25307);
- Note Verbale from the permanent representative of Mexico to the UNSG, dated 12 March 1993 (S/25417);
- Letter from the representatives of Egypt, The Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey (also on behalf of the Organization of the Islamic Conference) to the UNSG, dated 31 March 1993 (S/25512);
- Letter from the permanent representative of the USA to the UNSG, dated 5 April 1993 (S/25575);
- Letter from the permanent representative of the Russian Federation to the UNSG, dated 5 April 1993 (S/25537);
- Letter from the permanent representative of Brazil to the UNSG, dated 6 April 1993 (S/25540);
- Letter from the permanent representative of Canada to the UNSG, dated 13 April 1993 (S/25594);
- Letter from the permanent representative of Slovenia to the UNSG, dated 20 April 1993 (S/25652);
- Note Verbale from the permanent representative of the Netherlands to the UNSG, dated 30 April 1993 (S/25716);
- Letter from the permanent representative of the Federal Republic of Yugoslavia Federation to the UNSG and, thru him, to the UNSC, dated 19 May 1993 (S/25801).
- **Draft Code**, including:
 - International Law Commission (ILC), Forty-fifth session, Provisional Summary Record of the 2300th Meeting, Geneva, 25 May 1994, Contents: "Draft Code of Crimes against the Peace and Security of Mankind", 17 June 1993 (A/CN.4/SR.2300); and

- International Law Commission (ILC), Forty-sixth session, Provisional Summary Record of the 2333rd Meeting, Geneva, 6 May 1994, Contents: "Draft Code of Crimes against the Peace and Security of Mankind", 19 May 1994 (A/CN.4/SR.2333)

Vanberg, Georg. (2005), *The Politics of Constitutional Review in Germany*, Cambridge University Press, Cambridge.

Vierucci, Luisa. "The First Steps of the International Criminal Tribunal for the Former Yugoslavia", in *European Journal of International Law* Issue Vol. 6 (1995) No. 1, (pp 134-143).

Weber, Max. (2005) *Três Tipos de poder e outros escritos*, Tribuna da História, Lisboa, Jan. 2005, (translation by Morão, Artur Ferreira Pires., of five selected texts by Weber, Max: *Die drei reinen Typen der legitimen Herrschaft*, 1922; *Der Sozialismus*, 1918; *Politik als Beruf*, 1919; *Wissenschaft als Beruf*, 1919; and *Der sinn der "Wertfreiheit" der soziologischen und ökonomischen Wissenschaft*, 1917).