

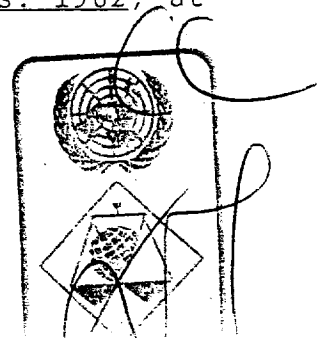
SUBMISSION OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA
CONCERNING CERTAIN ARGUMENTS MADE BY COUNSEL FOR THE ACCUSED
IN THE CASE OF THE PROSECUTOR OF THE TRIBUNAL V. DUSAN TADIC

The Government of the United States of America offers the following views concerning certain of the arguments made by Counsel for the Accused in the Tadic case which bear specifically on its special interest and knowledge as a Permanent Member of the U.N. Security Council and its substantial involvement in the adoption of the Statute of the Tribunal. The United States takes no position on the guilt or innocence of the Accused, nor does it wish to offer any comments on the allegations concerning the conduct of the Accused. Rather, we shall, in this submission, offer the views of the United States on certain issues raised in the motions filed by Counsel for the Accused on 23 June 1995, particularly with respect to the validity of the action of the Security Council in creating the Tribunal and the interpretation of the jurisdictional provisions of the Statute.

1. The Authority of the Tribunal to Review the Validity of the Decisions of the Security Council.

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.¹ A subsidiary organ

¹ Namibia Advisory Opinion, I.C.J. Reps. 1971, at 45, para. 89; Lockerbie Case (Provisional Measures) I.C.J. Reps. 1992, at 26; See also Expenses Advisory Opinion, I.C.J. Reps. 1962, at 168.



cannot be asked to review and overrule the actions of its parent body.

As indicated in the Report of the U.N. Secretary-General which preceded U.N. Security Council Resolution 780, the Tribunal was created as a subsidiary organ within the terms of Article 29 of the Charter.² Accordingly, any challenge to the creation or mandate of the Tribunal must be directed to the Council and not the Tribunal. (In fact, the lines of argument raised by Counsel for the Accused in the present case were considered and rejected by the Council at the time it created the Tribunal.³)

Further, Chapter VII of the Charter gives the Council the exclusive authority to determine the existence of a threat to international peace and security and to decide what measures

² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, Forty-Eighth Year at para 28, U.N. Doc. S/25704 (1993); S.C. Res. 827, U.N. SCOR, Forty-Eighth Year, 3217th mtg. at preamb. paras. 2, 11, U.N. Doc. S/RES/827 (1993).

³ See, e.g., Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, Forty-Ninth Year at paras. 22-3, 27-8, 39-40, U.N. Doc. S/25704 (1993); and, Note Verbale dated 4 May 1993 from the Permanent Representative of Netherlands to the United Nations Addressed to the Secretary-General, U.N. SCOR, Forty-Eighth Year at para. 2, U.N. Doc. S/25716 (1993); and, Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, U.N. SCOR Forty-Eighth Year at para. 39-40, U.N. Doc. S/25266 (1993).

shall be taken in response.⁴ These determinations are not subject to judicial review within the U.N. system.⁵

Accordingly, the Tribunal would not have authority to review the sufficiency or appropriateness of the Council's determination under Article 39 that violations of humanitarian law in the former Yugoslavia presented a threat to international peace and security, or its decision under Article 41 to create the Tribunal as measure to deal with that threat. (Once again, the lines of argument raised by Counsel for the Accused on these points were in fact considered and rejected by the Council at the time it created the Tribunal.⁶)

⁴ Namibia Advisory Opinion, I.C.J. Reps. 1971, at 55;
Lockerbie Case (Provisional Measures), I.C.J. Reps. 1992, at 17.

⁵ See S. Rosenne, The Law and Practice of the International Court 70 (1985); See also T. Elsen, Litispence Between the International Court of Justice and the Security Council 69 (1986); Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980, at 20-21; Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, I.C.J. Reports 1978, at 3; Aegean Sea Continental Shelf Case (Greece v. Turkey), Interim Measures, I.C.J. Reports 1976, para 33, at 3; See also Leland M. Goodrich and Edvard Hambro, Charter of the United Nations, Commentary and Documents 265 (2d ed. 1949) (stating that the Security Council has considerable discretion in its choice of the most appropriate methods for dealing with a threat to the peace).

⁶ S.C. Res. 827, U.N. SCOR, Forty-Eighth Year, 3217th mtg. at preamb. paras 2, 11, U.N. Doc. S/RES/827 (1993) (unanimous vote); S.C. Res. 808, U.N. SCOR, Forty-Eighth Year, 3175th mtg. at preamb. paras 2, 11, U.N. Doc. S/RES/808 (1993) (unanimous vote); Note Verbale dated 12 March 1993 from the Permanent Mission of Mexico to the United Nations Addressed to the Secretary-General, U.N. SCOR Forty-Eighth Year at para. 6, U.N. Doc. S/25417 (1993); Note Verbale dated 4 May 1993 from the Permanent Representative of Netherlands to the United Nations Addressed to the Secretary-General, U.N. SCOR,

In any event, these determinations are of a policy and political character and are not susceptible to judicial resolution. The question of whether particular events in a specific situation are a threat to international peace and security is not a juridical question and requires political judgment rather than legal knowledge. The question of whether a particular course of action is an appropriate response to such a threat to the peace is likewise not a legal question but one of policy and political judgment. These decisions must of necessity be taken, often on an emergency basis, by a political organ representing States prepared to take the actions necessary to enforce its decisions. The framers of the U.N. Charter gave these sensitive functions to the Security Council; it would be inconsistent with this structure to subject the Council's exercise of these functions to review after the fact by judicial organs.

Forty-Eighth Year at para. 2, U.N. Doc. S/25716 (1993); Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, U.N. SCOR Forty-Eighth Year at para. 39-40, U.N. Doc. S/25266 (1993); Letter dated 31 March 1993 from the representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia and Senegal to the United Nations Addressed to the Secretary-General, U.N. SCOR Forty-Eighth Year at para. I(5), U.N. Doc. S/25266 (1993) ("No State or individual shall have the right to challenge the Tribunal's establishment"); U.N. SCOR, Forty-Eighth Year, 3217th mtg. at p. 41, U.N. Doc. S/PV.3217 (1993) (stating that the Tribunal "derives . . . from the autonomy of its machinery, which is not subject to any external review").

2. The Validity of the Security Council's Decisions.

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 Counsel for the Accused. We address each in turn:

a. Existence of a threat to the peace. Counsel for the Accused argues that the situation in the former Yugoslavia does not constitute a threat to international peace and that there is therefore no basis for action by the Security Council under Chapter VII of the Charter. We disagree.

In the case of the former Yugoslavia, the Council has repeatedly (and usually by unanimous vote) determined that the situation constituted a threat to international peace and

security,⁷ a judgment supported by the Secretary-General⁸ and the General Assembly.⁹ We believe that no reasonable observer could deny this conclusion.

⁷ S.C. Res. 713, Forty-Sixth Year, 3009th mtg. at preamb. para. 4-5 and op. para. 6, U.N. Doc. S/RES/713 (1991) (unanimous vote); S.C. Res. 721, Forty-ninth Year, 3018th mtg. at preamb. para. 4, U.N. Doc. S/RES/721 (1991) (unanimous vote); S.C. Res. 743, Forty-Seventh Year, 3055th mtg. at preamb. para. 5, U.N. Doc. S/RES/743 (1992) (unanimous vote); S.C. Res. 770 (1992), Forty-Seventh Year, 3106th mtg. at preamb. para. 5, U.N. Doc. S/RES/770 (1992) (12-0, with 3 abstentions); S.C. Res. 807, Forty-Eighth Year, 3174th mtg. at preamb. para. 5, U.N. Doc. S/RES/807 (1993) (unanimous vote); S.C. Res. 808, Forty-Eighth Year, 3175th mtg. at preamb. para. 7, U.N. Doc. S/RES/808 (1993) (unanimous vote); S.C. Res. 815, Forty-Eighth year, 3189th mtg. at preamb. para. 5, U.N. Doc. S/RES/815 (1993) (unanimous vote); S.C. Res. 827, Forty-Eighth year, 3217th mtg. at preamb. para. 4, U.N. Doc. S/RES/827 (1993) (unanimous vote); S.C. Res. 900, Forty-Ninth year, 3344th mtg. at preamb. para. 15, U.N. Doc. S/RES/900 (1994) (unanimous vote); S.C. Res. 913, Forty-Ninth year, 3367th mtg. at preamb. para. 14, U.N. Doc. S/RES/914 (1994) (unanimous vote).

⁸ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, Forty-Eighth Year at para. 28, U.N. Doc. S/25704 (1993); S.C. Res. 827, U.N. SCOR, Forty-Eighth Year, 3217th mtg. at preamb. paras. 2, 11, U.N. Doc. S/RES/827 (1993); S.C. Res. 836, U.N. SCOR, Forty-Eighth Year, 3228th mtg. at preamb. para. 18, U.N. Doc. S/RES/836 (1993).

⁹ G.A. Res. 49/10, U.N. GAOR, 48th Session, 51st mtg. at op. para. 27, U.N. Doc. A/RES/49/10 (1994) (welcoming the fact that delays which hampered the work of the Tribunal had been removed); G.A. Res. 48/153, U.N. GAOR, 47th Session, 85th mtg. at preamb. para. 5 and op. para. 8, U.N. Doc. A/RES/48/153 (1993) (welcoming the convening of the Tribunal and the naming of its Chief Prosecutor); G.A. Res. 49/471, U.N. GAOR, Forty-Ninth Session, 95th mtg., U.N. Doc. A/RES/49/471 (1994) (committing additional funds to the Tribunal); G.A. Res. 47/235, U.N. GAOR, 47th Session, 110th mtg., Item No. 155 at op. para. 2, U.N. Doc. A/RES/47/235 (1993); G.A. Res. 48/251, U.N. GAOR, 48th Session, 93rd mtg., Item no. 159 at preamb. 3 and op. para. 2-212, U.N. Doc. A/RES/48/251 (1994).

Armed conflict has occurred and continues to this day among the States of the former Yugoslavia, with heavy military and civilian casualties. Armed units have operated across national borders and States have commanded and provided material support for military operations against their neighbors on many occasions. Large flows of refugees have moved across national borders, trade among the States of the region has been severely disrupted, and neighboring States have been forced to take concerted measures to curb the spread of the conflict to their territories. The fighting has necessitated intervention by the international community in the form of tens of thousands of troops and other personnel of the nations which contribute to or support the U.N. peacekeeping operations in the region. On the whole, only a small handful of other situations in the entire world since World War II have posed as serious a threat to international peace and security as the situation in the former Yugoslavia. Accordingly, the Council has acted well within its Chapter VII authority in determining that there exists a threat to international peace and security.

Counsel for the Accused argues that the Council's authority under Chapter VII is limited to international armed conflicts. This misreads the Charter. Article 41 refers to "threats to international peace and security," not to international armed conflicts. As indicated below, we believe that the conflict in the former Yugoslavia has been, and continues to be, of an international character. Even if this were not the case, the Council may exercise its Chapter VII authority whenever it

determines that there is a threat to international peace and security, whether or not caused by an international armed conflict.

Article 39 of the Charter is in no way limited to international armed conflicts and the Council has invoked the authority of Chapter VII on many occasions when no international armed conflict had occurred. Recent examples include the situations in Rwanda,¹⁰ Haiti,¹¹ and Somalia,¹² and there are many earlier examples.¹³ The Council can

¹⁰ S.C. Res. 955, Forty-Ninth Year, 3453th mtg. at preamb. para. 11, U.N. Doc. S/RES/955 (1994); Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), U.N. SCOR, Fiftieth Year at para. 6, U.N. Doc. S/1995/134 (1995).

¹¹ See, e.g., S.C. Res. 944, Forty-Ninth Year, 3430th mtg. at op. para. 4, U.N. Doc. S/RES/944 (1994); S.C. Res. 841, Forty-Eighth Year, 3238th mtg. at preamb. para. 12, 15, U.N. Doc. S/RES/841 (1993); S.C. Res. 861, Forty-Eighth Year, 3271st mtg. at preamb. para. 7, U.N. Doc. S/RES/861 (1993); S.C. Res. 873, Forty-Eighth Year, 3291st mtg. at preamb. para. 5, U.N. Doc. S/RES/873 (1993); S.C. Res. 917, Forty-Ninth Year, 3376th mtg. at preamb. para. 14, U.N. Doc. S/RES/917 (1994).

¹² S.C. Res. 923, Forty-Ninth Year, 3385th mtg. at preamb. para. 15, U.N. Doc. S/RES/923 (1994); S.C. Res. 897, Forty-Ninth Year, 3334th mtg. at preamb. para. 15, U.N. Doc. S/RES/897 (1994); S.C. Res. 837, Forty-Eighth Year, 3229th mtg. at preamb. para. 14, U.N. Doc. S/RES/837 (1993); S.C. Res. 794, Forty-Eighth Year, 3145th mtg. at op. para. 10, 15, U.N. Doc. S/RES/794 (1992); S.C. Res. 733, Forty-Seventh Year, 3063rd mtg. at op. para. 5, U.N. Doc. S/RES/733 (1992).

¹³ S.C. Res. 883, Forty-Eighth Year, 3312th mtg. at preamb. para. 10, U.N. Doc. S/RES/883 (1993) (acting under Chapter VII to impose sanctions on Libya in order to curtail terrorist activities); S.C. Res. 409, Thirty-Second Year, 2011th mtg. at preamb. para. 5, U.N. Doc. S/RES/409 (1977) (acting under Chapter VII to impose sanctions on the illegal regime of Southern Rhodesia); S.C. Res. 418 (1977), Thirty-Second Year,

accordingly properly determined¹ that an internal armed conflict (or a situation involving no armed conflict) threatens international peace and security for the purpose of Article 39, whether because of the risk of outside intervention or the spread of the conflict to other States, the impact on neighboring States of massive refugee flows or severe economic disruption, or the risk of political destabilization of the region.

b. Authority under Chapter VII to create a tribunal.

Counsel for the Accused argues that the creation of a tribunal to try offenses under international humanitarian law is not within the authority of the Security Council under Chapter VII. We disagree.

Article 41 of the Charter provides that the Council "may decide what measures not involving the use of armed force are to be employed to give effect to its decisions" and then gives an exemplary list of actions which the Council may call upon States to take. This list is not an exclusive enumeration of the measures the Council may take and nothing in Chapter VII limits the Council's choice of means. Accordingly, the decision as to what measures are to be taken is given

2046th mtg. at preamb. para. 10, U.N. Doc. S/RES/418 (1993) (acting under Chapter VII to impose an arms embargo against South Africa).

exclusively to the Council and is not subject to judicial review.¹⁴

In fact, the Council has resorted to a wide variety of actions under Chapter VII which are not specifically enumerated in the illustrative list in Article 41. This includes, for example, the creation of zones in which overflights are prohibited,¹⁵ the creation of "safe areas"¹⁶ and humanitarian corridors,¹⁷ the granting of compensation to the victims of armed attack,¹⁸ the delimitation of disputed borders,¹⁹ and

¹⁴ See supra note 5.

¹⁵ S.C. Res. 781 (1992), Forty-Seventh Year, 3122nd mtg. at op. para. 1, U.N. Doc. S/RES/781 (1992) (establishing a ban on military flights in the airspace of Bosnia and Herzegovina); S.C. Res. 786 (1992), Forty-Seventh Year, 3133rd mtg. at op. para. 1, U.N. Doc. S/RES/786 (1992) (reaffirming a ban on military flights in the airspace of Bosnia and Herzegovina).

¹⁶ S.C. Res. 824 (1993), Forty-Eighth Year, 3208nd mtg. at op. para. 3, U.N. Doc. S/RES/824 (1992) (designating cities as safe areas); S.C. Res. 819 (1993), Forty-Eighth Year, 3199th mtg. at op. para. 1, U.N. Doc. S/RES/819 (1992) (designating Srebrenica as a safe area).

¹⁷ S.C. Res. 918, Forty-Ninth Year, 3377th mtg. at para. 3, U.N. Doc. S/RES/918 (1994).

¹⁸ S.C. Res. 687, U.N. SCOR, Forty-Fifth Year, 2981st mtg. at op. paras. 16, 18, U.N. Doc. S/RES/687 (1991) (reaffirming Iraq's liability for actions against victims and setting up compensation fund).

¹⁹ S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. paras. 3, U.N. Doc. S/RES/687 (1991) (eventually establishing the U.N. Iraq/Kuwait Boundary Demarcation Commission).

the prohibition of the acquisition or possession of weapons of mass destruction by a particular State.²⁰

Further, Article 29 of the Charter provides that the Council "may establish such subsidiary organs as it deems necessary for the performance of its functions." There is no limitation on the character of such organs, and in fact the Council has created a wide variety of bodies under this authority. They include, for example, observer teams and peacekeeping forces,²¹ investigation commissions,²² commissions charged with enforcement of restrictions on weapons

²⁰ S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. paras. 3, U.N. Doc. S/RES/687 (1991) (recommending the establishment of a special commission to deal with the elimination, under international supervision, of Iraq's weapons of mass destruction).

²¹ S.C. Res. 814, Forty-Eighth Year, 3188th mtg. at op. paras. 5-14, U.N. Doc. S/RES/814 (1993) (Council establishes UNOSOM II to facilitate an immediate cessation of hostilities in Somalia); S.C. Res. 758, Forty-Seventh Year, 3083rd mtg. at op. para. 2, U.N. Doc. S/RES/758 (1992) (enlarging the mandate and strength of UNPROFOR to allow for the deployment of personnel to Bosnia and Herzegovina); S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. para. 5, U.N. Doc. S/RES/687 (1991) (approving a plan for the deployment of a U.N. observer unit to monitor the demilitarised zone between Iraq and Kuwait).

²² S.C. Res. 866, U.N. SCOR, Forty-Eighth Year, 3281st mtg. at op. para. 3(a), U.N. Doc. S/RES/866 (1993) (mandating UNOMIL to investigate all reports on alleged incidents of cease-fire agreement violations in Liberia); S.C. Res. 955, U.N. SCOR, Forty-Ninth Year, 3453rd mtg. at op. para. 1-7, U.N. Doc. S/RES/955 (1994) (establishing an international tribunal for the purpose of prosecuting persons responsible for violations of international humanitarian law).

and military activities,²³ commissions charged with demarcation of boundaries,²⁴ and committees charged with interpreting and administering sanctions regimes.²⁵ In at least two recent cases, the Council has created subsidiary organs with judicial or quasi-judicial functions: the U.N. Compensation Commission, which decides on the compensation to be given to particular victims of the Gulf War;²⁶ and the

²³ S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. paras. 9(b), 10, U.N. Doc. S/RES/687 (1991) (recommending the establishment of a special commission (UNSCOM) to deal with the elimination, under international supervision, of Iraq's weapons of mass destruction); Report of the Secretary-General: Implementation of paragraph 9(b)(i) of Security Council Resolution 687 (1991), U.N. SCOR, Forty-Sixth Year at para. 3, U.N. Doc. S/22508 (1991).

²⁴ S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. para. 3, U.N. Doc. S/RES/687 (1991) (calling upon the Secretary General to make arrangements regarding the demarcation of the boundary between Iraq and Kuwait); Report of the Secretary-General Regarding Paragraph 3 of Security Council Resolution 687 (1991), U.N. SCOR, Forty-Sixth Year at para. 3, U.N. Doc. S/22508 (1991) (describing the creation of the Iraq-Kuwait Boundary Demarcation Commission to carry out paragraph 3 of Resolution 687).

²⁵ S.C. Res. 918, U.N. SCOR, Forty-Ninth Year, 3377th mtg. at op. para. 14, U.N. Doc. S/RES/918 (1994) (Rwanda); S.C. Res. 748, U.N. SCOR, Forty-Seventh Year, 3063rd mtg. at op. para. 9, U.N. Doc. S/RES/748 (1992) (Libya); S.C. Res. 724, U.N. SCOR, Forty-Sixth Year, 3023rd mtg. at op. para. 5(b), U.N. Doc. S/RES/724 (1991) (Yugoslavia); S.C. Res. 661, U.N. SCOR, Forty-Fifth Year, 2933rd mtg. at op. para. 6, U.N. Doc. S/RES/661 (1990) (Iraq).

²⁶ S.C. Res. 687, U.N. SCOR, Forty-Fifth Year, 2981st mtg. at op. paras. 16, 18, U.N. Doc. S/RES/687 (1991) (reaffirming Iraq's liability for actions against victims and setting up compensation fund); S.C. Res. 692, U.N. SCOR, Forty-Sixth Year, 2987st mtg. at op. paras. 3, U.N. Doc. S/RES/692 (1991) (establishing the United Nations Compensation Commission); Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991), U.N. SCOR, Forty-Sixth

International Tribunal for Rwanda, which has functions closely related to those of the International Tribunal for the Former Yugoslavia.²⁷

The establishment of the International Tribunal was particularly appropriate in response to the situation in the former Yugoslavia. In Resolution 771, the Council expressly acted under Chapter VII in demanding that all parties to the conflict in the former Yugoslavia cease all breaches of international humanitarian law, reflecting the Council's determination that such violations constitute threats to international peace and security.²⁸ Such violations pose an ongoing obstacle to peace in the region as they provide motivation for revenge and fuel for those who would foment hatred among groups. Accordingly, an effort to establish the culpability of individuals responsible for atrocities -- and to deter future violations -- is a suitable and important step in removing the threat to international peace and security posed by the conflict.

Year at para 20, U.N. Doc. S/22559 (1993) ("[t]he Commission is not a court or an arbitral tribunal...it is a political organ that performs an essentially fact-finding function of examining claims,....,and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved").

²⁷ S.C. Res. 955, U.N. SCOR, Forty-Ninth Year, 3453rd mtg. at op. para. 1 and Annex, U.N. Doc. S/RES/955 (1994) (establishing an international tribunal for the purpose of prosecuting persons responsible for genocide and other violations of international humanitarian law in Rwanda).

²⁸ S.C. Res. 771, U.N. SCOR, Forty-Seventh Year, 3106th mtg. at op. paras. 3, 5, U.N. Doc. S/RES/771 (1992).

Hence, the Council specifically decided in Resolution 827 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 law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace . . .

and 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 redressed²⁹

In our view, these decisions are clearly within the purview of the Council under Chapter VII. In creating the Tribunal, the Council was acting to deal with a specific urgent situation presenting a serious threat to the peace. It was not creating new standards for international humanitarian law, nor was it creating a permanent institution to deal with situations other than the former Yugoslavia.

Counsel for the Accused argues that the creation of the Tribunal will obstruct rather than assist in the peace process and suggests instead that amnesty for those indicted would be more conducive to peace. This is, however, a judgment of policy and politics that is given by the U.N. Charter to the Security Council, and there is no basis for a judicial body to question that judgment.

²⁹ S.C. Res. 827 (1993), Fifty-First year, 3217th mtg. at preamb. paras. 6, 7, U.N. Doc. S/RES/827 (1993).

In any event, we disagree with the conclusion offered by Counsel for the Accused. It is essential to the establishment and maintenance of a lasting peace that there be some impartial mechanism to bring to justice those responsible for the atrocities committed during the current conflict. Contrary to the suggestions of Counsel for the Accused, international peace negotiators have consistently expressed strong support for the Tribunal.³⁰ The Council, by creating the Tribunal, has relieved the peace negotiators of the difficult burden of negotiating arrangements for the prosecution of war criminals.

Nor is it the case that the authority of the General Assembly has been infringed by the creation of the Tribunal.

³⁰ This has been true from the start of the international negotiations. See Szasz, The International War Crimes Tribunal for the Former Yugoslavia, 25 New York University Journal of International Law and Policy 405, 422-23 (1993) (views of international mediators summarized by counsel to the International Conference for the former Yugoslavia). Since early 1994, the United States has participated in the "Contact Group" of States conducting negotiations. From the start of that process, the United States has made it clear its commitment to the peace talks will not interfere with the Tribunal's jurisdiction. See, e.g., Madeleine Korbelt Albright, Bosnia in Light of the Holocaust, 5 United States Department of State Bulletin 209 (1994) (United States Ambassador to the United Nations noting United States opposition to amnesty and that the Tribunal is "essential to -- not an obstacle to -- national reconciliation"); Warren Christopher, War Crimes Tribunal Will Bring Justice to Those Denied Peace, Boston Sunday Globe, Nov. 7, 1993 (Secretary of State noting insistence that the Tribunal "bring war criminals to justice, whoever they may be and wherever they may be found Without justice, the healing process cannot begin."); Anthony Lewis, White House Is Adamant on Balkan War Crimes, New York Times, Nov. 3, 1993, at A16 (United States has "ruled out efforts to grant immunity," according to Ambassador Albright and unnamed officials).

The Assembly does not have the Council's Chapter VII authority to deal with threats to the peace or to obligate Member States to comply with Tribunal decisions. But even if the Assembly had all the necessary authority, this would not preclude the Council from exercising its own powers under Chapter VII. In fact, Article 12 of the Charter requires that the Assembly defer to the Council when the latter is exercising its Chapter VII authority in a particular situation.

Furthermore, Resolution 827 provides an 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. Contrary to the suggestion of Counsel for the Accused that the Assembly has expressed doubts about the propriety of the Security Council's actions in creating the Tribunal, the Assembly has in fact expressed its full support for the Tribunal, has elected its judges and has acted to provide financial support for its operations.³¹

³¹ G.A. Res. 49/10, U.N. GAOR, 48th Session, 51st mtg at op. para. 27, U.N. Doc. A/RES/49/10 (1994) (welcoming the fact that delays which had hampered the work of the Tribunal had been removed); G.A. Res. 48/153, U.N. GAOR, 47th Session, 85th mtg. at preamb. para. 5 and op. para. 8, U.N. Doc. A/RES/48/153 (1993) (welcoming the convening of the Tribunal and the naming of its Chief Prosecutor); G.A. Res. 49/471, U.N. GAOR, Forty-Ninth Session, 95th mtg., U.N. Doc. A/RES/49/471 (1994) (committing additional funds to the Tribunal); G.A. Res. 47/235, U.N. GAOR, 47th Session, 110th mtg., Item No. 155 at op. para. 2, U.N. Doc. A/RES/47/235 (1993); G.A. Res. 48/251, U.N. GAOR, 48th Session, 93rd mtg., Item no. 159 at preamb. 3 and op. para. 2-12, U.N. Doc. A/RES/48/251 (1994).

Contrary to the argument of Counsel for the Accused, the fact that the Council is a body of limited membership, while the Assembly includes all U.N. Members, has no relevance to whether the Council has authority to create the Tribunal. The composition of the Council was specifically designed with a view toward its exercise of the broad powers of Chapter VII to ensure the restoration and maintenance of the peace.

Finally, we do not agree with the contention of Counsel for the Accused that the validity of the Security Council's action rests on a demonstration that there are "exceptional circumstances" in this case that distinguish it from other situations where the Council has not created a tribunal to prosecute similar offenses. As a matter of fact, the Council did emphasize the "particular circumstances" of the former Yugoslavia in Resolution 827. 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.

In the case of violations of humanitarian law, the Council has now created ad hoc tribunals in the cases of Rwanda and the former Yugoslavia, and we trust the Council will consider similar action in any future instances of massive violations.

It is unconvincing to suggest, as does Counsel for the Accused, that the Council's failure to take similar action with respect to conflicts of past decades in Korea, Vietnam, Algeria, Cambodia and the Belgian Congo 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.

c. Independence of the Tribunal. Counsel for the Accused argues that the creation by the Security Council of the Tribunal necessarily impairs the independence of its judicial functions. We disagree. All judicial bodies are created by political acts; their degree of independence depends on the mandate and rules that govern their operations.

The independence of the Tribunal is prescribed by the mandate given to it by the Council in Resolution 827 and the Statute adopted thereby. Articles 12 and 13 of the Statute call for independent and impartial judges, and the oath of office prescribed by Tribunal rules requires an affirmation of impartiality.³² Article 16 provides that the Prosecutor will

³² The Tribunal's rules require that:

"Before taking up his duties each Judge shall make the following solemn declaration:

'I solemnly declare that I will perform my duties and exercise my powers as Judge of the International Tribunal for the Prosecution of Persons Responsible

act independently and "shall not seek or receive instructions from any Government or from any other source." Articles 20 and 21 call for fair trial proceedings and require that the accused be presumed innocent until proved guilty. Article 25 provides a right of appeal against any miscarriage of justice. There is no basis for any allegation that the Tribunal is not independent or that it is subject to influence by the Council in the conduct of its judicial functions.

d. Sovereignty of States. Counsel for the Accused argues that the creation of the Tribunal by the Security Council is inconsistent with the sovereignty of States under the Charter. We disagree.

The Tribunal was created pursuant to a treaty -- the U.N. Charter -- to which all the 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. Article 2(7) of the Charter, which states that the U.N. is not authorized to intervene in matters "which are essentially within the domestic jurisdiction of any state", specifically

for Serious Violations of International Humanitarian Law Committeed in the Territory of the Former Yugoslavia since 1991 honourably, faithfully, inpartially and conscientiously'."

Rule 14(A), Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committeed in the Territory of the Former Yugoslavia since 1991, U.N Doc. IT/32 (1994).

provides that "this principle shall not prejudice the application of enforcement measures under Chapter VII." As explained above, the Council used this authority to take the measures it deemed necessary to restore and maintain the peace in the former Yugoslavia. Accordingly, that exercise was not an infringement on the sovereignty of any State.

Similarly, we disagree with the assertion by Counsel for the Accused that the creation of the Tribunal improperly gives the Council authority over individuals accused of offenses within the Tribunal's jurisdiction. The relevant law and precedents for the offenses in question here -- genocide, war crimes and crimes against humanity -- clearly contemplate international as well as national action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all States, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals. Moreover, criminal responsibility for these acts was a part of the law of the former Yugoslavia at the time the offenses were committed. The Council has simply created a new international mechanism for the trial of crimes that were already the subject of international responsibility.

Moreover, many actions of the Council under Chapter VII directly affect individuals. For example, private individuals are precluded from various dealings with sanctioned countries, and the nationals of sanctioned countries are placed under

significant financial and other restrictions.³³ Private individuals are the subject of proceedings under the operations of the U.N. Compensation Commission.³⁴ Persons who attack or obstruct peacekeeping and enforcement forces authorized by the Council are subject to detention or, if necessary, the use of deadly force.³⁵ The fact that individuals are affected by Council action in no way invalidates such action.

³³ S.C. Res. 841, Forty-Eighth Year, 3238th mtg. at op. para. 5, U.N. Doc. S/RES/841 (1993) (requiring States to "prevent the sale or supply, by their nationals," of petroleum products or weaponry to "any person or body in Haiti..."); S.C. Res. 661 (1990), Forty-Fifth Year, 2933rd mtg. at op. para. 3, U.N. Doc. S/RES/661 (1990) (directing States to prevent "any activities by their nationals" which would promote the export of products with Iraq and Kuwait); S.C. Res. 883, Forty-Eighth Year, 3312th mtg. at preamb. para. 3-6, U.N. Doc. S/RES/883 (1993) (requiring States to prohibit their nationals from engaging in training Libyan pilots and insuring Libyan planes).

³⁴ Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991), U.N. SCOR, Forty-Sixth Year at para 21, U.N. Doc. S/22559 (1993) (permitting the Governing Council to determine in what manner the claims of foreign Governments, nationals and corporations are to be filed with the Commission); Letter Dated 2 August 1991 from the President of the Governing Council of the United Nations Compensation Commission to the President of the Security Council, U.N. SCOR, Forty-Sixth Year at para. 10-16, U.N. Doc. S/22885 (1991) (delimiting fixed compensation amounts for claims made by any person); Letter Dated 23 March 1992 from the President of the Governing Council of the United Nations Compensation Commission to the President of the Security Council, U.N. SCOR, Forty-Seventh Year at para. 6, 7, U.N. Doc. S/23765 (1992) (defining availability of payments to individuals).

³⁵ S.C. Res. 865, U.N. SCOR, Forty-Eighth Year, 3280th mtg. at op. para. 3, U.N. Doc. S/RES/865 (1993) (reaffirming that those who commit attacks on UNOSOM II personnel will be held individually responsible for the acts); S.C. Res. 837, U.N. SCOR, Forty-Eighth Year, 3229th mtg. at op. para. 5, U.N. Doc. S/RES/837 (1993) (affirming UN ability to prosecute those individuals who engage in armed attacks against UNOSOM II).

The Tribunal operates against individuals in the normal way that other international regimes do -- that is, through the actions of national and local authorities. The Tribunal acquires custody over individuals by requesting that such authorities defer to the competence of the Tribunal and deliver persons against whom arrest warrants have been issued. During trial, the authorities of the host State detain the accused. Upon conviction, sentences of imprisonment are carried out by authorities of States which have agreed to serve this function.

e. Involvement in humanitarian law. Counsel for the Accused argues that it is improper for the Security Council to become involved in humanitarian law. We disagree. All organs of the U.N. are obligated to support and comply with international law in their operations. In the case of the Security Council, the furtherance of international humanitarian law is essential to the accomplishment of one its core functions -- the maintenance of international peace and security under Chapter VII.

The Council has often determined that adherence to humanitarian law was an important element in the restoration of peace in particular situations. In fact, it may determine that one of the most serious obstacles to the restoration of peace is the commission of atrocities, which can inflame mutual passions and engender a cycle of violence and reprisal. Accordingly, the Council has frequently called for observance of humanitarian law obligations and has taken steps to encourage observance or to redress the victims of violations.

For example, in the case of the invasion of Kuwait, the Council called frequently for compliance with various humanitarian law norms,³⁶ and later took decisive action to terminate such violations and to provide compensation for the victims.³⁷ In the case of the various conflicts in the Middle East, the Council has frequently addressed humanitarian law issues and called upon States to comply with humanitarian law obligations.³⁸ In the case of Rwanda, the Council likewise demanded compliance with such obligations and took various

³⁶ See, e.g., S.C. Res. 666, U.N. SCOR, Forty-Fifth Year, 2939th mtg. at preamb. para. 5 and op. para. 2, U.N. Doc. S/RES/666(1990); S.C. Res. 667, U.N. SCOR, Forty-Fifth Year, 2940th mtg. at preamb. paras. 6, 9 and op. para. 3, 4, U.N. Doc. S/RES/667 (1990); S.C. Res. 670, U.N. SCOR, Forty-Fifth Year, 2943rd mtg. at preamb. paras. 2, 3 and op. para. 13, U.N. Doc. S/RES/670 (1990); S.C. Res. 674, U.N. SCOR, Forty-Fifth Year, 2951st mtg. at preamb. paras. 5 and op. para. 1, 3, U.N. Doc. S/RES/674 (1990).

³⁷ S.C. Res. 678, U.N. SCOR, Forty-Fifth Year, 2963rd mtg. at op. para. 2, U.N. Doc. S/RES/678 (1990) (authorizing member states cooperating with Kuwait to use all necessary means to uphold and implement Council resolutions and restore international peace and security in the area); S.C. Res. 687, U.N. SCOR, Forty-Sixth Year, 2981st mtg. at op. paras. 16, 18, U.N. Doc. S/RES/687 (1991) (reaffirming Iraq's liability for actions against victims and setting up compensation fund).

³⁸ See, e.g., S.C. Res. 598, U.N. SCOR, Forty-Second Year, 2750th mtg. at preamb. para. 3, U.N. Doc. S/RES/598 (1987) (deploring the violation of international humanitarian law in Iran and Iraq); S.C. Res. 540, U.N. SCOR, Thirty-Eighth Year, 2493rd mtg. at op. para. 2, U.N. Doc. S/RES/540 (1983); S.C. Res. 605, U.N. SCOR, Forty-Second Year, 2777th mtg. at op. paras. 1-3, U.N. Doc. S/RES/605 (1987); S.C. Res. 605, U.N. SCOR, Forty-Second Year, 2777th mtg. at op. paras. 1-3, U.N. Doc. S/RES/605 (1987); S.C. Res. 512, U.N. SCOR, Thirty-Seventh Year, 2380th mtg. at op. paras. 1-3, U.N. Doc. S/RES/512 (1987) (stressing adherence to humanitarian principles in Lebanon).

actions -- including the creation of a tribunal to try offenders -- to deal with violations.³⁹ Contrary to the suggestion of Counsel for the Accused, the International Committee of the Red Cross has not criticized the creation of the Yugoslav Tribunal, but has supported this action.⁴⁰

Moreover, the Council has not attempted to create new humanitarian law or to interfere with the way in which such law is developed. The law to be applied by the Tribunal is well

³⁹ S.C. Res. 955, U.N. SCOR, Forty-Ninth Year, 3453rd mtg. at op. para. 1, U.N. Doc. S/RES/955 (1994) (establishing an international tribunal for the purpose of prosecuting persons responsible for genocide and other violations of international humanitarian law in Rwanda); see, e.g., S.C. Res. 935, U.N. SCOR, Forty-ninth Year, 3400th mtg. at op. para. 2, U.N. Doc. S/RES/935 (1994); S.C. Res. 925, U.N. SCOR, Forty-ninth Year, 3388th mtg. at op. para. 11, 13, U.N. Doc. S/RES/925 (1994); S.C. Res. 918, U.N. SCOR, Forty-Ninth Year, 3377th mtg. at op. para. 5, 18, U.N. Doc. S/RES/918 (1994).

⁴⁰ Letter dated 8 April 1994 from Cornelia Sommaruga, President of the International Commission of the Red Cross, Addressed to Antonio Cassese, President of the International Tribunal (supporting the establishment of the Tribunal).

Indeed, in the very report cited by Counsel for the Accused in support of the suggestion that the International Committee for the Red Cross (ICRC) opposes the Council's involvement in humanitarian law, the ICRC stated that an effort towards "setting up an international tribunal to repress war crimes more effectively should . . . be welcomed"; referring to the establishment of this this Tribunal, the ICRC report described it as "an important attempt at fulfilling the obligation to punish war criminals." The ICRC report further stated that "it is of utmost importance that everything should be done to ensure that it functions effectively . . ." International Committee for the Red Cross, Report on the Protection of War Victims 44 (1993) (prepared for the International Conference for the Protection of War Victims).

established by conventional and customary law,⁴¹ and affirmed by the General Assembly.⁴² Accordingly, the Council's involvement in the enforcement of settled humanitarian law in the case of the former Yugoslavia in response to a threat to international peace and security in the former Yugoslavia is fully consistent with the Council's mandate.

3. The Subject-matter Jurisdiction of the Tribunal

Counsel for the Accused argues, in essence, that Articles 2-5 of the Statute of the Tribunal, which define the Tribunal's subject-matter jurisdiction, must be interpreted in a way that excludes their application to the situation in the former Yugoslavia. Such an interpretation would, of course, defeat the entire object and purpose of the Security Council in adopting the Statute, and should therefore be adopted only if no other reasonable interpretation is available. We believe that the interpretation offered by Counsel for the Accused is

⁴¹ See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, Forty-Ninth Year at paras. 29, 34, and 35, U.N. Doc. S/25704 (1993).

⁴² See, e.g., G.A. Res. 95, U.N. GAOR, 1st Session, U.N. Doc. A/RES/95 (1946) (affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal); G.A. Res. 2444, U.N. GAOR, 23rd Session, U.N. Doc. A/RES/2444 (1968) (recognizing the necessity of applying basic humanitarian principles in all armed conflicts and affirming certain principles to be observed in armed conflict); G.A. Res. 2712, U.N. GAOR, 25th Session, U.N. Doc. A/RES/2712 (1970) (calling upon states to try and punish persons who have committed war crimes and crimes against humanity); G.A. Res. 260, U.N. GAOR, 3rd Session, U.N. Doc. A/RES/260 (1948) (approving and proposing for signature the Convention on the Prevention and Punishment of the Crime of Genocide).

incorrect as a matter of the clear meaning of the language of these Articles, the history of their adoption, and the interpretation of the same concepts in other contexts.

a. Whether the situation in question is an international armed conflict. Counsel for the Accused argues that the events covered by the indictment against Dusan Tadic occurred in the context of an internal rather than an international conflict. We disagree.

The conflict that has taken place in the former Yugoslavia since 1991 has involved fighting between various armed forces in the territory of three former republics of the Socialist Federal Republic of Yugoslavia. Each of these republics had declared its independence before substantial fighting began on its territory, and Croatia and Bosnia had in fact been recognized as States by elements in the international community. Fighting among them, or between them and the "Federal Republic of Yugoslavia" (Serbia and Montenegro), is clearly subject to rules of international armed conflict.

The fighting has consistently been international in character. Some of the battles during this conflict have been between units of the regular armed forces of States; others between regular armed forces of one State and irregular forces of another; others between the armed forces of one State and dissident irregular forces within that State; and yet others between irregular forces of the same or different States. In many cases, irregular forces from one State have fought under the command or with the support of the regular armed forces of

another State. In essence, Counsel for the Accused wishes to isolate one series of battles in this conflict, which he alleges involved only Bosnian armed elements, and treat this as an internal armed conflict separate from the rest of the fighting in the former Yugoslavia. The purpose of this argument is of course to exclude from the case the more comprehensive and demanding rules of international armed conflict.

We believe that this is a wholly unrealistic view of the situation and one which is not consistent with the Statute of the Tribunal or with international humanitarian law in general. In a conflict such as this, where a single State has dissolved into multiple States, where the armed forces of several of those States have fought in the territory of the others, and where factions within several of those States have fought, in conjunction with regular and irregular forces of other States, with a goal of altering the international boundaries of the State in which they are present, humanitarian law is not applied by examining only the particular combatants involved in a specific incident or series of incidents, while ignoring the larger conflict of which these incidents were a part. In a conflict such as this, the conflict must be considered as a whole.⁴³

⁴³ The commentary to the Geneva Conventions makes clear that once the provisions of the Geneva Convention relating to international armed conflict are triggered, the Conventions apply in their entirety. See Jean S. Pictet, Commentary,

Likewise, we believe that the fighting in the former Yugoslavia since 1991 must be seen as a whole, constituting an international armed conflict to which the rules of international armed conflict apply. We believe it is artificial and improper to attempt to divide it into isolated segments, either geographically or chronologically, in an attempt to exclude the application of those rules.

In reality, there were essentially three main parties to this conflict during the period in question: first, the Yugoslav National Army (JNA) of the "Federal Republic of Yugoslavia" ("FRY") and various Serb armed elements in Bosnia and Croatia; second, the armed forces of Government of Croatia and Croatian armed elements in Bosnia; and third, the armed forces of the Government of Bosnia. (This excludes the brief period in early 1991 when JNA forces fought in Slovenia.) At

Geneva Convention Relative to the Protection of Civilian Persons in Time of War 16 (1958) ("as soon as one of the conditions of application for which Article 2 provides is present, no Contracting Party can offer any valid pretext, legal or otherwise, for not respecting the Convention in its entirety"). The commentary states that Article 2 is triggered any time a difference arises between States "leading to the the intervention of members of the armed forces." *Id.* at 20. Since the intervention of outside armed forces into Croatia and Bosnia has crossed the "international armed conflict" threshold, the Geneva Conventions are applicable in their entirety to the conflict. Attempting to identify elements of that conflict as "internal" is the kind of pretext for avoiding full application of the Conventions that is not permissible. Given the inextricable link of particular incidents to the broader conflict, the Tribunal should endorse the strictest rules governing treatment to be afforded to persons protected by international humanitarian law.

various times, elements of each of these three parties has fought against elements of the others, either alone or in combination.

From the very beginning, the "FRY" and JNA were heavily involved in the fighting in both Bosnia and Croatia. Until ordered otherwise in May 1992, JNA units fought openly under the "FRY" flag. Thereafter, units in Bosnia and Croatia that had formerly designated themselves as JNA began to identify themselves as forces of the "Serbian Republic of Bosnia" or the "Serbian Republic of Croatia," or as paramilitary forces; however, they retained "FRY" officers and pilots, received "FRY" equipment and supplies, and often coordinated their movements with "FRY" units in Serbia proper.⁴⁴ On occasion "FRY" units participated directly in their operations.⁴⁵

⁴⁴ See infra notes 45-47; see also Craig Scott, Abid Qureshi, Paul Mitchell, Jaminka Kalajdzic, and Peter Copeland, A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina, 16 Michigan Journal of International Law 1, 41, 45, 47 (1994) (JNA transferred units to Bosnian Serb forces, that Bosnian Serb forces have made use of Serbian territory to coordinate strategic movements, and that the JNA has provided Bosnian Serbs with supplies and other support).

⁴⁵ Annex Summaries and Conclusions, Annexes to the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), at para. 13, U.N. Doc. S/1994/674 Annexes (1994) (the JNA "militarily supported the Bosnia Serb forces [engaged in ethnic cleansing] in many ways, including bombardment and shelling. They were also directly involved in several operations."); id. at para. 29 (both the "Bosnian Serb Army" operating in Bosnia and the "Krajina Serb Army" operating in Croatia "are armed and supported by the JNA"); Annex III.A, Annexes to the Final Report of the United Nations Commission of Experts Established

The fighting itself has never respected national boundaries. Both regular and irregular⁴⁶ armed forces have often fought in neighboring countries. Major campaigns and supporting operations in locations such as Bihac and Brcko have taken place on both sides of internationally-recognized borders as military or political considerations dictated. Commanders of forces in one country have always sought to coordinate their operations with friendly forces in the other. This is particularly true with respect to the period covered by the indictment (essentially May-August 1992), during which period JNA units were fighting in Bosnia. There was considerable overlap between elements of the JNA and the emerging Bosnian Serb Army (including JNA officers in command of Bosnian Serb elements), the "FRY" was providing equipment and materiel

Pursuant to Security Council Resolution 780 (1992), at paras. 482, 487, and 489, U.N. Doc. S/1994/674 Annex III.A (1994) (indicating that JNA officers were involved in the 1992 campaign in Prijedor County); Annex IV, Annexes to the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), at para. 27 U.N. Doc. S/1994/674 Annex IV (1994) ("in the weeks following [Bosnia-Herzegovina's] recognition by the European Community, JNA and Bosnian Serb forces attacked Bosnian towns such as Prijedor and other villages in the Kozarac region of northeast [Bosnia and Herzegovina], and Zvornik in nothwest [Bosnia and Herzegovina]").

⁴⁶ Annex Summaries and Conclusions, Annexes to the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), at paras. 66, 73, U.N. Doc. S/1994/674 Annexes (1994) (noting that paramilitary groups working in support of the "FRY" have operated in Bosnia and Croatia and recounting evidence that the Serbian Government in Belgrade has coordinated the activities of such Serbian paramilitary units).

support to Bosnian Serb groups, and military installations in Serb-held Bosnia were supporting forces in Croatia.⁴⁷

During this same period, the decisions of the Security Council reflected many elements of a continuing international armed conflict. For example, Resolution 752 of 15 May 1992 demanded the withdrawal of JNA units and elements of the Croatian Army from Bosnia and the cessation of the violation of Bosnian territorial integrity by those units.⁴⁸ Resolution 757 of 30 May 1992 deplored the failure of these forces to

⁴⁷ Milan Vego, Federal Army Deployments in Bosnia and Herzegovina, 4 *Jane's Intelligence Review* 445-46 (October 1992) (indicating that the "FRY" commands and controls the Serbian forces in Bosnia and Herzegovina); Annex Summaries and Conclusions, Annexes to the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), at para. 29, U.N. Doc. S/1994/674 Annexes (1994) (both the "Bosnian Serb Army" operating in Bosnia and the "Krajina Serb Army" operating in Croatia have been "armed and supported by the JNA"); *id.* at para. 28 (special forces from Serbia supplemented Serbian JNA troops left in place in Bosnia after June 1992 when the JNA "officially" withdrew from Bosnia); *id.* at para. 29 (both the "Bosnian Serb Army" operating in Bosnia and the "Krajina Serb Army" operating in Croatia "are armed and supported by the JNA"); Annex III, Annexes to the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), at para. 17, U.N. Doc. S/1994/674 Annex III (1994) (indicating that Yugoslav military divided and created the Bosnian Serb Army following international recognition of Bosnia, but that the Bosnian Serb Army is carrying out the "FRY" objective of creating a new Yugoslav state from parts of Croatia and Bosnia and Herzegovina (quoting James Gow)); *id.* at para. 124 (the 110,000 troops nominally subordinated to the "Serbian Republic of Bosnia" and the "Serbian Republic of Croatia" "receive instructions, arms and ammunition and other support from the JA and from the FRY").

⁴⁸ S.C. Res. 752, U.N. SCOR, Forty-Seventh Year, 3075th mtg. at op. para. 4, U.N. Doc. S/RES/752 (1992).

comply with Resolution 752 and demanded their immediate withdrawal from Bosnia.⁴⁹ Resolution 779 of 6 October 1992 urged the withdrawal of forces from Croatia and authorized U.N. peacekeeping forces in the former Yugoslavia to monitor the withdrawal of JNA units from Croatia.⁵⁰ Resolution 787 of 16 November 1992 demanded that all forms of interference from outside Bosnia, including the infiltration into the country of irregular units and personnel, cease immediately and that all regular units be withdrawn from Bosnia.⁵¹

Resolution 757 of 30 May 1992 imposed a series of economic sanctions against the "FRY," which were to apply until the Security Council decided that the authorities of the "FRY," including the JNA, had taken effective measures to fulfil the requirements of Resolution 752 for the withdrawal of their forces from Bosnia and the cessation of their interference in Bosnia.⁵² The Council has never found that these requirements have been met and has not lifted all sanctions imposed. In effect, the Council's actions amount to a recognition of the continuing international character of the conflict.

⁴⁹ S.C. Res. 757, U.N. SCOR, Forty-Seventh Year, 3082nd mtg. at preamb. para 4, op. para. 2, U.N. Doc. S/RES/757 (1992).

⁵⁰ S.C. Res. 779, U.N. SCOR, Forty-Seventh Year, 3118th mtg. at op. paras 2, 4, U.N. Doc. S/RES/779 (1992).

⁵¹ S.C. Res. 787, U.N. SCOR, Forty-Seventh Year, 3137th mtg. at op. para. 5, U.N. Doc. S/RES/787 (1992).

⁵² S.C. Res. 757, U.N. SCOR, Forty-Seventh Year, 3082nd mtg., U.N. Doc. S/RES/757 (1992).

The Statute of the Tribunal was drafted against this background of a conflict that was clearly international in character. Articles 2-5 of the Statute reflect the Security Council's perception of the international character of the conflict. Each of the main elements of jurisdiction is applicable in situations of international armed conflict, and some of the international agreements mentioned apply primarily or solely to international conflicts.⁵³ In contrast, the comparable provisions of the Statute adopted by the Council for the Tribunal for Rwanda cite provisions that apply solely to internal armed conflicts, reflecting the Council's perception that the Rwandan conflict was internal in character.⁵⁴

⁵³ Under Article 2, the Tribunal may exercise jurisdiction over grave breaches of the Geneva Conventions of 1949; with the exception of Common Article 3, the Geneva Conventions apply in cases of international armed conflict. Article 3 gives the Tribunal the power to prosecute persons who violate the laws or customs of war. The non-exclusive list of such violations in Article 3 is derived from the fourth 1907 Hague Convention Respecting the Laws and Customs of War and Land and the Regulations Annexed thereto, which apply in international armed conflict. See Theodor Meron, War Crimes in Yugoslavia and the Development of International Law, 88 American Journal of International Law 78, 80 (1994). The violations enumerated in Article 3 are not exclusive, and the laws and customs of war also impose limitations on the conduct of participants in non-international armed conflict. Articles 4 and 5 permit the Tribunal to prosecute persons who commit genocide or crimes against humanity. These prohibitions are applicable in the case of international armed conflict, but also apply during non-international armed conflict or even in times of peace.

⁵⁴ The Rwanda Tribunal does not have jurisdiction over those provisions of the Geneva Conventions or Protocol I applicable only in situations of international armed conflict. The Rwanda Tribunal is authorized to prosecute: 1) persons who commit "genocide," Statute of the International Tribunal for Rwanda, Article 2, Annex to S.C. Res. 955, U.N. SCOR, Forty-Ninth Year,

Published commentary by experts on international humanitarian law confirms the view that the conflict in the former Yugoslavia has been an international armed conflict. For example, the U.N. Commission of Experts (established by Resolution 780 to investigate allegations of atrocities in the former Yugoslavia) concluded that:

. . . the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the Commission's approach in applying the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.⁵⁵

Professor Meron wrote that:

The various proposals submitted to the Security Council and the Secretary-General on establishing the tribunal treat all the aspects of the conflict as international The UN War Crimes Commission shares the view that the conflicts in Yugoslavia are international The Secretary-General's proposals on the tribunal's subject matter jurisdiction . . . are clearly based on the assumption that the conflicts are international. . . . It is fair to conclude, I submit, that the statute of the tribunal constitutes a determination that the conflicts in

3453rd mtg., U.N. Doc. S/RES/955 (1994), which may occur in time of war or peace and are thus not limited to situations of international armed conflict; 2) persons who commit crimes against humanity, *id.*, Article 3, which may also occur in time of war or peace and are thus not limited to situations of international armed conflict; and 3) persons who commit serious violations of Common Article III of the Geneva Conventions or Additional Protocol II, *id.*, Article 4, which are applicable in situations of armed conflict not of an international character.

⁵⁵ Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), at 13 para. 44, in Letter Dated 24 May 1994 from the Secretary-General Addressed to the President of the Security Council, U.N. S.C. Doc. S/1994/674 (1994), Annex.

Yugoslavia are international in character.⁵⁶

b. Grave breaches. Counsel for the Accused argues that the Tribunal does not have jurisdiction to try Dusan Tadic for grave breaches of the 1949 Geneva Conventions because the alleged offenses did not occur during an international armed conflict. We disagree.

First, as indicated above, we believe that the conflict in which these offenses allegedly occurred was in fact an international armed conflict.

Second, we believe that the "grave breaches" provisions of Article 2 of the Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character. For example, Article 130 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War defines "grave breaches" as any of a series of specified acts "if committed against persons or property protected by the Convention" (This definition is included almost verbatim in Article 2 of the Tribunal Statute.) There is no special definition or usage in the Third Geneva Convention of the phrase "persons . . . protected by the Convention." Insofar as Common Article 3 prohibits certain acts with respect to "[p]ersons taking no active part in hostilities" in cases of armed conflict not of an international character, it is consistent with the ordinary meaning of the Geneva Conventions

⁵⁶ Theodor Meron, War Crimes in Yugoslavia and the Development of International Law, 88 American Journal of International Law

to treat such persons as persons protected by the Conventions. See Vienna Convention on the Law of Treaties, May 22, 1969, Article 31(1), U.N. Doc. A/CONF./39127 (1969) (treaties are to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose").⁵⁷

c. Violations of laws or customs of war. Counsel for the Accused argues that the Tribunal does not have jurisdiction to try Dusan Tadic for violations of laws or customs of war, again because the alleged offenses did not occur during an international armed conflict. We disagree.

As indicated above, we believe that the conflict in which these offenses allegedly occurred was in fact an international armed conflict. Further, Article 3 of the Tribunal Statute authorizes the prosecution of "persons violating the laws or customs of war. Such violations shall include, but not be limited to . . ." a series of specific acts that would constitute such violations. This is only an exemplary and not

⁵⁷ Some commentators have assumed, often without discussion, that the grave breach provisions of the Geneva Conventions do not apply to violations of Common Article 3, see, e.g., Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Yale Law Journal 2537, 2562 n. 100 (1991), although this view is not uniform. See, e.g., Morris Greenspan, The Modern Law of Land Warfare 624 & n. 21 (1959). Not only is it consistent with the ordinary meaning of the terms of the treaty to treat "persons taking no active part in hostilities" covered by Common Article 3 as "persons protected by the Convention," it is also consistent with the humanitarian object and purpose of the Geneva Conventions of protecting war victims.

an exclusive list, and the language of Article 3 is otherwise broad enough to cover all relevant violations of the laws or customs of war, whether applicable in international or non-international armed conflict.

This is confirmed by statements of several of the members of the Security Council at the time of adoption of the Statute. The U.S. representative stated that "it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocols to these Conventions."⁵⁸ The representatives of the United Kingdom⁵⁹ and France⁶⁰ made similar statements, and there were no statements to the contrary from any member of the Council.

d. Crimes against humanity. Counsel for the Accused argues that the Tribunal does not have jurisdiction to try Dusan Tadic for crimes against humanity, again because the alleged offenses did not occur during an international armed conflict. We disagree.

humanitarian object and purpose of the Geneva Conventions of protecting war victims.

⁵⁸ Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, U.N. Doc S/PV.3217, at 15 (1993).

⁵⁹ Id. at 19.

⁶⁰ Id. at 11.

As indicated above, we believe that the conflict in which these offenses allegedly occurred was in fact an international armed conflict. Further, Article 5 of the Tribunal Statute explicitly covers the crimes enumerated "when committed in armed conflict, whether international or internal in character" Crimes against humanity are therefore within the Tribunal's jurisdiction, whether or not the conflict in question is judged to be international in character.

For the foregoing reasons, we urge that the Motion of the Accused be

DENIED.

Respectfully submitted,



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