

**AN ANALYSIS OF THE JURISDICTION OF THE INTERNATIONAL
CRIMINAL TRIBUNAL FOR WAR CRIMES IN THE FORMER
YUGOSLAVIA**

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I. INTRODUCTION: CONFUSION OF CRIMINALITY WITH JURISDICTION.....	43
II. THE LEGITIMACY OF THE CREATION OF THE TRIBUNAL	44
A. <i>Composition of the Tribunal</i>	44
B. <i>Creation of the Tribunal by the Security Council rather than by Treaty</i>	48
C. <i>Was the Tribunal Established by Law?</i>	51
III. LIMITATIONS ON THE TRIBUNAL’S JURISDICTION.....	56
A. <i>International Criminal Law and Competent Courts</i>	57
1. Sources of the Tribunal’s Jurisdiction.....	58
2. Limits of the Tribunal’s Jurisdiction	61
IV. THE TRIBUNAL’S ABILITY TO QUESTION ITS JURISDICTION	64
A. <i>The Tribunal’s Ability to Decide Whether it Can Question its Own Jurisdiction</i>	65
B. <i>Establishing a Legitimate International Criminal Court, With Jurisdiction Over War Crimes</i>	68
V. CONCLUSION	68

I. INTRODUCTION: CONFUSION OF CRIMINALITY WITH JURISDICTION

It is important not to confuse criminality with jurisdiction.¹ The term *criminality* is usually associated with the legislative authority to proscribe conduct. The term *jurisdiction* is usually associated with the judicial authority to subject a person or thing to the processes of a court.² The

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1. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 561 (1995). Unless otherwise noted, I use the word jurisdiction to refer to adjudicatory jurisdiction. See *infra* note 98.

2. The confusion of criminality with jurisdiction is more common than one would suppose. The most recent example in which this confusion surfaces is the argument that because murder, rape, and other war crimes are also crimes under national law, defendants must have known of the illegality of their alleged actions and thus, an international Tribunal may try

legislative authority to proscribe certain acts by law is not necessarily coupled with the judicial authority to try to punish violators of the law. The question of the criminality of the atrocities that occurred in the former Yugoslavia is distinguishable from the question of which courts have jurisdiction to try those accused of these offenses.³ The recent creation of the International Criminal Tribunal for War Crimes in the Former Yugoslavia (Tribunal) raises both these questions.

To date, most scholarly debate has focused on the former question, i.e. which international laws govern the atrocities committed in the former Yugoslavia. The latter question has received far less comment.⁴ The question of which courts have jurisdiction to try those accused of violations of international humanitarian law is the topic of this paper. Part II addresses the legitimacy of the creation of the Tribunal. Part III discusses the legal limits of the Tribunal's jurisdiction. Part IV examines the Tribunal's ability to question its own jurisdiction. Part V draws some conclusions from the reasoning of the prior sections.

II. THE LEGITIMACY OF THE CREATION OF THE TRIBUNAL

A. *Composition of the Tribunal*

International Criminal Tribunal for War Crimes in the Former Yugoslavia consists of three main organs: the Prosecutor, the Chambers

defendants on this basis. See IT. Doc. IT-94-1-AR72, Prosecutor of the Tribunal v. Duško Tadić (Appeals Chamber), para. 135 (Sep. 8, 1995) [hereinafter Appeals Chamber].

Presumably, these scholars are addressing the argument of *nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law). Indeed, international law prohibits prosecution for crimes, which were not yet law at the time of their commission. However, these scholars are confusing the defendant's knowledge of the criminality of his actions with the jurisdiction of the Tribunal. See James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 647 (1993).

Knowledge of the criminality of one's actions does not confer jurisdiction to all tribunals in which such actions are deemed illegal. Jurisdiction requires some greater connection between the illicit action and the tribunal sitting in judgment of the accused. For example, assuming the auto theft laws of Germany closely resemble those of California, a German court would not have jurisdiction to try a person accused of stealing an automobile in California, without some greater connection between the theft or the automobile and Germany.

3. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 561 (1995).

4. George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L L. 64-5 (1996) (reprinting without commentary the decision of the Tribunal).

and the Registry.⁵ A major distinction between the current Tribunal and previous war crimes tribunals is the lack of Office of Defense as an organ of the Tribunal.⁶ Although the Statute of the Tribunal contains a provision for the appointment of defense counsel,⁷ the Statute does not create an institutional mechanism to provide for the appointment or support of the defense counsel. The Special Task Force of the ABA Section of International Law and Practice criticized this failing.⁸

The role of the Prosecutor is to fulfill the purpose of the Tribunal: the prosecution of persons responsible for serious violations of international humanitarian law committed since 1991 in the territory of the former Yugoslavia.⁹ The Prosecutor is responsible for the gathering of evidence, the investigation into criminal cases and the preparation of indictments.¹⁰ The Prosecutor bears the burden of proof in all proceedings.¹¹ The Prosecutor must act independently and may not seek nor receive instructions from any government or from any other source.¹²

Eleven judges comprise the Court.¹³ No two judges may be nationals from the same state. Each judge serves a term of four years and may be

5. Statute of the Tribunal, arts. 11(a)-11(c) reprinted in *United Nations: Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, 32 I.L.M. 1159, 1190 (1993) [hereinafter Statute of the Tribunal]. There is also a bureau, which handles administrative matters.

6. AMERICAN BAR ASSOCIATION, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 20 (1993) (noting that "all defendants before the Tokyo War Crimes Tribunal were entitled both to appointed defense counsel provided without charge and to hired defense counsel of their own choosing").

7. Statute of the Tribunal, *supra* note 5, at art. 21(4)(d).

8. AMERICAN BAR ASSOCIATION, *supra* note 6, at 19-21.

9. Statute of the Tribunal, art. 16(1); Rules of Procedure and Evidence, IT/32/ Rev. 5 (June 15, 1995) [hereinafter Rules of Procedure and Evidence], incorporating the Statute of the Tribunal, art. 1.

10. Statute of the Tribunal, *supra* note 5, at arts. 16(1), 18(1-2).

11. Statute of the Tribunal, *supra* note 5, at art. 21(3). According to this article, the Tribunal, through the Office of the Prosecutor, bears the burden of proof on this issue of jurisdiction.

12. Statute of the Tribunal, *supra* note 5, at art. 16(2). It is unclear how this article would operate if under the forthcoming Paris peace conference, certain indicted defendants were to receive immunity from prosecution.

13. Statute of the Tribunal, *supra* note 5, at art. 26. The following lists the judges of the Tribunal and their nationalities.

The Appeals Chamber consists of: Antonio Cassese, (Italy) (Presiding Judge); Sir Ninian Stephen, (Australia); Li Hao Pei, (China); Jules Deschênes, (Canada); George Abi-Saab,

eligible for re-election.¹⁴ The judges are responsible for adopting rules of procedure and evidence for the Tribunal.¹⁵ The Chambers are composed of two Trial Chambers (with three judges each) and one Appeals Chamber (with five judges).¹⁶ The Trial Chambers serve as the first level courts of the Tribunal.

The Appeals Chamber handles both interlocutory and final appeals. Both types of appeals are limited to two grounds: an error or question of law invalidating a decision of the Trial Chamber or an error of fact, which has occasioned a miscarriage of justice.¹⁷ The Appeals Chamber may hear an interlocutory appeal of a Trial Chamber's decision on preliminary motions only in the case of a dismissal of an objection based on lack of jurisdiction.¹⁸ All other preliminary motions are immune from interlocutory appeal.¹⁹ Both the accused and the Prosecutor may appeal final judgments of the Trial Chamber.²⁰ As pointed out by Howard Levie, this language suggests that the Prosecutor may appeal an acquittal!²¹

(Egypt) resigned to *resume academic activities* and was replaced by Fouad Abdel-Moneim Riad, (Egypt) on Oct. 3, 1995.

The first Trial Chamber consists of: Gabrielle Kirk McDonald, (U.S.A.) (Presiding Judge); Rustam S. Sidhwa, (Pakistan); Lal Chand Vohrah, (Malaysia).

The second Trial Chamber consists of: Adolphus Godwin Karibi-Whyte, (Nigeria) (Presiding Judge); Germain Le Foyer de Costil (France); Elizabeth Odio Benito (Costa Rica) (Vice-President of the Tribunal). See Sec/C./Res. 857 (1993). See also Judge Antonio Cassese of Italy Elected President of International Tribunal for Crimes in Former Yugoslavia, 12/02/1993 Federal News Service; Monday Highlights, 10/03/1993 Federal News Service.

14. Statute of the Tribunal, *supra* note 5, at art. 13(4).
15. Statute of the Tribunal, *supra* note 5, at art. 15.
16. Statute of the Tribunal, *supra* note 5, at art. 11-12.
17. Statute of the Tribunal, *supra* note 5, at art. 25(1).
18. Rules of Procedure and Evidence, Rule 72(B); Appeals Chamber, *infra* note 34, at para. 6.
19. Rules of Procedure and Evidence, Rule 72(B); Appeals Chamber, *infra* note 34, at para. 6.
20. Statute of the Tribunal, *supra* note 5, at art. 25(1); Rules of Procedure and Evidence, Rule 108(A).
21. Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1, 26 (1995). See also Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 DENV. J. INT'L L. & POL'Y 305 (1997)(discussing the infringement of a defendant's rights by double jeopardy). Indeed the Prosecutor has appealed the first judgment of the Tribunal, Prosecutor v. Tadić, IT. Doc. IT-94-1-T. The defendant was convicted on eleven counts and acquitted on twenty counts of his indictment. Prosecutor v. Tadić, IT. Doc. IT-94-1-T, Tadić Judgment (May 7, 1997); Press Release, Tadić Case: The Verdict, UN Doc. CC/PIO/190-E (May 7, 1997). Tadić has been sentenced to twenty years imprisonment for his offenses. Prosecutor v. Tadić, IT. Doc. IT-94-1-T, Sentencing Judgment (July 14, 1997). Despite this

The Registry assists the Chambers and the Prosecutor in the performance of their functions.²² The Registry is responsible for the administration and servicing of the Tribunal,²³ including serving as the channel of communication for the Tribunal, disseminating public information, preparing the minutes of meetings and printing all Tribunal documents.²⁴

The appointments of the Tribunal organs and staff were made by the Security Council, agents of the Security Council, or by the Secretary-General. The General Assembly had a very limited role in the formation of the Tribunal and in the selection of the Tribunal's officers and staff.²⁵ The Secretary-General invited nomination of judges from the General Assembly, and then advised the Security Council to establish from these nominations a list of candidates "taking due account of the adequate representation of the principal legal system of the world."²⁶ Although this

conviction, the Prosecutor has appealed the Tribunal's judgment on the twenty acquittals. Press Release, *Tadić Case: Defense Counsel Appeals Against Sentencing Judgment of 14 July 1997*, U.N. Doc. CC/PIO/235-E (August 9, 1997); Notice of the appeal was filed two months earlier on June 9, 1997: Press Release, *Tadić Case: Prosecutor Files Notice of Appeal Against Judgement*, U.N. Doc. CC/PIO/210-E (June 9, 1997).

22. Rules of Procedure and Evidence, Rule 33.

23. Statute of the Tribunal, *supra* note 5, at art. 17(a); Rules of Procedure and Evidence, Rule 33.

24. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, U.N. Doc. S/25704 (May 23, 1993) [hereinafter Report of the Secretary-General] reprinted in *United Nations: Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, 32 I.L.M. 1159 (1993), para. 90 (explaining Statute of the Tribunal, art. 16).

25. The Prosecutor, Richard Goldstone, was appointed by the Security Council on the nomination by the Secretary General. The staff of the Prosecutors, the Registrar, the staff of the Registry were appointed by the Secretary-General of the United Nations. Statute of the Tribunal, arts. 16(4), 16(5), 17(3), and 17(4).

26. Report of the Secretary-General, para. 75; Statute of the Tribunal, *supra* note 5, at art. 13(2)(c). On August 20, 1995, the Security Council reduced the 41 judges nominated by United Nations members (including the Vatican and Switzerland) to 23 candidates for the 11 tribunal judgeships. The list of judicial candidates consisted of: Georges Abi-Saab, (Egypt); Julio Barberis (Argentina); Raphael Barras (Switzerland); Sikhe Camara (Guinea); Antonio Cassese (Italy); Hans Corell (Sweden); Jules Deschenes (Canada); Alfonso de los Heros (Peru); Jerzy Jasinski (Poland); Heike Jung (Germany); Adolphus Karibi-Whyte (Nigeria); Valentin Kisilev (Russia); Germain Le Foyer de Costil (France); Li Hao Pei (China); Gabrielle McDonald (United States of America); Amadou N'Diaye (Mali); Daniel Nsereko (Uganda); Elizabeth Odio Benito (Costa Rica); Huseyin Pazarci (Turkey); Moragodage Pinto (Sri Lanka); Rustam Sidhwa (Pakistan); Sir Ninian Stephen (Australia); and Lal Chan Vohrah (Malaysia). *23 Candidates Named for Balkan War Crimes Tribunal*, Agence France Presse (August 20, 1993).

language seems inclusive on its face, to my knowledge *all principal legal systems of the world* are Western-based legal systems.²⁷

B. Creation of the Tribunal by the Security Council rather than by Treaty

On May 25, 1993, the Security Council of the United Nations created the International Criminal Tribunal for War Crimes in the Former Yugoslavia.²⁸ Some States and scholars recommended that the Tribunal be created by treaty, utilizing the more representative and democratic forum of the General Assembly, rather than by the Security Council as a subsidiary organ.²⁹ The advantages of establishing the Tribunal by treaty would have been: (1) the participation of all United Nation member states in the establishment of the Tribunal would endow it with greater legitimacy; (2) signatory states to a treaty establishing the tribunal could not later dispute the legitimacy of the establishment of the Tribunal, and (3) the participation by such a generality of states, considering themselves legally bound to such a treaty, would provide evidence of the consensus required to create international customary law, which eventually would bind even non-signatory states.³⁰

27. Sharf, *supra* note 21, at 311 n.28 (commenting that only four of the eleven judges come from countries with predominantly Muslim populations and that none of the judges are Muslim).

28. S.C. Res. 827, U.N. SCOR., 3217th mtg. (May 25, 1993). Security Council Resolution 808, U.N. SCOR, 3175th mtg., para. 1 (February 22, 1993) called for the imminent establishment of the Tribunal, although it indicated neither how such a tribunal would be established nor on what legal basis.

29. Among the States opposed to the Security Council formation of the Tribunal were:

1. China (remarks of the Chinese representative during the Security Council deliberations on Security Council Res. 827, U.N. Doc. S/PV.3217, at 33 (1993)),

2. Brazil (remarks of the Brazilian representative during the Security Council deliberations on Security Council Res. 827, U.N. Doc. S/PV.3217, at 36-37 (1993)),

3. Mexico (Views of the Government of Mexico Supplied Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, U.N. Doc. S/25417 (1993)),

4. Russia (Letter from the Permanent Representative of the Russian Federation to the Secretary-General (Apr. 5, 1993), U.N. Doc. S/25537, at 15 (1993), and

5. Yugoslavia (Letter from the charge d'affaires a.i. of the Permanent Mission of Yugoslavia to the Secretary-General (May 19, 1993), U.N. Doc. S/25801, at 3 (1993)).

30. Article 38 of the Statute of the International Court of Justice defines customary international law "as a general practice *accepted as law*." Compare this definition to that of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987): customary international law "results from a general and consistent practice of states followed by them out of a sense of legal obligation."

These two definitions contains two elements: (1) acceptance by a generality of states, and (2) acceptance by the generality of states out of a sense of legal obligation. See Hiram E.

According to the Secretary General, two reasons supported the use of the Security Council rather than the General Assembly as the proper United Nations' organ to establish the Tribunal. First, the Secretary-General feared that if the Tribunal were created by treaty, even after months of negotiation and concessions, some member nations would not have voted for its ratification.³¹ "[T]here could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective."³²

Some scholars suggested and the Secretary-General hoped that the General Assembly would give its consent to the Tribunal by approving both the Tribunal's budget and nominating its judges.³³ Indeed, the General Assembly endorsed the establishment of the International Tribunal: by nominating its Judges, by approving the Tribunal's budget, and by passing resolutions in support of the Tribunal.³⁴ However, such *consent* does not permit States to voice their objections to: the structure of the Tribunal (*e.g.*, the lack of an Office of Defense), the scope of its jurisdiction, the language of the Statute, its criminal procedure and evidence rules or the

Chodosh, *Neither Treaty Nor Custom: the Emergence of Declarative International Law* 26 TEX. INT'L L.J. 87, 89 (1991).

Military and Paramilitary Activities (*Nicar. v. U.S.*), I.C.J. 4 (June 27), established the proposition that treaties could be a source of customary international law. Accordingly, if the General Assembly were to establish the Tribunal by treaty and a generality of states explicitly consented to its establishment, the Tribunal would also be binding on non-signatory states as binding customary international law. *See contra* J.Y. Sanders, *Jurisdiction, Definition of Crimes and Triggering Mechanisms*, 25 DENV. J. INT'L L. & POL'Y 233 n.10 (1997) (quoting GRIGORY TUNKIN, *THEORY OF INTERNATIONAL LAW* 122-33 (1974) (international law is based on consent)).

31. *Report of the Secretary General*, at para. 19.

32. *Report of the Secretary General*, at para. 20. One wonders if the Secretary-General, in reference to *those states* meant the *states* or parties currently disputing the land in the former Yugoslavia or prominent and outspoken members of the United Nations (*e.g.*, China, Russia or the United States). *See* J.Y. Sanders, *supra* note 30, at n. 4.

See also Terry Atlas, *Atrocity Docket UN Has Done Little to Prosecute Villains in Bosnia*, CHI. TRIB., Feb. 13, 1994:

The U.S. ambassador to the UN, Madeleine Albright, is the most forceful advocate of the tribunal in the face of something less than unqualified international enthusiasm. . . [T]he British and French, in particular, have been cool toward pursuing war crime indictment of Bosnian Serb leaders that might complicate peace talks.

33. James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 643 (1993). U.N. Doc. S/25704 at 21, 32 I.L.M. 1159, 1168. The Tribunal's Appeals Chamber also mentioned this argument in defense of its jurisdiction.

34. Appeals Chamber, 32 I.L.M. 1993, para. 44.

Tribunal's sanction powers. Accordingly, the manner in which the Tribunal was established greatly diminishes the precedential value of this Tribunal as a representative consensus on the necessity and function of an international criminal court.

The second reason that the Security Council was used to create the Tribunal was the issue of time.³⁵ The Tribunal was created in less than seven months. The rules of criminal procedure were drafted in less than four months.³⁶ Gathering the unanimous support of the General Assembly undeniably would have taken far longer than achieving a consensus among the limited number of States serving in the Security Council.³⁷ The speed of the Tribunal's creation is reflected in the imprecise drafting of its Statute. For example, Article 1 states the Competence of the 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 provision of the present Statute." One scholar explained that Article 1 should have stated that the International Tribunal had the power "to try persons allegedly responsible for" or "accused of" serious violations rather than to "prosecute persons responsible" for them.³⁸

Prosecution is the function of the Prosecutor, not of the Tribunal; and persons are not *responsible* until that has been determined by trial and conviction. Moreover, it was obviously not intended that the serious violations of international humanitarian law were to have been committed in accordance with the provisions of the present Statute.³⁹

Such hastily constructed phrasing does not strengthen the legitimacy of this worthy endeavor.

35. *Secretary General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. SCOR., U.N. Doc. S/25704 at 20 (1993), reprinted in 32 I.L.M. 1159 (1993) [hereinafter *Secretary General's Report*].

36. William W. Horne, *The Real Trial of the Century*, AM. LAWYER, Sept., 1995, at 5.

37. *Secretary General's Report*, *supra* note 35.

38. Levie, *supra* note 21, at 7 n.28.

39. *Id.*

C. *Was the Tribunal Established by Law?*

The question of *how* the Tribunal was established is quite important when read in light of one of the most important humanitarian treaties to date, the International Convention on the Protection of Civil and Political Rights. Article 14(1) of this treaty provides that the accused is entitled to the right to be tried by a tribunal *established by law*.⁴⁰ Accordingly, if the Tribunal was established by powers beyond the authority of the Security Council (or beyond those currently belonging the United Nations), it would be disqualified from conforming with Article 14(1).

This objection was raised by the defense counsel for Duško Tadić⁴¹ (Defense), the first defendant to be tried by the Tribunal. The Trial Chamber dismissed the defense's objection to jurisdiction questioning the validity of the Tribunal's creation rather than as questioning the Tribunal's jurisdiction.⁴² The Defense then appealed to the Appeals Chamber, under Rule 72(B), which allows interlocutory appeals in the case of dismissal of an objection based on lack of jurisdiction.⁴³ The Appeals Chamber took the appeal.⁴⁴

The Appeals Chamber avoided the issue of whether the Tribunal was in conformity with Article 14(1) by stating that Article 14(1) of the International Convention on the Protection of Civil and Political Rights applied only to national courts. "This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting."⁴⁵ According to the Appeals Chamber, the rights of the accused are different under international law than under national law. Moreover, at least in this case, the Appeals Chamber is implying that the human rights accorded individuals are less protected under international law than under national law!

This construction of the nature of rights is greatly troubling. The Appeals Chamber's decision requires that rights stem from beneficent

40. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (*concluded* Dec. 9, 1966), art. 14(1).

41. The thirty-nine year old Duško Tadić is a former cafe owner, karate instructor, and policeman in the town of Kozarac, Bosnia. He is married and has two children. W. H. and Hillary Kessler, *Tadić Trial Primer*, AM. LAWYER, Sept., 1995, at 59.

42. Case No. IT-94-1-AR72, Prosecutor v. Duško Tadić in the Trial Chamber, para. 4. (Oct. 2, 1995) [hereinafter Trial Chamber].

43. Rules of Procedure and Evidence, Rule 72(B).

44. Appeals Chamber, *supra* note 34, at para. 6.

45. *See generally*, Appeals Chamber, para. 42.

grants of legislative and juridical authorities, rather than stemming from a person's entitlement as a human being. This dangerous precedent calls into question the nature of protection afforded by all international humanitarian conventions and treaties.⁴⁶ For this reason, the Appeals Chamber's decision warrants a more thorough investigation.

The parties before the Appeals Chamber submitted three potential interpretations of the phrase *established by law*. The first interpretation sounds akin to the Appeals Chamber's conclusion above that rights are created by law, presumably by a legislative body. The Defense argued that the legal establishment of a law requires the efforts of a legislature. Under this interpretation, both executive and judicial acts are not considered law

[E]stablished by law could mean established by a legislature. [The Defense] claims that the International Tribunal is the product of a *mere executive order* and not of a decision making process under democratic control, necessary to create a judicial organization in a democratic society. Therefore the [Defense] maintains that the International Tribunal [has] not been *established by law*.⁴⁷

The European Convention on Human Rights, as interpreted by both the European Commission on Human Rights and the European Court of Human Rights, reaches the same conclusion: *established by law* requires the efforts of a legislature.⁴⁸

46. See Universal Declaration of Human Rights, G.A. Res. 217A, 3 GAOR, Resolutions (A/810), at 71 (Dec. 10, 1948): "[T]he inherent dignity and. . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. . . ."; International Covenant on Economic, Social and Cultural Rights, Preamble, 993 U.N.T.S. 3 (Dec. 16, 1966): "[R]ights derive from the inherent dignity of the human person."; International Covenant of Civil and Political Rights, Preamble, 999 U.N.T.S. 171 (Dec. 19, 1966): "[R]ights derive from the inherent dignity of the human person."; American Convention on Human Rights, Preamble, 1144 U.N.T.S. 123 (*adopted* Nov. 22, 1969): "Recognizing that the essential rights of man are not drive from one's being a national of a certain state, but are based upon attributes of the human personality. . . ."

47. See *generally*, Appeals Chamber, para. 43.

48. *Id.* para. 43:

The case law applying the word *established by law* . . . bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (See *Zand v. Australia*, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, 80 (1979); *Piersak v. Belgium*, App. No. 8692/79, 476 Eur. H.R. (ser. B) at 12 (1981); *Crociani*,

Such a construction, however, undercuts the possibility that law can be created in a common law fashion.⁴⁹ According to this line of thought, customary law, including customary international law, would cease to be law. The crimes that the accused war criminals are being tried for, crimes, which are considered by most scholars as part of customary international law,⁵⁰ would cease to be international crimes. Obviously, the Appeals Chamber did not desire to bring about this counterproductive result.

Because of this danger, the Appeals Chamber refused to interpret the phrase *established by law* in this manner. The Appeals Chamber concluded that because no international legislature exists, which is formally empowered to enact law binding on international legal subjects, this interpretation of *established by law* is not applicable to the international sphere.⁵¹ Of course this interpretation begs the question: if no legislative body can enact binding international law, how could the Security Council create a Tribunal whose jurisdiction is binding on individual defendants.

A second possible interpretation of *established by law* refers to the "establishment of international courts by a body . . . [that] has a limited power to take [sic] binding decisions."⁵² This cryptic phrasing suggests a court is legally established, if enacted by a political body (such as the Security Council) that is endowed with the authority to make legally binding decisions on other branches of an organization.

This second interpretation differs from the first in its not requiring the actions of a legislature to enact law. Taking a domestic example, the decisions of the United States' Supreme Court are binding on the coordinate branches of the United States government; thus these decisions are considered legally established, even though they are "enacted" without a legislature.

The Defense argued that because the Security Council decisions are not necessarily binding on other coordinate branches of the United Nations, its decisions (such as the establishment of the Tribunal) are not *established by law*.⁵³ The Appeals Chamber responded that the Tribunal should be considered established by law if the Security Council acted according to its

Palmiotti, Tanassi and D'Ovidio v. Italy, App. Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined) 22 Eur. Comm'n H.R. Dec. & Rep. 147, 219 (1981)).

49. By *common law fashion*, I mean law that is built upon principles of justice and fairness found in precedential cases, rather than the law that is created by legislative enactment of statutory law.

50. See generally, Appeals Chamber, para. 98-127.

51. *Id.* at 43.

52. *Id.* at 44.

53. *Id.*

powers under the United Nations Charter.⁵⁴ Thus, if the Security Council were empowered under the United Nations Charter to make binding decisions on either the Secretary-General or the General Assembly on issues falling within its enumerated powers, its creation of the Tribunal would be, under this second interpretation, "established by law."

Under the United Nations Charter, the Security Council is empowered to make legally binding decisions on other organs of the United Nations.⁵⁵ However, its enumerated powers do not include jurisdiction over individuals,⁵⁶ nor can it create subsidiary organs with broader jurisdiction that it itself possesses. The Appeals Chamber correctly noted that Security Council is empowered conditionally to take action when a threat to the peace is involved.⁵⁷ However, the scope of the Security Council's authority to act is the issue at hand, not whether the Security Council can act at all. The Defense did not question the Security Council's ability to intervene in the conflicts in the former Yugoslavia, rather, it maintained that the Security Council's institution of a criminal tribunal was beyond the scope of its constitutional powers.

The third possible interpretation of the phrase *established by law* is that the establishment of the Tribunal "must be in accordance with the rule of law."⁵⁸ This interpretation refers to the standards and procedural safeguard common to all legal systems.⁵⁹ Among these standards are: "fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments."⁶⁰

54. *Id.*:

It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter.

55. United Nations Charter, art. 25. Of course, if the establishment of the Tribunal were binding on other branches, theoretically the General Assembly would have been bound to approve the Tribunal's funding and thus this would detract from the earlier argument that the General Assembly's voluntary support was evidence of the consent of its members.

56. The interests of individuals, especially those belonging to minority groups, are not always well represented by the General Assembly, which is composed of appointed representatives of nation states rather than elected officials.

57. *See generally*, Appeals Chamber, para. 29. *See also id.* para. 44:

"[W]e are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII [Article 41] in the light of its determination that there exists a threat to the peace."

58. Appeals Chamber, *supra* note 34, at para. 45.

59. *Id.*

60. *Id.*

In addition to finding that the Tribunal satisfied the second interpretation of *established by law*, the Appeals Chamber found that the Tribunal's establishment satisfied this third interpretation.⁶¹ The Security Council followed the appropriate procedures of the United Nations Charter in establishing the Tribunal.⁶² While the third interpretation is obviously necessary to establishing a legitimate Tribunal, this interpretation does not bear on the issue of whether the creation of the Tribunal was *ultra vires*.⁶³ The internal procedures of the Tribunal are of secondary importance compared to whether the existence of the Tribunal is legitimately supported by international law.

Because the creation of the Tribunal expands the jurisdiction of international organizations to try and punish individuals, such an expansion of powers potentially represents a dramatic change in current international law.⁶⁴ That is, even if the Security Council can create a Tribunal, it cannot enact new international law. Thus, the Tribunal was not legitimately established by existing international law and is most likely an *ultra vires* application of the Security Council's authority. Moreover, the precedent setting judgments of the Tribunal, which can be said to be creating new international humanitarian law, is an exercise of jurisdiction beyond the power of the organ which created the Tribunal, the Security Council.⁶⁵

In summary, Article 14(1) calls for any legitimate international court to be *established by law*. The Tribunal was not *established by law* in the sense of having been created by a legislative body. As for the second

61. *But see* Scharf, *supra* note 21 (criticizing the Tribunal's procedure for allowing double jeopardy, rotation between the trial level and appellate level, limiting the defendant's ability to cross-examine witnesses, and the partial involvement of the Security Council).

62. Appeals Chamber, *supra* note 34, at para. 47:

"[T]he 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'."

63. Both the Trial Chamber and the Appeals Chamber glossed over this distinction, citing the fact that a proposed amendment to change the wording of Article 14 to *pre-established by law* was successfully defeated. Trial Chamber, para. 34; Appeals Chamber, para. 45.

Yet the Defense's concern is not whether or not the Tribunal were pre-established by law, but rather whether it was created within the legitimate, (if not specifically enumerated), powers of the Security Council.

64. *See* R.J. Goldstone, *Submissions by the Prosecutor, an Application for Deferral by the Federal Republic of Germany in the Matter of Dusko Tadić Also Known by the Names Dusan 'Dule' Tadić* at para. 3 (noting that the Tribunal is the first attempt by the United Nations to enforce international humanitarian law).

65. *See infra* text accompanying note 80.

interpretation, although the Tribunal was established by an organ with binding authority over other branches of the United Nations, the Security Council's establishment of a tribunal with jurisdiction greater than the Security Council itself possesses does not satisfy Article 14(1). Although the Tribunal was *established by law* according to the third interpretation in the sense of having fair procedures, this alone is most likely not enough to satisfy Article 14(1). According to the most critical test of *established by law*, i.e., having been established by a body acting within its powers, the Tribunal was not *established by law*. Although the Security Council can bind other organs of the United Nations, it cannot bind them with regard to areas in which it lacks jurisdiction, and jurisdiction over individuals is not within the Security Council's enumerated or existing powers.

III. LIMITATIONS ON THE TRIBUNAL'S JURISDICTION

Even if we put aside the question of the legitimacy of the creation of the Tribunal, the question remains whether this Tribunal has the jurisdiction to try and punish individuals, even those accused of war crimes. In order for an international tribunal to legitimately obtain jurisdiction over individuals, two conditions must be satisfied. First, the tribunal must be established by law, that is, it must be created in accordance with the current conceptions and limitations of international law. As discussed above, this point is debatable. Second, such a tribunal must have jurisdiction to try individuals.

The question whether a court has jurisdiction over a criminal act may be divided into two parts: (1) whether the criminal law under which the criminal act falls authorizes a specific court to try the alleged offense and (2) whether the court has competence to try the accused for this criminal act. Taking the United States Supreme Court as an example, the United States Constitution explicitly grants the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party. . . ." ⁶⁶ Because the Constitution also is the foundation of the Supreme Court's competence, this same article provides the competence of the Supreme Court to try anyone accused of these cases. However, the Court's jurisdiction is not unlimited. For example, the Supreme Court would lack jurisdiction over a dispute involving a French Ambassador and an Australian consul, that took place in England, unless there existed some connection to the United States. The

66. U.S. CONSTITUTION, art. III, cl. 2.

legislative authority to proscribe conduct does not automatically confer judicial authority to try all instances of transgression.⁶⁷

A. *International Criminal Law and Competent Courts*

On the international scale, the source of an international criminal law determines which court systems will have legitimate jurisdiction over an international criminal offense. The two chief sources of international criminal law are treaty law and international customary law. When an international criminal law originates in a treaty, we should examine the treaty to determine the appropriate judicial body to administrate the legal consequences of violating the law. When the international criminal law originates in international custom, we should first look to international custom to determine the appropriate judicial body to administrate the legal consequences for violating the law.

Many national courts have the jurisdiction to try crimes committed in violation of international law.⁶⁸ Judicial bodies that may be empowered to adjudicate alleged violations of international criminal law include national or multinational courts.⁶⁹ Usually treaties obligate the courts of the contracting states to try those accused of violating the criminal offenses set out in the treaty.⁷⁰

67. See *Buchanan v. Rucker*, 9 East 192, 103 Eng. Rep. 546 (K.B. 1908)(A default judgment case, in which Lord Ellenborough inquired: "Can the Isle of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?").

68. See German Grundgesetz (Basic Law), art. 25 which incorporates rules of customary international law as part of German federal law. See also similar provisions incorporating customary international law as part of national law, and thus within the jurisdiction of national courts: art. 9 of the Austrian Constitution, art. 2 of the Greek Constitution, and art. 10 of the Italian Constitution.

For incorporation of treaty provisions into national law see the Netherlands Constitution, arts. 91(3), 94 (1983); art. 55 of French Constitution as decided by the Klaus Barbie Case (Cour de Cassation, 62 J.C.P. II, No. 20,107 (Criminal Chamber) (October 6, 1983) reprinted in 78 I.L.R. 125, 128-31(1988).

69. Prior to the creation of the International War Crimes Tribunal for the Former Yugoslavia, there have only been a multinational war crimes tribunals. See Trial Chamber, para. 6: "This is the first time that the international community has created a court with criminal jurisdiction." "The Nuremberg Tribunals--the closest analogy--was not in fact a body representing the international community as a whole, but was created by a special treaty of the victorious nations after World War II." Lieutenant Col. Robert T. Mounts, USAF (Retired), Douglass W. Cassel, Jr. & Jeffrey L. Bleich, *Panel II: War Crimes and Other Human Rights Abuses in the Former Yugoslavia*, 16 WHITTIER L. REV. 387, 412 n.44 (1995).

70. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 561 (1995).

The United Nations Secretary-General recently reaffirmed the criminality of numerous provisions of international humanitarian law. The Secretary-General also stated that violators of these international laws will be held individually responsible. "The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law."⁷¹ However, regardless of the illegality of these actions, this illegality alone does not confer universally the jurisdiction to try those accused of these violations of international humanitarian law.⁷² None of the provisions of treaties defining war crimes authorizes the International War Crimes Tribunal for the Former Yugoslavia to try alleged violations of these international crimes.

B. *Does the Tribunal have Legitimate Jurisdiction over Individuals?*

The question whether the Tribunal has legitimate jurisdiction over individuals accompanies the question relating to the establishment of the Tribunal.⁷³ Even if the Tribunal was *established by law*, as required by Article 14(1),⁷⁴ the scope of the Tribunal's jurisdiction would still be an issue. For this reason, this section investigates the sources and limits of the Tribunal's jurisdiction.

1. Sources of the Tribunal's Jurisdiction

The sources of Tribunal's jurisdiction differ from those of past war crimes tribunals the most famous of which is the Nürnberg Tribunal. The Nürnberg Tribunal perceived two grounds for its jurisdiction. First, under customary international law, a victor's assumption of jurisdiction, after an unconditional surrender of a defeated state, legitimately transfers the territorial jurisdiction normally exercised by the courts of the defeated state. Thus the unconditional surrender of the German Reich to the Allied Powers, endowed them with legitimate jurisdiction to try and punish individuals for war crimes as defined by German law.⁷⁵

71. *Report of the Secretary-General*, para. 39, 53.

72. Obviously a court or tribunal set up illegally, would not have the jurisdiction to try these offenses.

73. *See supra* text accompanying note 40.

74. *Id.*

75. This territorial jurisdiction is distinguishable from victor's justice jurisdiction, which the Nürnberg Tribunal explicitly rejected: the Allied Power's jurisdiction to try and punish those accused of war crimes and crimes against humanity was "not an arbitrary exercise of power on

Second, the Allied Powers, in creating a war crimes tribunal to try those accused of war crimes and crimes against humanity and punish those found responsible, did “together what any one of them might have done singly.”⁷⁶ Because the crimes of which the accused were charged were crimes associated with universal jurisdiction, any of the Allied Powers could have tried the accused in their own national courts, regardless of the situs of the offense or the nationalities of the offenders or the victims.

[T]he universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned. Piracy and slave trading are the prototypical offenses that any state can define and punish because pirates and slave traders have long been considered the enemies of all humanity.⁷⁷

Although the Nürnberg Tribunal stands as an example of an organization of states trying individuals for war crimes, the question remains whether an organization having no direct connection to the hostilities may apply universal jurisdiction in excess of its express jurisdictional limits.

The jurisdiction of the International Criminal Tribunal for the Former Yugoslavia does not rest on either of the grounds that supported the Nürnberg Tribunal. First, no clear victor in the conflict can be determined.⁷⁸ While victor’s justice has been highly criticized, few victors have ever been tried for their war crimes.⁷⁹ Second, the accused are being

the part of the victorious Nations.” *International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), reprinted in 41 AM. J. INT’L L. 172, 216 (1947).*

76. *Id.* at 216.

77. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1995). See *Filartiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (holding pirates as *hostis humani generis*, an enemy of all mankind).

78. “[H]ow do you convene a war-crimes trial when the accused have won the war--or have not been defeated and run to ground?”, *No Road to Nuremberg from Dayton*, CHI. TRIB. Nov. 12, 1995, at 12, WL 6267217 (comparing the Tribunal to that of the Nürnberg trials).

79. Although the fire bombing of Dresden, the nuclear bombing of Hiroshima and Nagasaki, and the atrocities committed in Vietnam come readily to mind, no soldier or commander has been brought to justice for these intentional losses to civilian life. See National Public Radio, *Four Hours in My Lai: Book About the Massacre*, Weekend Edition, (March 14, 1992):

. . . 400 Vietnamese civilians--unarmed old men, women and young children--were murdered by US soldiers, . . . who destroyed the hamlet of My Lai. Only four participants were ever brought to trial and only one, Lieutenant William Calley, who received a life sentence, ever served time for the killings. Mr. Calley spent several months under house arrest before being paroled.

tried by non-participants in the conflict. If the Tribunal's jurisdictional grounds are not those of the Nürnberg Tribunal's, where, then, can they be found?

The Security Council functions as the limited executive branch of the United Nations, possessing neither legislative nor judicial functions. Thus, the Security Council can neither create new international law nor make binding interpretations of existing international law.

It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to *legislate* that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.⁸⁰

For this reason, in his report the Secretary-General stated that the international law applied must be "beyond any doubt part of customary [international] law so that the problem of adherence of some but not all States to specific conventions does not arise."⁸¹ It would be absurd for the Secretary-General to require that the substantive law (i.e. what actions constitute war crimes) applied by the Tribunal be part of established customary international law, while allowing the procedural law (i.e. the scope of the jurisdiction of the Tribunal) applied by the Tribunal to exceed existing customary international law.

It is problematic that United Nations Charter does not contain a provision giving any branch of the United Nations jurisdiction or authority to try or punish individuals.⁸² The United Nations does not have the authority to try or imprison individuals, even those who have violated international law. Moreover, the Security Council's ability to punish

80. *Secretary-General's Report*, para. 29.

81. *Secretary-General's Report*, para. 33. Interestingly, such a construction of the subject-matter jurisdiction of the Tribunal assumes that a state's consent is necessary to legitimizing the process of the court.

82. Although the elimination of discrimination based upon race, sex, language and religion are listed as purposes of the United Nations, (United Nations Charter, arts. 1(3) and 55(c)), the framers of the Charter contemplated that the promotion and protection of these purposes would be by member-states rather than by the intervention of the United Nations (arts. 2(2) and 2(7)). Of course, the final sentence of Article 2(7) concludes that this article will not prejudice the application of enforcement measures under Chapter VII, the very chapter used by the Security Council to create the Tribunal. However, it is unlikely that Chapter VII was envisaged as providing near limitless power upon this highly unrepresentative organ.

individuals for international crimes is not among its enumerated powers listed in the United Nations Charter. In addition, no international convention, agreement or treaty that codifies international humanitarian law grants to the United Nations the power to adjudicate these criminal cases.⁸³ Instead, these documents generally state that the signatory states will have the jurisdiction to try these cases, often regardless of where the violation occurs.⁸⁴

2. Limits of the Tribunal's Jurisdiction

Undeniably, the Tribunal's jurisdiction is limited by the Security Council's jurisdictional limitations.⁸⁵ No political body can delegate more jurisdiction than it itself possesses. Thus, the Tribunal's jurisdiction cannot exceed that of the Security Council's. The Trial Chamber noted this fact

83. For instance, the pertinent articles of *The Convention of the Prevention and Punishment of the Crime of Genocide*, provide an example of the understanding that national tribunals are the appropriate tribunals to try those accused of the odious crime of genocide:

Article V: The Contracting Parties undertake to enact, in accordance with the respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such *international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.*

G.A. Res. 260(III) A (Dec. 9, 1948) (emphasis added). It was generally accepted that an international criminal tribunal could not be created without first obtaining consent from contracting parties to confer jurisdiction on the tribunal. *Report of the 1953 Committee on International Criminal Jurisdiction*, General Assembly, 9th Sess., Supp. No. 12 (A/2645) at para. 50 (1954) cited in BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE--A DOCUMENTARY HISTORY AND ANALYSIS 439 (1980).

84. See for example article IV of *The International Convention on the Suppression and Punishment of the Crime of Apartheid*, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973) (obligating parties to adopt legislation to try offenders of this law regardless where the crime occurs). *But cf.* articles 5 and 8 of *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Annex to G.A. Res. 3946 (Dec. 17, 1984) (limiting a state's national jurisdiction over crime of torture and other degrading treatment to territorial jurisdiction (when the offense occurred in the prosecuting state's territory), nationality jurisdiction (when the alleged offender is a national of the prosecuting state), and passive personality jurisdiction (when the victim is a national of the prosecuting state)).

85. *See generally*, Appeals Chamber, para. 28.

when answering the Defenses' contention that the Tribunal was an *ultra vires* action of the Security Council.

Support for the view that the Security Council cannot act arbitrarily . . . is found in the nature of the Charter as a treaty delegating certain powers to the United Nations. In fact, such a limitation is almost a corollary of the principle that the organs of the United Nations must act in accordance with the powers delegated them.⁸⁶

Moreover, because the Tribunal is not empowered to create new international law, the Tribunal is limited by the historical limits of the jurisdiction of the Security Council. The Appeals Chamber conceded that:

the Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. . . . Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization.⁸⁷

The limitations on the Security Council's authority are stated in Chapters VI, VII, VIII, and XII of the United Nations' Charter.⁸⁸ The most important of these chapters is Chapter VII, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." Under Chapter VII, the Security Council is authorized to interrupt economic relations,⁸⁹ halt transnational communication,⁹⁰ cease diplomatic relations,⁹¹

86. See generally, Trial Chamber, para. 15.

87. Appeals Chamber, para. 28.

88. U.N. Charter, art. 24(2): "The specific powers appointed to the Security Council for the discharge of these duties are laid down in chapters VI, VII, VIII, and XII." It is important to note that some scholars maintain that these *specific powers* are not limitations, but examples of powers. According to this argument the Security Council has power limited only by the general purposes of the United Nations (Chapter I). However, it seems unlikely that the drafters of the document would have enabled the least representative branch of the United Nations with such unchecked control. Furthermore, it is unlikely that if such power existed, it would have gone unused as it has--nearly 50 years. This is even more unlikely when taking into account the Security Council's silence in the face of the atrocities committed in Cambodia, under the Pol Pot regime. See also Trial Chamber, para. 7.

89. U.N. Charter art. 41.

90. U.N. Charter art. 41.

91. U.N. Charter art. 41.

enforce economic sanctions,⁹² and initiate armed invasion.⁹³ None of these provisional measures taken by the Security Council may prejudice "the rights, claims, or position of the parties concerned."⁹⁴

None of these explicit powers grants the Security Council jurisdiction over individuals, nor does any other provision of the United Nations Charter, nor has the Security Council ever asserted such powers in the past. For these reasons, we may conclude that, historically, the Security Council has not had jurisdiction over individuals.

Despite the United Nations' lack of authority to try individuals, national courts are often empowered to apply international law in their domestic role.⁹⁵ For instance, both the Constitution and the Criminal Code of the Socialist Federal Republic of Yugoslavia of 1990, incorporate both international customary and treaty law into national law.⁹⁶ Thus, it would be a completely legitimate exercise of jurisdiction for a national court established by the newly independent states of the former Yugoslavia to try individuals accused of violating international law. Because the existence of alternate forums in which to try those accused of violating international humanitarian law, there is little need to bend out of shape the rules of existing international law to cover the creation of an international tribunal. The prosecution for the Tribunal has argued that it is odd that the community of nations could each try a violator of international humanitarian law individually, but not collectively under the auspices of the United Nations.⁹⁷ However, odd it may be, this is the current state of international law.

92. U.N. Charter art. 42.

93. U.N. Charter art. 42.

94. U.N. Charter art. 40. The cryptic phrasing of Article 40 leaves unexplained how the Security Council may launch an armed invasion into a State without prejudice to its rights or claims.

95. Appeals Chamber, 32 I.L.J. 1993, para. 132.

96. *Id.*; See also Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.

97. See Appeals Chamber, para. 135. Compare this argument to the justification of the Nürnberg Tribunal, see *supra* text accompanying note 75. The jurisdictional powers of the Nürnberg Tribunal and the International War Crimes Tribunal for the Former Yugoslavia may be distinguished by the foundations upon which the tribunals' jurisdiction rests. The jurisdiction of the Nürnberg Tribunal rested upon three foundations of its jurisdiction: territorial jurisdiction of the German Reich, the customary international law of victors' justice having secured Germany's unconditional surrender and the universal jurisdiction to try those accused of violating international humanitarian law. In contrast, the jurisdiction of the International War Crimes Tribunal for the Former Yugoslavia rests solely upon this final foundation: universal jurisdiction to try those accused of violating international humanitarian law. Moreover, the International War Crimes Tribunal for the Former Yugoslavia's jurisdiction over individuals is highly questionable.

IV. THE TRIBUNAL'S ABILITY TO QUESTION ITS JURISDICTION

Given the arguments of the preceding sections, the jurisdiction of the Tribunal over individuals is highly questionable. However, without standing to question the jurisdiction of the Tribunal or an appropriate forum in which to question the Tribunal's jurisdiction the preceding sections would be doomed to realm of academic musings. Part III argues that even though the Tribunal does not have the jurisdiction to try and punish individuals, it does have the jurisdiction to decide the legal scope of its jurisdiction.

The word *jurisdiction* in regard to a judicial body is capable of several meanings.⁹⁸ The first interpretation is the *power to decide whether one has the authority to decide the matter* before the court. A court's ability to decide its own jurisdiction fits within this interpretation. The second interpretation is the *power to decide the matter* under the law. A court's abilities to adjudicate a dispute and to decide a criminal action are examples of this second interpretation. The third interpretation, often referred to as *subject-matter jurisdiction*, is the *power to decide what law applies* to the matter before the court. A court's ability to rule on which laws govern a given situation illustrates this third interpretation. While the first two parts of this paper addressed the Tribunal's jurisdictional power over individuals, the second interpretation of *jurisdiction*, Part III examines the first interpretation of *jurisdiction*. Part III addresses whether the Tribunal can

98. Jurisdiction is capable of several meanings, each dealing with the relation of authority of different branches of a political organization and law. *Legislative jurisdiction* is the authority to create law applicable to specific actors, events or things. *Adjudicatory jurisdiction* is the authority to subject actors or things to the processes of judicial or administrative tribunals. *Enforcement jurisdiction* is the authority to compel specific actors to comply with its laws and to redress noncompliance. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786 (1988).

In regards to legislative jurisdiction, five types of criminal jurisdiction exist. See Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction Over International Crimes*, 87 COLUM. L. REV. 1515, 1519 (1987):

International law recognizes five types of criminal jurisdiction: (1) territorial -- jurisdiction based on the location where the alleged crime was committed, and including *objective* territorial jurisdiction, which allows countries to reach acts committed outside territorial limits but intended to produce, and producing, detrimental effects within a nation; (2) nationality -- jurisdiction based on the nationality of the offender; (3) protective -- jurisdiction based on the protection of the interests and the integrity of the nation; (4) passive personality -- jurisdiction based on the nationality of the victim; and (5) universality -- jurisdiction for certain crimes where custody of the offender is sufficient.

See also Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 787-88 (1988).

rule on its own jurisdiction, or whether such an investigation would either be barred by the limits of the Tribunal's judicial review powers or be barred as a non-justiciable political question.

A. The Tribunal's Ability to Decide Whether it Can Question its Own Jurisdiction

The first defendant to be brought before the Tribunal is Duško Tadić. In accordance with Rule 73(A)(I),⁹⁹ Tadić's defense questioned the legitimacy of the Tribunal's jurisdiction, presenting the Tribunal with the first opportunity to examine this controversial issue. The Trial Chamber held that the Tribunal was not empowered to question the legitimacy of its creation.¹⁰⁰ The Trial Chamber declined to entertain the question of its own jurisdiction for several reasons.

[I]t is not for this Trial Chamber to judge the reasonableness of the acts of the Security Council. . . .¹⁰¹

[E]ven if there be such limits [on the powers of the Security Council], that is not to say that any judicial body, let alone this International Tribunal, can exercise powers of judicial review to determine whether . . . those limits have been exceeded.¹⁰²

The Trial Chamber considered such challenges to its jurisdiction and the question of the legitimacy of the Security Council's action in creating the Tribunal as being non-justiciable, because either the Tribunal lacked the power of judicial review or that questioning the actions of the Security Council (including the establishment of the Tribunal) involved a political question.

With regard to lacking power of judicial review, the Trial Chamber found persuasive precedent in the rulings of the International Court of Justice (I.C.J.) and the Administrative Tribunal that these courts lacked judicial review powers over the decisions of other organs of the United Nations. In the *Namibia Advisory Opinion*, the I.C.J. held that "the Court

99. Rules of Evidence and Procedure, Rule 75 (A) (I).

100. *See generally*, Trial Chamber, para. 8.

101. *Id.* at para. 16.

102. *Id.* at para. 17.

does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organ concerned.”¹⁰³

With regard to the Security Council’s actions being a political question, and therefore non-justiciable, the Tribunal concluded: “The factual and political nature of an Article 39 determination by the Security Council makes it inherently inappropriate for any review by this Trial Chamber.”¹⁰⁴ Note that the Trial Chamber strictly interpreted its own jurisdiction as described in Article 1 of its Statute as being precisely and narrowly defined, stating the “full extent of the competence of the International Tribunal.”¹⁰⁵ Contrariwise, the Trial Chamber rendered a liberal interpretation of the Security Council’s jurisdiction, reading the enumerated economic and political measures accorded placed under Security Council jurisdiction by Article 41 as *not exhaustive*.¹⁰⁶

The Defense appealed the ruling of the Trial Chamber to the Appeals Chamber. The Appeals Chamber rephrased this Prosecutor’s arguments against the Tribunal’s ability to question the legitimacy of its creation:

This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a ‘political question’ and, as such, ‘non-justiciable’, regardless of whether or not it falls within its jurisdiction.¹⁰⁷

Although the International Tribunal was not established to “scrutinize the actions of organs of the United Nations,”¹⁰⁸ the Appeals Chamber found it had jurisdiction to examine the legitimacy of its jurisdiction as established by the Security Council.¹⁰⁹ The Appeals Chamber found the power to decide its own jurisdiction in the residual power of its judicial function. “[J]urisdiction cannot be determined exclusively by reference to or inference from the intention of the Security Council thus totally ignoring any residual powers which may derive from the requirements of the ‘judicial function’ itself.”¹¹⁰

103. *Id.* at para. 11.

104. *Id.* at para. 24.

105. *See generally*, Trial Chamber, para. 8.

106. *Id.* at para. 28.

107. 32 I.C.J. 1993, para. 13.

108. *Id.* at para. 20.

109. *Id.* at para. 21.

110. *Id.* at para. 14.

In deciding this issue, the Appeals Chamber distinguished two types of adjudicatory jurisdiction, each referred to by more than one name: *original*, *primary* or *substantive* jurisdiction refers to the jurisdiction explicitly conferred by statute;¹¹¹ *incidental* or *inherent* jurisdiction refers to the jurisdiction that derives from the exercise of the judicial function.¹¹² Among the inherent jurisdictional powers of a court is *Kompetenz-Kompetenz* in German or *la compétence de la compétence* in French, i.e. the power of a court to determine its own jurisdiction.¹¹³

The Appeals Chamber reversed the Trial Chamber's decision on its ability to investigate the legitimacy of its creation, holding that the Tribunal did have the authority to interpret the Charter of the United Nations and thus investigate the legitimacy of the Security Council's actions in creating the Tribunal.

The Appeals Chamber does not consider that the International Tribunal is barred from examination of the Defense's jurisdictional plea by the so-called 'political' or 'non-justiciable' nature of the issues it raises.¹¹⁴

[I]t has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.¹¹⁵

According to this ruling, the Tribunal may investigate the legitimacy of its creation by the Security Council. This important decision allows the Tribunal to rectify the situation in which it now finds itself, namely, that despite the best of intentions, the legitimacy of the establishment of the Tribunal is in peril.

111. *Id.* at para. 20.

112. *Id.*

113. 32 I.C.J. 1993, para. 18.

114. *Id.* at 25.

115. Appeals Chamber, para. 24 quoting Certain Expenses of the United Nations, 1962 I.C.J. Reports 151, at 155 (Advisory Opinion of July 20, 1962).

B. *Establishing a Legitimate International Criminal Court, With Jurisdiction Over War Crimes*

Two courses of action could be taken to institute a International Criminal Court, whose legitimacy would be beyond question. First, the General Assembly could act. The General Assembly is the only branch of the United Nations capable of amending its Charter or expanding the powers vested in the Organization.¹¹⁶ Although Article 10 grants the power to amend the Charter to the General Assembly, this article also incorporates Article 12, which limits the General Assembly's ability to interfere in any action of the Security Council, other than by the Security Council's request.¹¹⁷ The limits imposed by Article 12 are themselves limited to only those functions of the Security Council "assigned to [the Security Council] in the present Charter."¹¹⁸

Thus the question arises, if the Security Council is exercising powers beyond those assigned by the Charter, is the General Assembly limited by Article 12? It seems unlikely that this question will reach the International Court of Justice, for unless there is overwhelming pressure to have the Statute of the Tribunal ratified as a treaty, the General Assembly will not press the matter. However, if broad support for ratification were to arise, the Security Council would be unlikely to impede the ratification of the Statute of the Tribunal as a treaty. Thus, there being no procedural obstacles, the General Assembly should proceed to ratify the statute as a treaty in order to demonstrate overwhelming support for the Tribunal, or by its inaction the General Assembly could acknowledge that the Security Council has the ability to create new international law. Ratification, which would greatly enhance the Tribunal's legitimacy, would also provide a viable precedent for the eventual establishment of a international criminal court.

V. CONCLUSION

In Part I we saw that the legitimacy of the creation of the Tribunal is highly questionable. First, the Tribunal was not established by a representative body of the international community. Second, the manner in which the Tribunal was established neither affords the international community of States the opportunity to consent to the establishment of the Tribunal nor enables them to object to its establishment. Third, the

116. U.N. Charter, art. 10.

117. *See id.*, at art 12.

118. U.N. Charter, art. 12.

Tribunal was hastily established. The resultant mistakes from this haste detract from the legitimacy of the Tribunal.

In Part II we saw that Tribunal's jurisdiction is limited to that of the Security Council's. First, nowhere in the United Nations Charter is the Security Council granted jurisdiction over individuals. Second, historically the Security Council has not had jurisdiction over individuals. Third, the Security Council is not empowered to create new international law. For these reasons, the Security Council cannot create a Tribunal with legitimate jurisdiction over individuals.

In Part III we examined the Tribunal's ability to question its own jurisdiction. Because all courts have *Kompetenz-Kompetenz*, the Tribunal does have the power to investigate the limits of its jurisdiction. The Appeals Chamber concluded that it was not barred from examining its own creation by the Security Council nor was the legitimacy of its creation a non-justiciable political question. Accordingly, based on the reasoning of Parts I and II, the Appeals Chamber should have concluded that it had no jurisdiction over individuals, even those accused of violating international humanitarian law.

The Appeals Chamber overcome with the immensity of the atrocities and its desire to prevent their continuance, glossed over the technical requirements of jurisdiction of the Tribunal.

[T]o the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. . . . No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.¹¹⁹

Such conclusive language without the support of reasoned legal analysis fails to endow the Tribunal with unassailable legitimacy.¹²⁰

119. Appeals Chamber, 32 I.C.J. 1993, para. 129.

120. On November 21, 1995, the leaders of the former Yugoslavian republics signed a peace agreement in Dayton. The peace agreement carefully avoids using the word *consent* in reference to the jurisdiction of the Tribunal. For the sake of consistency, those who believe that the Tribunal was established within the legitimate powers of the Security Council, the consent of the governments whose citizens are on trial is irrelevant. Thus, the Dayton peace agreement states that the governments must "cooperate with. . . the International Tribunal for the Former Yugoslavia." Proximity Peace Agreement at Wright-Patterson Air Force Base, Dayton, Ohio (November 1- 21, 1995), Chapter 3, art. XIII(4).

Note that by cooperating with the Tribunal, the government have only agreed to cooperate with its adjudicatory jurisdiction, i.e., the findings and holdings of the Tribunal. The

The creation of an international criminal court is very appealing and a most worthy endeavor to pursue. The Trial Chamber has suggested that the Tribunal "represents an important step towards the establishment of a permanent international criminal tribunal."¹²¹ To provide posterity with the precedent of a legitimate international criminal tribunal, the creation of the International War Crimes Tribunal for the Former Yugoslavia should be thoroughly scrutinized. An international criminal court should be established, but established by the most representative body of States in order to ensure that all States have a voice in the creation of a court that can try and punish their citizens. This paper addressed problems in the creation and jurisdiction of the International Criminal Tribunal for the Former Yugoslavia. This Tribunal was not created in complete conformity with the rules and limitations of existing international law. It is my hope that bringing these problems into clearer focus, will enable the world community to overcome the legal hurdles obstructing the establishment of a fully legitimate international criminal court.

enforcement jurisdiction of whatever body may be charged with "arresting" alleged war criminals is not mentioned in the peace agreement. However, the final words of article XIII(4) add that the governments will cooperate with "any other organization authorized by the U.N. Security Council with a mandate concerning human rights or humanitarian law." Presumably the governments have committed to the implicit understanding that they will cooperate with other organizations legitimately authorized (i.e., within its powers) by the Security Council.

121. *See generally*, Trial Chamber, para. 6.