UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-99-37-PT

Date: 6 May 2003

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Richard May, Presiding**
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: **Mr. Hans Holthuis**

Decision: **6 May 2003**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
DRAGOLJUB OJDANIĆ
NIKOLA ŠAINOVIĆ

DECISION ON MOTION CHALLENGING JURISDICTION

The Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Geoffrey Nice

Counsel for the Accused:

Mr. John Livingston, for Milan Milutinović
Mr. Tomislav Višnjić and Mr. Peter Robinson, for Dragoljub Ojdanić
Mr. Toma Fila and Mr. Zoran Jovanović, for Nikola Šainović

I. INTRODUCTION

1. The procedural background to this matter is as follows. On 29 November, the Defence of Dragoljub Ojdanić ("Defence") filed a "General Dragoljub Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction/Kosovo" ("Defence Motion"). On 13 December 2002, the Prosecution filed a "Prosecution's Response to General Dragoljub Ojdanić Preliminary Motion to Dismiss for Lack of Jurisdicition: Kosovo" ("Prosecution Response"). On 6 January 2003, the Defence filed a "Reply Brief: Preliminary Motion to Dismiss for Lack of Jurisdiction: Kosovo" ("Defence Reply Brief"). On 9 January 2003, the Prosecution filed a "Prosecution's Notification in relation to Ojdanić's Reply Briefs to his Preliminary Motions to Dismiss for Lack of Jurisdiction: Kosovo and Joint Criminal Enterprise" ("Prosecution Notification") observing that both Defence Reply Briefs have been filed out of time. On 16 January 2003, the Defence filed a "General Ojdanić Motion for Leave for Late Filing of the Reply Briefs" ("Defence Leave Request").

2. In its application, the Defence argues that the Tribunal does not have jurisdiction over crimes committed in the territory of Kosovo, a constituent part of the Federal Republic of Yugoslavia ("FRY"). The Defence advances two reasons for its submission:

(i) It says that at the time of the adoption of the Statute of the International Tribunal in 1993, and at the time of the events charged in the Third Amended Indictment in 1999, the FRY was not a member of the United Nations.[1] Consequently, it is argued, in the constitutional framework of the Charter of the United Nations, the Organisation - at large - and the Security Council - in particular - lacked the power to impose Chapter VII measures on a non-member State, namely the FRY;[2] and

(ii) The doctrine of "universal jurisdiction" is not part of customary international law[3] and, in any event, in contradistinction to the applicability of such jurisdiction by a State, "universal jurisdiction" cannot justify the jurisdiction of an international court.[4]

3. In its Response, the Prosecution submits that the Defence Motion should be dismissed and requests that the relief sought be denied for the following reasons:

(i) The Prosecution points out that the Tribunal's territorial and personal jurisdiction is set forth in Articles 6 and 8 of the Tribunal's Statute, the scope and nature of which has already been

[1] Defence Motion, para. 30.
[2] *Ibid*, para. 25.
[3] *Ibid*, para. 32.
[4] *Ibid*, para. 33.

conclusively decided by the Appeals Chamber in *Tadić*[5] and, therefore, notions of statehood, United Nations membership and citizenship are irrelevant;[6]

(ii) The Prosecution alternatively notes that on 27 April 1992, the two remaining Socialist Federal Republic of Yugoslavia ("SFRY") republics, Serbia and Montenegro, declared that they were the legal successor to the SFRY and hence that the FRY's membership of the United Nations was a continuation of the SFRY's membership;[7]

(iii) The Prosecution further argues that the Security Council itself has issued a number of resolutions under Chapter VII of the United Nations Charter in response to the situation in Kosovo, several of which make express reference to the work of the Tribunal with regard to the FRY; that Kosovo has, since June 1999, been governed under a United Nations interim administration established under a Chapter VII resolution,[8] thus demonstrating the scope of the Security Council's Chapter VII powers;[9] and

(iv) The Prosecution also submits that the ability of the Security Council to respond expeditiously and effectively to Chapter VII threats is dependent upon its having universal – or as near-universal as possible – reach and cannot be dependent upon conflicting claims of statehood or United Nations membership of newly created States or entities.[10]

[5] *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 Oct. 1995 ("*Tadić Jurisdiction Decision*"); Prosecution Response, para. 5.
[6] Prosecution Response, para. 4.
[7] *Ibid*, para. 11.
[8] UN SC Res. 1244, 10 June 1999, UN doc. S/Res/1244 (1999).
[9] Prosecution Response, para.15.
[10] *Ibid*, para. 18.

II. DISCUSSION

4. In dealing with the Motion, it is necessary to have a clear understanding of certain events and decisions in the period between 1992 and 2000. Accordingly, the following background material is set out.

A. Background

1. The Break-up of the Former SFRY

5. Prior to its fragmentation, the SFRY consisted of six republics: Serbia, Croatia, Bosnia-Herzegovina, Macedonia, Slovenia, and Montenegro. On 25 June 1991, Croatia and Slovenia both declared independence, followed by the former Yugoslav Republic of Macedonia on 17 September 1991, and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Croatia, Slovenia and Bosnia-Herzegovina were admitted as members of the United Nations.[11] The "Former Yugoslav Republic of Macedonia" was admitted to membership in the United Nations on 8 April 1993.[12] Thus, at the time of the adoption of the Statute of the International Tribunal on 25 May 1993,[13] all the republics that formerly constituted the SFRY, with the exception of Serbia and Montenegro, had been admitted as members of the United Nations.

6. The FRY (Serbia and Montenegro) came into being on 27 April 1992. On that date, a joint session of the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro proclaimed a new constitution of the "Federal Republic of Yugoslavia", and also adopted a Declaration.[14] The preamble of the Declaration reflects the common will of the citizens of Serbia and Montenegro "to stay in the common state of Yugoslavia", and also provides:

> "The Federal Republic of Yugoslavia, continuing the state, international, legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.
> ...
> Remaining bound by all obligations to international organisations and institutions whose member it is, the Federal Republic of Yugoslavia shall not obstruct the newly formed states to join these organisations and institutions, particularly the United Nations and its specialised agencies."[15]

[11] Croatia, UN GA Res. 46/238, 22 May 1992, UN doc. A/Res/46/238 (1992); Slovenia, UN GA Res. 46/236, 22 May 1992, UN doc. A/Res/46/236 (1992); Bosnia-Herzegovina, UN GA Res. 46/237, 22 May 1992, UN doc. A/Res/46/237 (1992).
[12] Former Yugoslav Republic of Macedonia, UN GA Res. 47/225, 8 April 1993, UN doc. A/Res/47/255 (1993).
[13] UN SC Res. 827, 25 May 1993, UN doc. S/Res/827 (1993), ("Statute of the International Tribunal" or "Statute").
[14] Declaration of the Joint Session of the SFRY, Republic of Serbia and Republic of Montenegro Assemblies, 27 April 1992, UN doc. S/23877, Annex (1992) ("Declaration"), reprinted in M. Weller (ed.) *International Documents and Analysis* I (1999), p. 63.
[15] *Ibid*, paras 1, 3.

7. The Declaration was brought to the attention of the United Nations by a Note of the same date informing the Secretary-General of the following:

> "The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.
>
> Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organisations and participation in international treaties ratified or acceded to by Yugoslavia."[16]

2. United Nations Resolutions and Treaty Practice

8. Prior to the establishment of the Tribunal, the Security Council had adopted a number of resolutions under Chapter VII dealing with the conflict. The first was resolution 713 (1991) of 25 September 1991 in which the Security Council ordered a complete embargo on the supply of weapons and military equipment to Yugoslavia.[17] That resolution was followed by others.[18]

9. On 19 September 1992, the Security Council adopted resolution 777 (1992), which reads as follows:

> *"Considering* that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,
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> *Recalling* in particular resolution 757 (1992) which notes that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted",
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> 1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;
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> 2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."[19]

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[16] Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General, UN doc. A/46/915 (Annex I).
[17] UN doc. S/Res/713 (1991).
[18] *See,* e.g., UN SC Res. 721, 27 November 1991, UN doc. S/Res/721 (1991); UN SC Res. 724, 15 December 1991; UN SC Res. 727, 8 January 1992, UN doc. S/Res/727 (1992); UN SC Res. 740, 7 February 1992, UN doc. S/Res/740 (1992); UN SC Res. 743, 21 February 1992, UN doc. S/Res/743 (1992); UN SC Res. 749, 7 April 1992, UN doc. S/Res/749; and UN SC Res. 752, 15 May 1992, UN doc. S/Res/752 (1992).
[19] UN doc. S/Res/777 (1992).

10. On 22 September 1992, pursuant to the recommendation of the Security Council, the General Assembly adopted the following resolution 47/1:

> *"The General Assembly,*
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> *Having received* the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,
>
> 1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *decides* that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;
>
> 2. *Takes note* of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."[20]

11. In a letter dated 25 September 1992, Croatia and Bosnia-Herzegovina requested the Secretary-General to provide a legal opinion on the status of the FRY in the United Nations.[21] On 29 September 1992, the United Nations Under-Secretary-General for Legal Affairs addressed a letter to the Permanent Representatives of Croatia and Bosnia-Herzegovina, in which the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" was stated as follows:

> "While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.
>
> On the other hand, the resolution neither terminates nor suspends Yugoslav's *membership* in the Organisation. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign "Yugoslavia". Yugoslav missions at the United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assemblies bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1."[22]

[20] UN doc. A/Res/47/1 (1992).
[21] Letter dated 25 September 1992 from the Permanent Representatives of Bosnia and Herzegovina and Croatia to the UN addressed to the Secretary-General, UN doc. A/47/474 (1992).
[22] Letter dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, addressed to the Permanent Representative of the Bosnia and Herzegovina and Croatia to the United Nations, UN doc. A/47/485, Annex (1992), (emphasis in the original).

12. On 22 February 1993, the Security Council adopted resolution 808 (1993)[23] in which it determined that the events occurring within the territory of the former Yugoslavia constituted a threat to international peace and security.[24] By paragraph 1 of resolution 808 (1993), the Security Council decided "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[25] The Secretary-General noted in his report presented pursuant to paragraph 2 of resolution 808 (1993) that that resolution represented a further step taken by the Security Council in a series of resolutions[26] concerning serious violations of international humanitarian law occurring in the territory of the former Yugoslavia.[27] On 27 May 1993, the Security Council acting under Chapter VII of the United Nations Charter adopted the Statute of the International Tribunal by resolution 827 (1993).[28]

13. On 29 April 1993, the General Assembly, acting upon a recommendation of the Security Council,[29] adopted resolution 47/229 in which it "*decide[d]* that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council."[30] In a further resolution of 20 December 1993, the General Assembly reaffirmed its resolution 47/1 of 22 September 1992 and "*urge[d]* Member States and the Secretariat in fulfilling the spirit of that resolution, to end the de facto working status of Serbia and Montenegro."[31]

14. The "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties", described the position as follows:

> "A special difficulty arose upon the adoption of resolution 47/1 of 22 September 1992, by which the General Assembly considered that the Federal Republic of Yugoslavia (Serbia and Montenegro) could not continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and therefore decided that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it should not participate in the work of the General Assembly; the resolution was interpreted by the Secretariat to apply to subsidiary organs of the General Assembly, as well as conferences and meetings convened by it. Consequently, the Federal Republic of Yugoslavia (Serbia and Montenegro), was not invited to participate in conferences convened by the Assembly (e.g., the World Conference on Human Rights). However, this was without effect on the capacity of the

[23] UN doc. S/Res/808 (1993).
[24] *Ibid.*
[25] *Ibid.*
[26] UN SC Res. 764, 13 July 1992, UN doc. S/Res/764 (1992); UN SC Res. 771, 13 August 1992, UN doc. S/Res/771 (1992); UN SC Res. 780, 6 October 1992, UN doc. S/Res/780 (1992).
[27] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), UN doc. S/25704, paras 4-10.
[28] *Supra* n 13.
[29] UN SC Res. 821, 28 April 1993, UN doc. S/Res/821 (1993).
[30] UN doc. A/Res/47/229 (1993).
[31] UN doc. A/Res/48/88 (1993), para. 19.

> Federal Republic of Yugoslavia (Serbia and Montenegro) to participate in treaties, including those deposited with the Secretary-General."[32]

The errata subsequently published by the Secretariat modified the last sentence of this paragraph as follows:

> "However, this is without effect on the capacity of the Federal Republic of Yugoslavia (Serbia and Montenegro) to participate in treaties deposited with the Secretary-General subject to any decision taken by a competent organ representing the international community of States as a whole or by a competent treaty organ with regard to a particular treaty or convention."[33]

15. In Chapter XII of the Summary of Practice entitled "Succession to treaties",[34] the United Nations Office of Legal Affairs concluded that the legal effects of General Assembly resolution 47/1 were limited to the framework of the United Nations and the context of the Charter and not to affect the question of continuity or extinction of Yugoslavia. It stated:

> "In the absence of provisions which set specific conditions for succession or which otherwise restrict succession, the Secretary-General is guided by participation clauses of the treaties as well as by the general principles governing the participation of States (see Chap. V.). The independence of the new successor State, which then exercises its sovereignty on its territory, is of course without effect as concerns the treaty rights and obligations of the predecessor State as concerns its own (remaining) territory. Thus, after the separation of parts of the territory of the Union of Soviet Socialist Republics (which became independent States), the Union of Soviet Socialist Republics (as the Russian Federation) continued to exist as a predecessor State, and all its treaty rights and obligations continued in force in respect of its territory. The same applies to the Federal Republic of Yugoslavia (Serbia and Montenegro), which remains as the predecessor State upon separation of parts of the territory of the former Yugoslavia. General Assembly resolution 47/1 of 22 September 1992, to the effect that the Federal Republic of Yugoslavia could not automatically continue the membership of the former Yugoslavia in the United Nations (see para. 89 above), was adopted within the framework of the United Nations and the context of the Charter of the United Nations, and not as an indication that the Federal Republic of Yugoslavia was not to be considered a predecessor State."[35]

However, an errata was subsequently published in which the last two sentences related to the FRY were deleted.[36]

16. The position of the United Nations Secretariat is further reflected in the publication entitled "Multilateral Treaties Deposited with the Secretary-General; Status as at 31 December 2001" (2002), in the following terms:

> "General Assembly resolution 47/1 did not specifically address the question of the status of either the former Yugoslavia or of Yugoslavia with regard to multilateral treaties that were deposited with the Secretary-General. The Legal Counsel took the view in this regard that the Secretary-General was not in a position, as depositary, either to reject or to disregard the claim of Yugoslavia that it continued the legal personality of the former Yugoslavia, absent any decision to the contrary either by a competent organ of the United Nations directing him in the exercise of his depositary

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[32] Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN doc. ST/LEG/7/Rev. 1 (1999) ("Summary of Practice"), para. 89.
[33] Errata to the English Version of the Summary of Practice, UN doc. ST/LEG/7/Rev. 1 (1999) ("Errata").
[34] Summary of Practice, *supra* n 32.
[35] *Ibid*, para. 297 (footnotes omitted).
[36] Errata, *supra* n 33, para. 297.

> functions, or by a competent treaty organ created by a treaty, or by the contracting States to a treaty directing him in the exercise of his depositary functions with regard to that particular treaty, or by a competent organ representative of the international community of States as a whole on the general issue of continuity and discontinuity of statehood to which the claim of Yugoslavia gave rise.
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> Consistent with the claim of Yugoslavia to continue the international legal personality of the former Yugoslavia, the Secretary-General, as depositary, continued to list treaty actions that had been performed by the former Yugoslavia in status lists in the present publication, using for that purpose the short-form name "Yugoslavia", which was used at that time to refer to the former Yugoslavia. Between 27 April 1992 and 1 November 2000, Yugoslavia undertook numerous treaty actions with respect to treaties deposited with the Secretary-General. Consistent with the claim of Yugoslavia to continue the international legal personality of the former Yugoslavia, these treaty actions were also listed in status lists against the name "Yugoslavia". Accordingly, the Secretary-General, as depositary, did not make any differentiation in the present publication between treaty actions that were performed by the former Yugoslavia and those that were performed by Yugoslavia, both categories of treaty actions being listed against the name "Yugoslavia". The General Assembly admitted Yugoslavia to membership by its resolution A/RES/55/12 on 1 November 2000. At the same time, Yugoslavia renounced its claim to have continued the international legal personality of the former Yugoslavia.
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> Treaty actions undertaken by Yugoslavia are now listed in this publication against the designation "Yugoslavia."[37]

17. Thus, the Secretariat continued to list "Yugoslavia" as member of the United Nations after September 1992. "Yugoslavia" also maintained other attributes of membership in the Organisation including its flag, seat and nameplate in the General Assembly. The FRY was allowed to maintain the Yugoslav Permanent Mission to the United Nations and to circulate and receive documents. "Yugoslavia" continued to be listed in the annual "Scale of Assessments" approved by the General Assembly for the contributions of member States to the United Nations budget.[38]

18. In October 2000, changes in the FRY's leadership were followed by numerous changes on the international scene. Most significantly, the FRY abandoned its previous claim to continue the membership of the Socialist Federal Republic of Yugoslavia in the United Nations. On 27 October 2000, the newly elected President Koštunica addressed a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations.[39] In this letter, President Koštunica referred to Security Council resolution 777 (1992),[40] and requested admission of the FRY to membership in the United Nations "[I]n the wake of fundamental democratic changes that took

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[37] UN doc. ST/LEG/SER.E/20.

[38] On 23 December 1994, the General Assembly fixed a new rate of assessment for "Yugoslavia" of 0.11, 0.1025 and 0.10 per cent for the years 1995, 1996 and 1997 respectively. UN GA Res. 49/19B, 23 December 1994, UN doc. A/Res/49/19B (1994). By General Assembly resolution 52/15A, the rate of assessment of the FRY for the years 1998, 1999, and 2000 was determined to be 0.060, 0.034 and 0.026 per cent respectively. UN GA Res. 52/15A, 23 December 1997, UN doc. A/Res/52/15A (1997).

[39] Letter dated 27 October 2000 from the President of the Federal Republic of Yugoslavia to the Secretary-General, A/55/528 – S/2000/1043, Annex.

[40] Resolution 777 (1992) observes that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted" and suggests that the FRY should apply for membership in the United Nations. *Supra* para. 9, n 19.

place in the Federal Republic of Yugoslavia".[41] On 31 October 2000, the Security Council, "*having examined* the application of the Federal Republic of Yugoslavia for admission to the United Nations", recommended admission.[42] The following day, the General Assembly admitted the FRY to membership in the following terms:

> "*The General Assembly,*
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> *Having received* the recommendation of the Security Council of 31 October 2000 that the Federal Republic of Yugoslavia should be admitted to membership in the United Nations,
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> *Having considered* the application for membership of the Federal Republic of Yugoslavia,
>
> *Decides* to admit the Federal Republic of Yugoslavia to membership in the United Nations."[43]

19. The procedure for admission of the FRY in the United Nations appears to have followed the provision of the United Nations Charter for admission of new members.[44] Enclosed in the application for admission was a solemn declaration by which the Federal Republic of Yugoslavia accepts the obligations contained in the Charter of the United Nations and undertakes to fulfil them.[45] According to a 27 September 2002 updated List of member States published by the United Nations, "Yugoslavia" appears as a member State, the date of admission indicated is 1 November 2000. An explanatory note states:

> "The Socialist Federal Republic of Yugoslavia was an original member of the United Nations, the Charter having been signed on its behalf on 26 June 1945 and ratified 19 October 1945, until its dissolution following the establishment and subsequent admission as new members of Bosnia and Herzegovina, the Republic of Croatia, the Republic of Slovenia, The former Yugoslav Republic of Macedonia, and the Federal Republic of Yugoslavia.
> ...
> The Federal Republic of Yugoslavia was admitted as a member of the United Nations by General Assembly resolution A/RES/55/12 of 1 November 2000."[46]

20. Following admission, by a letter of the Legal Counsel of the United Nations of 8 December 2000, the FRY was invited to decide whether or not to assume rights and obligations of the former SFRY in international treaties:

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[41] *Supra* n 39.
[42] UN doc. S/Res/1326 (2000).
[43] UN GA Res. 55/12, 1 November 2000, UN doc. A/Res/55/12 (2000) (footnotes omitted).
[44] Article 4 of the United Nations Charter provides: "(1) Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgement of the Organisation, are able and willing to carry out these obligations; (2) The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."
[45] Declaration, A/55/528 – S/2000/1043, Enclosure.
[46] Available at http://www.un.org/Overview/growth.htm. A similar note is added for Bosnia-Herzegovina, Croatia, Slovenia and Macedonia and their respective dates of admission. In fact, the United Nations member State "Yugoslavia" had never been removed from the list of member States. Thus, during the year 2000 alone, two new members were admitted (Tuvalu and Yugoslavia), yet the total membership increased only by one, from 188 member States in 1999 to 189 member States in 2000.

> "It is the Legal Counsel's view that the Federal Republic of Yugoslavia should now undertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations of a successor State."

21. Finally, it may be worth noting that in a communication dated 4 February 2003, the Government of the Federal Republic of Yugoslavia informed the Secretary-General that :

> "... following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the Federal Republic of Yugoslavia on 4 February 2003, as previously adopted by the National Assembly of the Republic of Serbia on 27 January 2003 and by the Assembly of the Republic of Montenegro on 29 January 2003, the name of the State of the Federal Republic of Yugoslavia was changed to "Serbia and Montenegro."

Notwithstanding this change, the Chamber finds it more convenient for the purposes of this decision to use the name Federal Republic of Yugoslavia ("FRY").

3. Judgements of the International Court of Justice

(a) NATO Bombing Cases: *Legality of Use of Force*[47]

22. On 29 April 1999 the Federal Republic of Yugoslavia instituted proceedings before the International Court of Justice ("ICJ") against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America, accusing those States of bombing Yugoslav territory in violation of their obligation not to use force against another State. On the same day, the FRY submitted a request for the indication of provisional measures, asking the Court to order defendant States to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

23. Belgium argued, *inter alia*, that the Court's jurisdiction cannot be based on Article 36, paragraph 2, of the ICJ Statute, for, under this provision, only "States parties to the ... Statute" may subscribe to the optional clause for compulsory jurisdiction contained therein.[48] Referring to United Nations Security Council resolutions 757 (1992) of 30 May 1992[49] and 777 (1992) of 19 September 1992,[50] and to United Nations General Assembly resolutions 47/1 of 22 September 1992[51] and 48/88 of 20 December 1993,[52] Belgium contended that "the Federal Republic of Yugoslavia is not the continuator State of the former Socialist Federal Republic of Yugoslavia as

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[47] *Legality of Use of Force (Yugoslavia v. Belgium), (Yugoslavia v. Canada), (Yugoslavia v. France), (Yugoslavia v. Germany), (Yugoslavia v. Italy), (Yugoslavia v. Netherlands), (Yugoslavia v. Portugal), (Yugoslavia v. Spain), (Yugoslavia v. the United Kingdom), (Yugoslavia v. the United States of America).*

[48] Article 36, paragraph 2, of the ICJ Statute provides: "The states parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation ...."

[49] UN doc. S/Res/757 (1992).

[50] *Supra* n 19.

[51] *Supra* n 20.

[52] *Supra* n 31.

regards membership of the United Nations", and that, not having duly acceded to the Organisation, it is in consequence not a party to the Statute of the Court and cannot appear before the latter.

24. On the other hand, Yugoslavia, referring to the position of the Secretariat, as expressed in a letter dated 29 September 1992 from the Legal Counsel of the Organisation,[53] and to the latter's subsequent practice, contends, for its part, that General Assembly resolution 47/1 "neither terminate[d] nor suspend[ed] Yugoslavia's membership in the Organisation", and that the said resolution did not take away from Yugoslavia "its right to participate in the work of organs other than Assembly bodies".

25. The Court found that it had "no *prima facie* jurisdiction to entertain Yugoslavia's Application", on the basis of Article 36, paragraph 2 without, however, addressing the question of the Yugoslav membership in the United Nations.[54] By letter dated 8 February 2002, Yugoslavia, referring to "dramatic" and "ongoing" changes in Yugoslavia which it claimed have put the case "in a quite different perspective", as well as to the decision to be taken by the Court in another case involving Yugoslavia, requested "a stay of proceedings or ... an extension by twelve months of the time period for the submission of observations on the preliminary objections raised by ... [the respondent State]" in each case.[55] The Court granted the request and fixed 7 April 2003 as the new time limit.

(b) *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[56]

26. On 20 March 1993, the Government of Bosnia and Herzegovina instituted proceedings against the FRY in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide. By an Order of 8 April 1993, the Court indicated certain provisional measures following the request of the Applicant. Although the question of FRY membership of the United Nations was of considerable importance,[57] the Court refrained from deciding the issue and based its jurisdiction solely on Article 35, paragraph 2 of its

[53] *Supra* n 22.
[54] *Legality of Use of Force (Yugoslavia v. Belgium)*, (Provisional Measures, Order of 2 June 1999), (1999) *ICJ Reports* 124.
[55] *See* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-10_yugo_20020322.htm.
[56] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, (Bosnia and Herzegovina v. Yugoslavia)*, (Judgement of 11 July 1996) ["*Genocide Case* (Preliminary Objections)"], (1996) *ICJ Reports* 595.
[57] Article 35, paragraph 1 of the ICJ Statute provides that the Court "shall be open to the States parties to the present Statute." Article 93 of the United Nations Charter provides that all members of the United Nations are "*ipso facto* parties to the Statute of the International Court of Justice."

Statute[58] in combination with Article IX of the Genocide Convention.[59] With regard to the question of the FRY membership in the United Nations, the Court said:

> "*Whereas*, while the solution adopted [by the United Nations Legal Affairs Office] is not free from legal difficulties, the question whether or not Yugoslavia is a member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings."[60]

27. In its Judgement of 11 July 1996 on Preliminary Objections the Court dealt incidentally with the question of jurisdiction *ratione personae* although the parties did not raise the matter. Referring to the Declaration of 27 April 1992, The Court observed:

> "The intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary–General. The Court observes, furthermore, that it has not been contested that Yugoslavia was a party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, on 20 March 1993."[61]

28. On 24 April 2001, the FRY filed an application for revision of the Judgement delivered by the ICJ on 11 July 1996 in the *Genocide Case* (Preliminary Objections).[62] Yugoslavia based its application for revision of 24 April 2001 on Article 61 of the Statute of the Court.[63] In its application, the FRY contended that a revision of the Judgement of 11 July 1996 was necessary since it was clear that it had never continued the legal personality of the SFRY. The FRY submitted that at the time of the reading of the Judgement (1996), it was not a member of the United Nations, an Organisation it had joined on 1 November 2000. The FRY was, therefore, not a State party to the Statute of the Court, and was also not a State party to the Genocide Convention. Yugoslavia requested the Court to declare that "there [was] a new fact of such a character as to lay the case open to revision under Article 61 of the Statute of the Court."[64]

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[58] Article 35, paragraph 2 of the ICJ Statute provides: "The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

[59] Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide stipulates: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

[60] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro),* (Order of 8 April 1993) (1993) *ICJ Reports* 3 ("*Genocide Case* (Provisional Measures)"), p. 14.

[61] *Genocide Case* (Preliminary Objections), *supra* n 56, para. 17.

[62] *Ibid.*

[63] Article 61 of the ICJ Statute provides that: "An application for revision of a judgement may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence ...".

[64] *See* http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-05_ybh_20030127.htm.

29. The Court rendered its Judgement on the application for revision on 3 February 2003.[65] After recounting the background to the application, the Court noted that between the adoption of General Assembly resolution 47/1 of 22 September 1992 and the admission of the FRY to the United Nations on 1 November 2000, the legal position of the FRY remained complex.[66] With regard to the FRY membership in the United Nations, the Court stated, *inter alia*, the following:

> "... the difficulties which arose regarding the FRY's status between the adoption of that resolution and its admission to the United Nations on 1 November 2000 resulted from the fact that, although the FRY's claim to continue the international legal personality of the Former Yugoslavia was not "generally accepted" (see Security Council resolution 777 of 19 September 1992), the precise consequences of this situation were determined on a case-by-case basis (for example, non-participation in the work of the General Assembly and ECOSOC). Resolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute. Nor did it affect the position of the FRY in relation to the Genocide Convention."[67]

30. In the Court's view, the admission of the FRY in the United Nations on 1 November 2000

> "cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention."[68]

31. Ultimately, the FRY's application for revision was rejected because, in the view of the Court, the FRY was not relying on facts that existed in 1996, but rather was seeking to rely on the legal consequences of facts subsequent to its Judgement of 11 July 1996.[69]

B. Applicability of the *Tadić Jurisdiction Decision*[70]

32. In his Motion, Mr. Ojdanić contends that the Tribunal lacks jurisdiction because the alleged crimes were committed in Kosovo, part of the territory of the FRY, of which he is a national, and which was not a member of the United Nations either at the time the Tribunal was created or at the time of the alleged offences.[71] In essence, therefore, he contends that the Security Council lacked the power to give the Tribunal jurisdiction over offences committed in Kosovo since the FRY, of which Kosovo is a part, was not a member of the United Nations both at the time of the adoption of the Statute and at the time of the commission of the alleged offences.

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[65] Application for Revision of the Judgement of 11 July 1996 in the Case Concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections,* (Yugoslavia *v.* Bosnia and Herzegovina), Judgement of 3 February 2003, available at http://www.icj-cij.org/icjwww/idocket/iybh/iybhjudgment/iybh_ijudgment_20030203.PDF ("*Genocide Case* (Application for Revision)", 3 February 2003.
[66] *Ibid*, para. 33.
[67] *Ibid*, para. 70.
[68] *Ibid*, para. 71.
[69] *Ibid*, para. 69.
[70] *Tadić Jurisdiction Decision*, *supra* n 5.
[71] Defence Motion, para. 3.

33. He distinguishes his situation from that in *Tadić* in that the Appeals Chamber ruled in that case that:

> "The United Nations Security Council had the power to establish the Tribunal pursuant to Articles 39 and 41 of the United Nations Charter, and that the Tribunal had jurisdiction to prosecute *Tadić*, a Bosnian national, for offences committed in the territory of Bosnia and Herzegovina, a United Nations member."[72]

34. It is clear that Mr. Ojdanić appreciates the need to distinguish his Motion from that brought in *Tadić* since both touch upon the authority of the Security Council in establishing the Tribunal, and if his motion is essentially the same, the decision of the Appeals Chamber in *Tadić*, which was followed by this Chamber in *Milošević*,[73] is binding on the Chamber. [74]

35. In *Tadić*, the issue was, as it was in the Milošević decision, the authority of the Security Council to establish the Tribunal, it being contended that the Council's authority to establish a judicial body such as the Tribunal could not be derived from Chapter VII of the United Nations Charter. The Appeals Chamber dismissed the Motion holding that, although the power to establish a judicial body was not expressly provided for in Chapter VII of the Charter, the Council had wide discretionary powers[75] under Articles 39 and 41 of the Charter to adopt measures in the exercise of its responsibility for the maintenance of international peace and security;[76] one such was the establishment of an international criminal tribunal "as a measure contributing to the restoration and maintenance of peace in former Yugoslavia".[77] *Tadić* was therefore confined to the question of the authority of the Council to establish the Tribunal. It did not deal with the essential issue raised by this Motion, i.e. the authority of the Council to establish a Tribunal which would have jurisdiction in respect of a crime committed by a person in a country, of which he is a national, when that country was not a member of the United Nations either at the time of the adoption of the Statute or at the time of the commission of the alleged crime. In the Chamber's view, therefore, although the decision in *Tadić* is relevant to some of the jurisdictional issues raised in this Motion, it is distinguishable from this case.

36. The Chamber observes, however, that the decision in *Tadić* did not, as is contended in the Motion, proceed on the basis that the Security Council had the power to establish the Tribunal because the crimes were committed by Tadić, a Bosnian national, in Bosnia and Herzegovina, which was a member of the United Nations both at the time of the creation of the Tribunal and the

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[72] *Ibid.*
[73] *Prosecutor v. Slobodan Milošević*, Decision on Preliminary Motions, Case No. IT-99-37-PT, 8 Nov. 2001 ("Milošević decision").
[74] *Prosecutor v. Zlatko Aleksovski*, Judgement, Case No. IT-95-14/1-A, 24 Mars 2000, para. 113.
[75] *Tadić Jurisdiction Decision, supra* n 5, para. 31.
[76] *Ibid*, paras 37-38.
[77] *Ibid.*

commission of the alleged crimes. *Tadić* did not turn on the United Nations membership of Bosnia and Herzegovina. Its *ratio decidendi* was simply that the Security Council had the power, under Chapter VII of the United Nations Charter, to establish a judicial body in the exercise of its responsibility for the maintenance of international peace and security.[78] The decision took no account either of the nationality of Tadić or of the United Nations membership of Bosnia and Herzegovina, the country in which the crimes were committed.

C. FRY Membership in the United Nations between 1992 and 2000

37. The Chamber considers the analysis of the Legal Counsel referred to in paragraph 11 of this decision to be correct. Resolution 47/1 did not deprive the FRY of all the attributes of United Nations membership: the only practical consequence was its inability to participate in the work of the General Assembly, its subsidiary organs, conferences or meetings convened by it. Apart from that, it continued to function as a member of the United Nations in many areas of the work of the United Nations. Notably, the resolution left untouched the relationship of the FRY to the Security Council, and consequently, the application of the regime of Security Council resolutions to it. Thus, notwithstanding its exclusion from participation in the work of the General Assembly, its subsidiary bodies, and conferences or meetings convened by it, the following factors indicate that the FRY was in fact treated as a United Nations member for certain purposes:

(i) the seat and nameplate remained as before although in meetings of the General Assembly, the FRY representatives could not sit behind the sign "Yugoslavia",[79]

(ii) the Yugoslav missions at the United Nations Headquarters continued to function and could receive and circulate documents,[80]

(iii) the secretariat continued to fly the flag of the old Yugoslavia,[81]

(iv) Yugoslavia retained its right to participate in the work of organs other than the General Assembly and its bodies,[82] including, to the extent permitted, the Security Council,[83]

(v) Yugoslavia continued to be listed in the scale of assessments for the contribution of United Nations member States to the budget.[84]

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[78] *Ibid*, paras 26-48.
[79] *Supra* para. 16.
[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid.*
[83] *See* Article 31 of the United Nations Charter, 29 June 1945, and Article 37 of the Provisional Rules of Procedure of the Security Council, UN doc. S/96/Rev. 7 (1983).

38. Thus, while the FRY's membership was lost for certain purposes, it was retained for others. The Chamber holds that the FRY retained sufficient indicia of United Nations membership to make it amenable to the regime of Chapter VII Security Council resolutions adopted for the maintenance of international peace and security. The proper approach to the issue of the FRY membership of the United Nations in the period between 1992 and 2000 is not one that proceeds on a *a priori*, doctrinaire assumption that its exclusion from participation in the work of the General Assembly necessarily meant that it was no longer a member of the United Nations. As the FRY membership was neither terminated nor suspensed by General Assembly resolution 47/1,[85] it is more appropriate to make a determination of its United Nations membership in that period on an empirical, functional and case-by-case basis.

39. The Chamber, therefore, concludes that in relation to the application of the Security Council resolution establishing the Statute of the International Tribunal,[86] the FRY was in fact a member of the United Nations both at the time of the adoption of the Statute in 1993 and at the time of the commission of the alleged offences in 1999.

40. It remains now to consider the impact, if any, on the Chamber's conclusion of the formal admission of the FRY to membership of the United Nations in 2000, as well as the decision of the ICJ in the *Genocide Case*.[87]

41. In the Chamber's view, the formal admission of the FRY to membership in the United Nations in 2000 does not invalidate its conclusion that the FRY retained sufficient indicia of membership in the period between 1992 and 2000 to render Security Council resolution 827 (1993) establishing the Statute of the Tribunal applicable to it.

42. It must be remembered that the formal admission of the FRY to United Nations membership in 2000 was an event that was anticipated, and indeed required, by the United Nations. Thus, in resolution 777 (1992) and General Assembly resolution 47/1, both the Security Council and the General Assembly, having decided that the FRY could not automatically continue the membership of the SFRY in the United Nations, decided that the FRY should apply for membership in the United Nations.[88] The somewhat untidy situation in which the FRY was barred from participating in the work of the General Assembly, without any termination or suspension of its membership of the Organisation, could only be resolved by the formal admission of the FRY to United Nations membership. That is why the Legal Counsel pointed out in his letter of 29 September 1992 that

[84] *See, supra* para. 17, n 38.
[85] *Supra* para. 11, n 22.
[86] *Supra* n 13.
[87] "*Genocide Case* (Preliminary Objections), *supra* n 56.

"[T]he admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1."[89] But that formal admission does not necessarily mean, and does not in fact mean that the FRY was not a member of the United Nations for certain purposes in the period between 1992 and 2000, retaining sufficient indicia of membership to make it amenable to the regime of Security Council resolutions adopted under Chapter VII of the United Nations Charter for the maintenance of international peace and security.

43. The history of the *Genocide Case* is set out in paragraphs 26 to 31 above and for that reason the Chamber does not need to recount it in detail. The issue before the Court was the FRY's request for revision of the Court's 1996 Judgement on the basis of Article 61 of the ICJ Statute. In order to succeed the FRY had to establish that a new fact had arisen subsequent to the 1996 decision. The FRY argued that its admission to the United Nations in November 2000 was such a fact. The Court noted that the legal position of the FRY between 1992 and the year 2000 "remained complex".[90] The Chamber cannot but agree with that comment. However, the Court rejected the FRY's application for revision, holding that the FRY was not relying on facts that existed in 1996, but was in fact seeking revision on the basis of the legal consequences that it sought to draw from facts subsequent to the judgement of 1996.[91] Thus, the issue in that case was not so much whether the FRY was a member of the United Nations between 1992 and 2000 (although the Court did have occasion to comment on that question) as it was whether the formal admission of the FRY to United Nations membership in 2000 was a new fact warranting revision of its 1996 Judgement.

44. However, the reasoning in that case is relevant to some of the issues raised by this Motion. The Court held that the precise consequences for FRY's United Nations membership arising from General Assembly resolution 47/1 were determined on a case-by-case basis.[92] This is consistent with the Chamber's conclusion that there can be no *a priori* determination of the complex issue of the FRY's United Nations membership during the relevant period; what is required is a more empirical, function-by-function determination of that issue. It was also held that resolution 47/1 did not affect the FRY's right to appear before the Court or to be a party to a dispute before the Court.[93] Since those two rights are indicative of United Nations membership,[94] the Court was in effect concluding that the FRY retained those attributes of United Nations membership. This is illustrative of the function-by-function determination of membership that the Chamber has held is the correct approach to the issues raised by this Motion. The Court also emphasised that "General

[88] *See, supra* paras 9-10.
[89] *Supra* n 22.
[90] *Genocide Case* (Application for Revision), *supra* para. 29, n 65.
[91] *Ibid*, para. 69.
[92] *Ibid*, para. 70.
[93] *Ibid.*

Assembly resolution 55/12 of 1 November 2000[95] cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations ...".[96] Again, this is consistent with the conclusion reached by the Chamber that the formal admission of the FRY to membership in 2000 in no way invalidates its finding that the FRY retained sufficient indicia of membership during that period to be amenable to the regime of the Security Council resolutions adopted under the United Nations Charter for the maintenance of international peace and security.

D. Chapter VII of the United Nations Charter vests the Security Council with authority over the FRY

45. In this section, the Chamber proposes to consider whether or not, even if the FRY was not a member of the United Nations at the relevant time, Chapter VII of the United Nations Charter is open to the interpretation that the Security Council had authority over the FRY.

46. When the Security Council established the Tribunal in 1993, the former SFRY, which was a member of the United Nations, had already broken up into five different States: Croatia, Slovenia, Macedonia, Bosnia and Herzegovina, and the FRY (Serbia and Montenegro). This break-up was a direct result of the conflict that started in the territory of the former SFRY in 1991. Security Council resolutions 808 (1993) of 22 February 1993[97] and 827 (1993) of 25 May 1993[98] establishing the Tribunal were therefore a response to a conflict that took place in the territory of the former SFRY, and it is with that conflict which was essentially related to that territory that it sought to deal, and not with a conflict in the respective Republics. In doing so resolution 827 (1993) was both retrospective and prospective in that it related to crimes committed after 1991, and thus covered the period before and after the adoption in 1993 of the Statute establishing the Tribunal.

47. It is significant, therefore, that Article 1 of the Statute ("Competence of the International Tribunal") vests the Tribunal with power to prosecute persons responsible for serious violations of international humanitarian law committed, not in Bosnia and Herzegovina, Slovenia, Croatia, Macedonia or Serbia and Montenegro, but rather in the territory of the former Yugoslavia.[99] Article 8 ("Territorial and temporal jurisdiction") is even more specific in providing that the territorial

[94] *See* Article 35 and Article 93 of the ICJ Statute.
[95] By which the FRY was admitted to the United Nations, *supra* n 43.
[96] *Genocide Case* (Application for Revision), *supra* n 65, para. 71.
[97] *Supra* n 23.
[98] *Supra* n 13.
[99] Article 1 of the Statute reads as follows: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."

jurisdiction of the Tribunal extends to the territory of the former SFRY.[100] It is inarguable that the Security Council, in the exercise of its responsibility for the maintenance of international peace and security, had the power in 1993 to deal with a conflict that started in the territory of the former Yugoslavia in 1991, in relation to which it had already taken a number of measures between 1991 and 1993, which was taking place in that territory at the time of the adoption of the Statute, and showed all likelihood of continuing thereafter.[101] If it were otherwise, the Security Council would have been frustrated in the discharge of its responsibility under Chapter VII in relation to a situation that it had already determined to be a threat to international peace and security.[102]

48. The principle of institutional effectiveness, elaborated by the ICJ in the *Reparation Case*[103] and the case of *Certain Expenses*[104] also lends support to an interpretation of Chapter VII of the Charter as empowering the Security Council to adopt measures for the maintenance of international peace and security in the circumstances of this case: a situation that in its inception related to a country that was a member of the United Nations, but which at the time the Security Council established the Tribunal, had broken up into a number of States all of which, with the exception of the FRY (Serbia and Montenegro), were members of the United Nations. Chapter VII of the Charter may be interpreted purposively as empowering the Security Council to continue to deal with a situation which it has determined to be a threat to international peace and security even if the country concerned ceases to be a member of the United Nations.

49. In the *Reparation Case*, the Court held that

> "under international law, the organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[105]

50. The Court also held that an international organisation such as the United Nations, with wide membership within the international community, may possess the capacity to bring claims against both members and non-members:

> "On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to

[100] Article 8 of the Statute provides: "The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."

[101] For resolutions adopted by the Security Council between 1991 and 1993 relating to the conflict, *see supra* para. 8, n 18, and para. 12, n 26.

[102] *See* UN SC Res. 808 (1993), *supra* n 23; prior to this resolution, the Security Council had already made the determination in several resolutions, e.g., UN SC Res. 713 (1991), *supra* n 17.

[103] *Reparation for Injuries Suffered in the Service of the United Nations*, (Advisory Opinion of 11 April 1949) ("*Reparation Case*"), (1949) *ICJ Reports*, p. 174.

[104] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, (Advisory Opinion of 20 July 1962) ("*Certain Expenses*"), (1962) *ICJ Reports* p. 151.

[105] *Reparation Case*, *supra* n 103, p. 182.

> bring into being an entity possessing objective international personality, and not merely personality recognised by them alone, together with capacity to bring international claims."[106]

51. While Article 25 of the United Nations Charter obliges members of the United Nations to "accept and carry out the decisions of the Security Council in accordance with the present Charter", Article 2, paragraph 6 establishes a certain relationship between the Organisation and non-member States in respect of the latter's conformity with the principles of the Charter. It provides:

> "The Organization shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

52. The maintenance of international peace and security is emphasised because of its fundamental importance for the achievement of the purposes of the United Nations; it is placed in Article 1 of the Charter as the first purpose of the United Nations.

53. In *Certain Expenses*, the Court held that:

> "The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. [...] But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization".[107]

54. Article 2, paragraph 6 of the Charter does not say how the organisation is to ensure that non-members act in conformity with the Charter's Principles. However, the provision raises the question of the applicability of Article 34 of the Vienna Convention on the Law of Treaties, which provides that a treaty is not binding on non-parties without their consent.[108]

55. The Chamber does not consider it necessary to pronounce on the general question of the application of the United Nations Charter to non-member States; on that issue scholarly opinion is divided.[109] In practice the Security Council has adopted resolutions which apply to States that are not members of the United Nations.[110] There are, of course, cases in which specific provisions of United Nations resolutions, whether of the General Assembly or the Security Council, will apply to

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[106] *Ibid*, pp. 184-185.
[107] *Certain Expenses*, *supra* n 104, p. 168.
[108] *Vienna Convention on the Law of Treaties*, adopted 29 May 1969, entered into force 27 January 1980, 1155 UNTS 331 ("*Vienna Convention*").
[109] *See*, e.g., Kelsen and Brownlie support such an application: Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (1950), pp. 85-110, Ian Brownlie, *Principles of Public International Law* (5th ed, 1998), pp. 517-519; while Bindschedler and Simma argue against: Bindschedler-Robert, 108 *Hague Receuil* (1965) 40 44-46, Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (1994), p. 627.
[110] *See*, e.g., UN SC Res. 235, 29 May 1968, UN doc. S/Res/235 (1968); UN SC Res. 276, 30 January 1970, UN doc. S/Res/276 (1970); UN SC Res. 314, 28 February 1972, UN doc. S/Res/314 (1972); UN SC Res. 418, 4 November 1977, UN doc. S/Res/418 (1977); UN SC 757 (1992), *supra* n 49.

all States, irrespective of United Nations membership, because they reflect rules of customary international law or *jus cogens*.

56. It is sufficient for the Chamber to hold that in the particular circumstances of this case, nothing stands in the way of a reading of Chapter VII, as enabling the Council to adopt measures under Article 41 of the Charter in relation to a conflict that it has determined to be a threat to international peace and security, and which started in a member State of the United Nations, but which at the time of the measures taken was no longer a United Nations member. The centrality of the goal of the maintenance of international peace and security within the global system established by the Charter underpins this interpretation of Chapter VII.

57. To borrow the language of *Certain Expenses*,[111] when the Security Council, as it has done in this case in relation to the FRY, takes action that is necessary for the maintenance of international peace and security, the presumption is that such action is not *ultra vires* the Charter of the United Nations.

58. Once it is appreciated that the jurisdiction of the Tribunal properly relates to the territory of the former SFRY, irrespective of its subsequent break-up into different States, it becomes clear that that jurisdiction covers the commission of the crimes by any person in a State that was part of the territory of the former SFRY. This includes the commission of crimes in Kosovo, a part of the FRY which was itself a part of the former SFRY. The point made in the Motion concerning the nationality of Mr. Ojdanić is without merit. A crime committed by any person, whatever his nationality, in a country that is part of the former SFRY, is triable by the Tribunal.

59. The Chamber, therefore, concludes that the fact that the alleged crimes were committed in Kosovo, a part of the FRY, which, in the submission of the Defence, was not a member of the United Nations either at the time of the establishment of the Tribunal or of the commission of the offence, is immaterial to its jurisdiction. What is material is that the Security Council certainly had the authority in 1991 to deal with the conflict before the break-up of the SFRY, which was an original member of the United Nations. It does not lose that jurisdiction either as a result of the subsequent break-up of the former SFRY, or by the circumstance of the non-United Nations membership of one or more of the States after that break-up. It, therefore, had jurisdiction in 1993 to deal with the conflict in the territory of the former SFRY by establishing a Tribunal to try the crimes committed in that territory since 1991.

[111] *Certain Expenses, supra* n 104, p. 168.

60. The Chamber observes that prior to the Security Council resolution establishing the Tribunal in 1993,[112] the Council had adopted a number of resolutions to deal with the conflict in the territory of the former Yugoslavia.[113] It would, indeed, be odd if the authority which the Council had to deal with the conflict in the territory of the former Yugoslavia in 1991 and 1992 was somehow lost in 1993 by the circumstance of the non-membership of the United Nations of any of the States that formerly constituted the SFRY. It would be strange because the conflict was still taking place in 1993 when the Tribunal was established, and thus the need for measures for the maintenance of international peace and security was no less urgent in 1993 than it was in 1991 and 1992.

61. It would also be odd if the authority which the Council had in 1991, 1992 and 1993 was somehow lost in 1999 when the alleged crimes were committed, since those crimes were part of the same conflict with which the Council was dealing. In this regard, the Chamber notes that the *ratio decidendi* of the Appeals Chamber's decision joining the three indictments relating to Croatia, Bosnia, and Kosovo against the then co-accused Milošević[114] was that the acts alleged in the indictments were part of the same transaction, being characterized by a "common scheme, strategy or plan".[115] The Chamber also observes that the jurisdiction *ratione temporis* of the International Tribunal[116] was left open-ended, no doubt because the Security Council foresaw the continuation of the conflict.

62. The constitutional character of the Charter, its near universal membership, the critical importance to the international community of the goal of the maintenance of international peace and security, are all factors that combine to render the Chapter VII resolution establishing the Tribunal[117] applicable to any country that was a part of the former SFRY, irrespective of its United Nations membership at the time of the adoption of that resolution, or at the time of the commission of the offences.

63. The Chamber, therefore, holds that even if the FRY was not a member of the United Nations at the relevant time, Chapter VII of the Charter is open to the interpretation that the Security Council had authority over the FRY in the circumstances of the this case.

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[112] *Supra* n 13.
[113] *Supra* para. 8, n 17-18.
[114] *Prosecutor v Slobodan Milošević*, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Case No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, 18 Apr. 2002.
[115] *Ibid*, paras 19-21.
[116] Article 8 of the Statute.
[117] *Supra* n 13.

E. Universal Jurisdiction; the FRY's Treaty Rights and Obligations as a Predecessor or Successor State

64. The Chamber acknowledges that the question of the exercise of universal jurisdiction in respect of the crimes with which the accused is charged, and the issue of the FRY's rights and obligations as a predecessor or successor State in the period 1992 to 2000 may be relevant to the issues raised by the Motion. However, in the light of the conclusions that the Chamber has reached in the two previous sections, it does not consider it necessary to make a determination of these issues.

65. Accordingly, the Defence Motion is dismissed.

Richard May
Presiding

Dated this sixth day of May 2003
At The Hague,
The Netherlands

[Seal of the Tribunal]

Judge Patrick Robinson appends a separate opinion to this decision.

SEPARATE OPINION OF JUDGE PATRICK ROBINSON

I. Introduction

1. The Motion raises the question of universal jurisdiction, but only to dismiss it, arguing that the Tribunal's mandate is limited to applying existing humanitarian law; that Judge Guillaume, in his Separate Opinion in the case of *Congo v. Belgium*,[1] concluded that universal jurisdiction was not part of customary international law and that even if universal jurisdiction allowed a State to prosecute for a crime not committed in its territory or against its nationals, there was no precedent for an international court to exercise such a jurisdiction.[2]

2. In this Opinion, I propose to consider whether, on the assumption that the FRY was not a member of the United Nations either at the time of the adoption of the Statute or at the time of the commission of the offences in Kosovo, the Tribunal would nonetheless have jurisdiction on the basis that the crimes with which the accused is charged, that is, crimes against humanity and war crimes, attract universal jurisdiction.

II. The Relevance of Universal Jurisdiction to the Motion

3. This is how I believe the proponent for the application of universal jurisdiction of the Tribunal in the circumstances of this case would argue: on the basis of universal jurisdiction, the crimes are triable by any country, irrespective of the place of commission of the crimes or the nationality of the offender or victim; arguably, if the crimes are triable by any State in those circumstances, they should also be triable by an international criminal tribunal, established by the Security Council in discharge of its responsibility for the maintenance of international peace and security under chapter VII of the United Nations Charter, unless there is something either in the Statute of the Tribunal or the United Nations Charter or general international law that prohibits the assumption of such jurisdiction; thus the place of the commission of the crimes, Kosovo, is immaterial to the jurisdiction of the Tribunal.

4. However, since the essence of universal jurisdiction is the immateriality to jurisdiction of the place of commission of the offence or the nationality of the offender or the victim, it is not clear how its application would, following that line of argument, answer the point that the FRY ("Serbia and Montenegro"), of which Kosovo is a part, was not a member of the United Nations either at the time of the adoption of the Statute or the commission of the offences. At first glance, universal

[1] *Case Concerning the Arrest Warrant of 11 April 2001 (Democratic Republic of the Congo v. Belgium)*, (Judgement of 14 February 2002) ["*Arrest Warrant Case*"], available at http://www.icj-cij.org.
[2] Defence Motion, paras 32-33.

jurisdiction does not address the issue of membership of the United Nations. I return to this issue later.

III. Universal Jurisdiction

5. In *Pinochet*,[3] Lord Millet held that:

> "...crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order".[4]

6. According to the first criterion, the norms breached by crimes that attract universal jurisdiction form part of *jus cogens*. These norms safeguard the interest of the international community as a whole. All States are entitled, under customary international law to prosecute offenders for breach of these norms, irrespective of the place of commission of the offence or the nationality of the offender or victim; it is argued by some that the breach of such a peremptory norm results not in the right, but in the obligation of all States to prosecute offenders, irrespective of the place of commission of the offence or the nationality of the offender or victim.[5] At the conventional level, many States are parties to a number of treaties obliging them to prosecute offenders if they do not extradite them, generally, irrespective of the place of commission of the offence or the nationality of the offender or victim.

7. The second criterion stresses the character of the crime as one that by reason of its gravity and scale offends international public order. Thus offenders are perceived as *hostis humanis generis*, because the norms breached by their conduct protect universal values.

8. The main controversy over universal jurisdiction concerns the issue whether the presence of the suspect or accused in the forum State is a precondition for its exercise.

9. The Belgian law is an example of the broader concept of universal jurisdiction, that is, the assumption of jurisdiction by a State even if the offender is not present in its territory.[6] In the

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[3] *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening (No. 3)*, House of Lords, 24 March 1999, [2000] 1 AC 147, [1999] 2 All ER 97, [1999] 2 WLR 827 ["*Pinochet (No. 3)*"].

[4] *Ibid.*

[5] *See*, e.g., Bassiouni who argues that "the implications of *jus cogens* are those of a duty and not of optional rights, otherwise *jus cogens* would not constitute a peremptory norm of international law" in M. Cherif Bassiouni, Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: *Jus Cogens* and Obligation *Erga Omnes*, (1996) 59 *Law & Contemporary Problems* 63.

[6] Belgian Act of 16 June 1993 concerning the punishment of grave breaches of the Geneva Convention of 12 August 1949 and their Additional Protocols I and II of 18 June 1997 (*Official Journal*, 05.08.1993, pp 1751-1755), as modified by the Act of 10 February 1999 concerning the punishment of grave breaches of international humanitarian law, *Official Journal*, 23.03.1999, pp. 9286-9287 ("Belgian Act"). In a ruling of 26 June 2002 in the case of *Sharon*

Arrest Warrant Case, Congo questioned the issue by Belgium of a warrant for the arrest of a Minister of Foreign Affairs who was not in Belgium at that time.[7] Two questions were raised: immunity and universal jurisdiction. However, the Congo did not argue the latter; the Judgement is, therefore, confined to a consideration of the question of immunity. Nonetheless, the some of the Separate Opinions make an important contribution to the learning on this question.

10. Judge Guillaume held that "universal jurisdiction *in abstentia* as applied in the present case is unknown to international law",[8] and that international law only allows universal jurisdiction in the case of piracy and in the circumstances set out in various treaties.[9] Judges Higgins, Kooijmans and Buergenthal,[10] after noting that the *aut dedere aut judicare* – surrender or prosecute - jurisdiction necessarily requires the presence of the suspect or accused in the forum State ("there cannot be an obligation to extradite someone you choose not to try unless that person is within your reach"),[11] concluded that a State may elect to exercise universal jurisdiction *in absentia*, but only if certain safeguards are in place to prevent abuse.[12] Ad hoc Judge Van den Wyngaert concluded that:

> "...there is no conventional or customary international law or legal doctrine in support of the proposition that (universal) jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant is present on the territory of the prosecuting State".[13]

11. The more qualified notion of universal jurisdiction, requiring the presence of the suspect or accused in the forum State, has greater support in State practice than the broader concept just discussed. It is, as has just been indicated,[14] reflected in the *aut dedere aut judicare* principle. This

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& others, the Brussels Appeals Chamber interpreted the Belgian Act as requiring the presence of the suspect on Belgian territory. However, on 12 February 2003, the Belgian Supreme Court (*Cour de Cassation*) overruled that decision, holding that because of the nature of the crimes involved (genocide, crimes against humanity and war crimes), and as an exception to the general rule (in domestic criminal proceedings), prosecutions *in abstentia* are permissible under the Belgian Act. The Belgian Senate has adopted a Bill (*Projet de Loi*) that modifies the Belgian Act. As in the previous Act, the Bill provides that the accused need not be on Belgian territory. However, it entrusts the Federal Prosecutor with a discretion as to whether or not to initiate an investigation when (i) the alleged crime did not take place on Belgian territory, (ii) the accused is not Belgian, (iii) the accused is not present on Belgian territory, and (iv) the victim is not a Belgian national, or has not been a resident of Belgium for at least one year. Further, if the alleged crime took place in a country with an impartial judiciary, cases may be sent back to the authorities of that country; cases may also be referred to the International Criminal Court. *See* Belgian Senate, *Projet de Loi modifiant la loi du 16 Juin 1993 relative à la repression des violations graves du droit international humanitaire*, 5 February 2003.

[7] *Arrest Warrant Case*, *supra* n 1.

[8] *Ibid*, Separate Opinion of President Guillaume, p. 7.

[9] *Ibid*, p. 8.

[10] *Ibid*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal ("Joint Separate Opinion").

[11] *Ibid*, p.14, para. 57.

[12] The following safeguards are suggested in the Joint Separate Opinion: (i) the exercise of universal jurisdiction must not infringe the immunities of the person concerned; (ii) the forum State must first give the State of which the person concerned is a national the opportunity to institute proceedings itself in respect of the charges; and (iii) such charges may only be laid by a Prosecutor who is independent, and has no links to or control by the government of that State. *Ibid*, pp. 14-15.

[13] *Arrest Warrant Case*, *supra* n 1, Dissenting Opinion of Judge Van den Wyngaert, p. 30.

[14] *Supra*, para. 10.

principle has become a feature of many suppression of crimes treaties adopted over the past three decades.[15] The legislation of several countries reflects this notion of universal jurisdiction.

12. Notwithstanding the distinction made in the *Arrest Warrant Case* between immunity and impunity, the Judgement in that case is likely to be seen as weakening the principle of universal jurisdiction by reason of its conclusion that international law does not make the commission of certain international crimes an exception to the rule granting immunities to ministers of foreign affairs.[16]

IV. Crimes that Attract Universal Jurisdiction

13. The historical genesis of universal jurisdiction is *piracy jure gentium*. There is general agreement that every State has the right to prosecute persons for piracy (an offence committed on the high seas and, therefore, outside the jurisdiction of any State), even if the offence was not committed by one of its nationals. The prohibition of piracy has been codified in the Montego Bay Convention on the Law of the Sea,[17] Article 105 of which provides that any State may seize, arrest and prosecute a pirate.[18] Indubitably, there would also be a customary basis for such action.

14. Genocide is another crime that has both a conventional[19] and customary basis. In the 1996 *Genocide Case*,[20] the International Court of Justice ("ICJ") held that "the rights and obligations enshrined in the Convention are rights and obligations *erga omnes*",[21] and that "the obligation of

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[15] *See*, generally, M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law* (1995), and the comprehensive list of treaties listed in Part II. In this Opinion, however, I am principally concerned with those *aut dedere aut judicare* suppression of crimes treaties adopted after 1970.

[16] *Arrest Warrant Case*, *supra* n 1, paras 58-60. On the question of the relationship between immunity and jurisdiction, the International Law Association stated: "... it would appear that the notion of immunity from criminal liability for crimes under international law, whether by existing or former office holders, is fundamentally incompatible with the proposition that gross human rights offences are subject to universal jurisdiction". International Law Association (Committee on International Human Rights Law and Practice), *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, 2000, p. 14 (footnote omitted), available at http://www.ila-hq.org/html/layout_committee.htm.

[17] Adopted 10 December 1982, entered into force 16 November 1994, 1833 U.N.T.S. 3 ("Convention on the Law of the Sea").

[18] Article 105 of the Convention on the Law of the Sea ("Seizure of a pirate ship or aircraft") provides: "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the person and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."

[19] The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by resolution of the United Nations General Assembly on 9 December 1948, came into force 12 January 1951, 78 U.N.T.S. 277 ("Genocide Convention").

[20] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, (Bosnia and Herzegovina v. Yugoslavia)*, (Judgement of 11 July 1996) ("*Genocide Case* (Preliminary Objections)"), available at www.icj-cij.org.

[21] *Ibid*, para. 31.

each State thus to prevent and to punish the crime of genocide is not territorially limited".[22] An accused may be tried by a Court of the State in the territory of which the crime was committed, or by an international tribunal with the requisite jurisdiction.[23] Arguably, it is only in the latter case, that is, trial by an international criminal tribunal whose jurisdiction has been accepted by the Contracting Parties, that universal jurisdiction could be said to exist; otherwise, the jurisdiction would seem to be territorial, although that would be without prejudice to the right of every State under customary international law to exercise universal jurisdiction in respect of genocide, i.e., irrespective of the place of commission of the offence or the nationality of the accused or victim. On the other hand, the conventional basis for jurisdiction in respect of apartheid[24] is wholly universal: States Parties must adopt legislation to try accused persons "whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other States or are stateless persons";[25] trials are by the court of any State Party that has acquired jurisdiction over the accused, or by an international tribunal with jurisdiction in relation to States that have accepted its jurisdiction.[26]

15. War crimes also attract universal jurisdiction both under conventional and customary international law. Thus, under the grave breaches provisions of the Geneva Conventions,[27] States Parties have an obligation to prosecute persons for grave breaches of the Conventions, irrespective of the place of the commission of the crimes, or the nationality of the accused; alternatively, they may surrender them to another Party for prosecution. These Conventions are, therefore, one of the first examples of the *aut dedere aut judicare* principle that has over the last three decades become a hallmark of treaties devoted to the suppression of specific crimes. Although the grave breaches provisions, (which in effect, establish universal jurisdiction), relate to conflicts of an international

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[22] *Ibid.*

[23] Article VI of the Genocide Convention provides: "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."

[24] *See* Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 November 1973, came into force 18 July 1976, 1015 U.N.T.S. 243 ("Apartheid Convention").

[25] *Ibid*, Article IV.

[26] Article V of the Apartheid Convention provides: "Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction."

[27] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31, Article 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85, Article 50; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135, Article 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, Article 146; and Protocol I Additional to the Geneva Conventions of 12 August 1949, 1125 U.N.T.S. 3, Article 85.

character, it has been cogently argued that in the current state of international law universal jurisdiction also applies to conflicts not of an international character.[28]

16. Crimes against humanity were first introduced in the Nuremberg and Tokyo trials.[29] In modern instruments, they are included in Articles 5 and 3 of the Statutes of this Tribunal ("ICTY")[30] and the International Criminal Tribunal for Rwanda ("ICTR")[31] respectively, where the jurisdiction is essentially territorial. Article 7 of the Rome Statute[32] also provides for crimes against humanity; the jurisdiction there, as far as States Parties are concerned, is also essentially territorial.

17. In their Joint Separate Opinion in the *Arrest Warrant Case*,[33] Judges Higgins, Kooijmans and Buergenthal expressed the view that war crimes and crimes against humanity attract universal jurisdiction.[34]

18. There is now strong authority for saying that torture, which has a conventional basis in the 1984 United Nations Convention Against Torture, Other Cruel, Inhumane and Degrading Treatment or Punishment,[35] attracts universal jurisdiction. In *Pinochet*, Lord Browne-Wilkinson said that "the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed".[36] In *Furundžija*,[37] this Tribunal held that the prohibition of torture "has evolved into a peremptory norm of *jus cogens*",[38] and that

> "one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute, and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction."[39]

19. In the 1996 Draft Code of Crimes Against the Peace and Security of Mankind,[40] the International Law Commission concluded that genocide, crimes against humanity and war crimes

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[28] *See*, e.g., Theodor Meron, "International Criminalization of Internal Atrocities", (1995) 89 *American Journal of International Law* 554.
[29] Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279, 288, Article 6(c); and, similarly, Charter of the International Military Tribunal for the Far East, 19 January 1949, Article 5(c).
[30] UN SC Res. 827, 25 May 1993, UN doc. S/Res/827 (1993), ("Statute of the International Tribunal" or "Statute").
[31] UN SC Res. 955, U.N. Doc. S/RES/955 (1994) ("ICTR Statute").
[32] Rome Statute of the International Criminal Court, 17 July, 1998, U.N. Doc. A/CONF.183/9 (1998) ("ICC Statute").
[33] *Supra* n 1.
[34] *Ibid,* Joint Separate Opinion, *supra* n 10, paras 61-65.
[35] Adopted on 10 December 1984, entered into force 26 June 1987, 1465 U.N.T.S. 85.
[36] *Pinochet (No. 3)*, *supra* n 3, pp. 837-838.
[37] *Prosecutor v Anto Furundžija*, Trial Chamber Judgement, Case No. IT-95-17/1-T, 10 Dec. 1998.
[38] *Ibid*, para. 153.
[39] *Ibid*, para. 156.
[40] Text adopted by the Commission at the forty-eight session, in 1996, and submitted to the General Assembly in its Report on the work of its forty-eight session 6 May – 26 July 1996, GAOR, Fifty-first session, Supplement No. 10, UN doc. A/51/10.

attract universal jurisdiction, and that the State Party in whose territory an accused is found must extradite or prosecute him.[41]

20. Mention has already been made of the considerable number of treaties adopted over the past thirty years for the specific purpose of suppressing certain kinds of conduct.[42] These treaties, of which the Hague[43] and Montreal[44] Hijacking Conventions are examples, typically require each State Party to establish its jurisdiction over the specified crimes in a number of situations, e.g. when the offences are committed on its territory and when the alleged offender is a national of that State, and in some cases, when the victim is a national of that State. They also have provisions requiring the State Party in whose territory a suspect or an accused is found either to surrender or prosecute him (strictly speaking, to submit the case to its competent authority for the purpose of prosecution) – *aut dedere aut judicare*.[45]

21. These provisions are generally considered as illustrating a kind of universal jurisdiction, since if it does not extradite him, the State on whose territory the suspect or accused is found must prosecute him, even though the crime was not committed on its territory. Thus the International Law Commission ("ILC") in the Commentary on its Draft Statute of an International Criminal Court, identifies the following as one criterion for inclusion in its list of "treaty crimes" over which the Court would have jurisdiction: "that the treaty created either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility for an international criminal court to try the same, or both, ...".[46] However, in their Joint Separate Opinion, Judges Higgins, Kooijmans and Buergenthal concluded that the *aut dedere aut judicare* provision in these treaties

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[41] *Ibid*, Commentary on Articles 8, 17, 19 & 20.
[42] *Supra* n 15.
[43] Convention for the Suppression of Unlawful Seizure of Aircraft, adopted 16 December 1970, came into force 14 October 1971, 860 U.N.T.S. 105 ["Hague Hijacking Convention"]. Article 4(1) of this Convention is a typical jurisdictional provision of these treaties. It provides:
1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases: (a) when the offence is committed on board an aircraft registered in that State; (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State."
2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the State mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction in accordance with national law.
[44] Convention for the Suppression of Unlawful Acts Against the Safety of the Civil Aviation, 23 September 1971, 974 U.N.T.S. 177 ["Montreal Hijacking Convention"].
[45] Hague Hijacking Convention, *supra* n 40, Article 7.
[46] Report of the International Law Commission on the work of its forty-sixth session, GAOR, Forty-ninth session, Supplement No. 10, UN doc. A/49.10, p. 78, para. 11, Commentary on Article 20.

are more properly seen as "an obligatory territorial jurisdiction over persons albeit in relation to acts committed elsewhere".[47] In my view, these treaties do exemplify universal jurisdiction.

22. It is doubtful whether the prohibition of the specific conduct and the obligation *aut dedere aut judicare* in most of the suppression of crime treaties relating to hijacking and terrorism have yet acquired customary status; it may be that they exist only as treaty obligations. In other words, the required State practice and *opinio juris* may not be present in relation to the prohibition of those activities and the companion obligation *aut dedere aut judicare*. On the other hand, the prohibited acts and the obligation *aut dedere aut judicare* in the treaties on torture and, perhaps, apartheid as well, have achieved customary status.

23. Generally, these suppression of crime treaties may be seen as filling the gap left by the failure of the international community to agree on a definition of terrorism within the framework of a treaty.[48] A definition of international terrorism set out in a treaty covering the acts prohibited by the several hijacking and anti-terrorism treaties, would, in my opinion, achieve customary status more readily than the prohibition of those acts and the *aut dedere aut judicare* principle set out in those specific treaties.

V. The International Criminal Court

24. In considering whether the ICC applies universal jurisdiction, a distinction must be made between the jurisdictional provisions of its Statute relating to States Parties and non-States Parties on the one hand, and those relating to the Security Council on the other.

25. By virtue of Article 12 of the Rome Statute, the Court will only have jurisdiction if the crime took place in a State which is a party to the Statute or if the crime was committed by a person who is a national of a party to the Statute.[49] If the State where the crime was committed or the State of the nationality of the accused is not a party to the Court's Statute, it may by declaration accept the jurisdiction of the Court in relation to the specified crimes.[50] Thus, in respect of States parties and non-States Parties, the Court's jurisdiction is not universal; it requires territorial or nationality linkages.

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[47] *Supra* n 10, p. 10.

[48] In 1994, the General Assembly adopted a Declaration on Measures to Eliminate International Terrorism which in its third paragraph provides as follows: criminal acts intended or calculated to provoke a state of terror in the general public, a group or a particular person for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them. UN GA Res 49/60, 9 December 1994, UN doc. A/RES/49/60. This provision utilizes language from the 1937 League of Nations Convention on the Prevention and Punishment of Terrorism, which never entered into force.

[49] ICC Statute, *supra* n 32.

[50] *Ibid*, Article 12, paragraph 3.

26. On the other hand, in respect of the Security Council, the jurisdiction of the ICC is classically universal. Under Article 13, paragraph (a) of the ICC Statute, the Council may refer to the Prosecution any situation in which it appears that one of the specified crimes may have been committed. Thus, a referral may be made whether or not the country in which the crime was committed or the State of nationality of the accused is a party to the Statute.

27. No doubt it is the Security Council's unique responsibility under the Charter for the maintenance of international peace and security that accounts for the distinctive treatment of its referrals to the Prosecutor.

28. However, a proposal was made at the Rome Conference for the Court's jurisdiction to be based on universal jurisdiction. Germany proposed that:

> "A State which becomes a party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5 [paragraphs (a) to (d)]".[51]

29. The German proposal, if accepted, would have meant that following ratification the ICC could try a person for one of the core crimes if it were committed in any State, be it the territorial State or the State of nationality of the accused, and whether or not that State is a party to the Court's Statute; in other words, ratification would give the Court a kind of inherent or automatic jurisdiction over the crimes.

30. The jurisdiction of the ICC, therefore, is only universal in part, but to the extent that it is, it serves to rebut the submission in the Motion that "there is no precedent for an international court to exercise such jurisdiction".[52]

31. In considering the question of the application of universal jurisdiction by an international criminal tribunal, a comparison may usefully be made with the Nuremberg Tribunal. There is some controversy as to whether the Nuremberg Tribunal exercised universal jurisdiction. The controversy appears to stem from the interpretation of the following passage from the Judgement:

> "The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."[53]

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[51] Report of the Preparatory Committee of the Establishment of an International Criminal Court, A/Conf. 183/2/and 1, p. 33, Article 9 – Further option. The second part of the German proposal relating to non Parties provides: "A State that is not a Party to this Statute may, by declaration lodged with the Registrar, accept the obligation to cooperate with the Court with respect to the prosecution of any crime referred to in article 5. The accepting State shall then cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute."

[52] Defence Motion, para. 23.

[53] Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946 (1947) ("Trial of the Major War Criminals"), p. 218.

32. That passage from the Nuremberg Judgment was commented on by the United Nations Secretary-General in his 1949 Report on the Nuremberg Tribunal as follows:

> "It is possible that the Court meant that the several signatory Powers had jurisdiction over the crimes defined in the Charter because these crimes threatened the security of each them. The Court may, in other words, have intended to assimilate the said crimes, in regard to jurisdiction, to such offences as counterfeiting of currency. On the other hand, it is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every state. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation. But it must be conceded, at the same time, that the phrase "right thus set up special courts to administer law" is too vague to admit of definite conclusions."[54]

33. The phrase that the Allied powers had "done together what anyone of them might have done singly" has been interpreted to mean that the Court viewed the crimes under its Charter as international crimes subject to the jurisdiction of any State. The United Nations Commission of Experts on the former Yugoslavia[55] appears to have had this statement in mind when it said:

> "Jurisdiction for war crimes is governed by the universality principle and, hence, is vested in all States, whether parties to the conflict or not. Although the Genocide Convention emphasis territorial jurisdiction, it also establishes the jurisdictional basis for an international tribunal. It is well recognized that the principle of universality can also apply to genocide as well as other crimes against humanity.
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> States may choose to combine their jurisdiction under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such a combination of national jurisdictions of the States parties to the London Agreement setting up that Tribunal."[56]

34. It seems to me that a large part of the difficulty in determining whether an international criminal tribunal such as the Nuremberg IMT, the ICTY or the ICTR exercises universal jurisdiction is explained by the failure to distinguish between the basis for the creation of that tribunal (a question that raises the issue of the delegation by States of their jurisdictional powers to an international tribunal), and the jurisdiction that is actually exercised by it by virtue of its Statute or customary international law.[57] The Secretary-General was clearly referring to the former when he said "[T]his interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation".[58] Thus, while it may be said that in establishing the Nuremberg Tribunal, the Allied powers relied on a

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[54] The Charter and Judgement of the Nuremberg Tribunal, Report submitted by the Secretary-General, U.N. doc. A/CN.4/5 (1949) ("Secretary-General Report on the Nuremberg Tribunal").
[55] Established Pursuant to Security Council Resolution 780 (1992), 6 October 1992, U.N. doc. S/RES/780.
[56] Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. doc. S/25274 (1993), paras 72-73.
[57] *See* the article cited in paragraph 12 of the Defence Motion: Madeleine Morris, High Crimes and Misconceptions: The ICC and Non-Party States, (2001) 64(1) *Law & Contemporary Problems*, pp. 13, 35, 36.
[58] Secretary-General Report on the Nuremberg Tribunal, *supra* n 56 (emphasis added).

combination of their individual rights to exercise universal jurisdiction, the question as to whether the Tribunal actually exercised such jurisdiction has to be answered, in the first place, by an examination of the provisions of its constituent instrument, that is, its Statute.

35. An examination of the Nuremberg Charter shows that, while there were other bases for the Tribunal's jurisdiction, the jurisdiction exercised in relation to crimes that, admittedly, attract universal jurisdiction, was essentially territorial in character.

VI. The International Criminal Tribunal for the Former Yugoslavia

36. In *Tadić*, the Appeals Chamber, when considering the question whether the accused should be tried by his national courts under national laws, concluded that "universal jurisdiction [is] nowadays acknowledged in respect of international crimes".[59] What the Tribunal did in that dictum was to acknowledge that the crimes set out in its Statute attract universal jurisdiction. The ICTR also held in *Ntuyahaga* that universal jurisdiction exists in respect of the crime of genocide.[60]

37. However, the Tribunal has never said that it exercises universal jurisdiction in respect of the crimes set out in its Statute. The question as to whether the Tribunal exercises such jurisdiction has in the first place to be answered by an examination of its constituent instrument, that is, the Statute adopted by the Security Council by resolution 827 (1993).

38. There is nothing in the Statute that, either by express reference or by inference, indicates that the Tribunal exercises universal jurisdiction. In fact, Article 1 ("Competence of the International Tribunal") gives the Tribunal power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. Article 8 ("Territorial and temporal jurisdiction"), as is indicated in the decision of the Chamber at paragraph 47, is even more specific in providing that the territorial jurisdiction of the Tribunal extends to the territory of the former Socialist Federal Republic of Yugoslavia.

39. The jurisdiction of the Tribunal is therefore territorial. However, it may be said that there is a universal element in ICTY's jurisdiction to the extent that it has the power to prosecute any person, irrespective of nationality, for crimes committed in the territory of the former Yugoslavia. This point was made by the Chamber in paragraph 58 of its Decision.

40. Interestingly, the ICTR Statute gives that Tribunal the power to prosecute (i) persons responsible for serious violations of international humanitarian law committed in the territory of

[59] *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 Oct. 1995 ("*Tadić Jurisdiction Decision*"), para. 62.

Rwanda, and (ii) Rwandan citizens responsible for such violations committed in the territory of neighbouring States.[61] Thus, the ICTR's jurisdiction, so far as crimes committed in Rwanda are concerned, resembles that of the ICTY in that it may prosecute any person for crimes committed in Rwanda, irrespective of nationality. In the case of *Prosecutor v Georges Ruggiu*, the Italian-Belgian journalist Georges Ruggiu was found guilty of direct and public incitement to commit genocide and crimes against humanity in Rwanda, and sentenced to 12 years imprisonment following a guilty plea.[62]

41. I turn now to consider whether, in the absence of any provision in the ICTY Statute for universal jurisdiction, the Tribunal could nonetheless exercise such jurisdiction under customary international law. The Tribunal, in the discharge of its mandate, applies customary international law as a constituent element of international humanitarian law. Two questions arise: first, is universal jurisdiction a rule of customary international law? Second, if it is, can the Tribunal assume jurisdiction on that basis in the circumstances of this case?

42. As to the first, in my view, if there is a principle of universal jurisdiction in customary international law, it is the narrower concept of that jurisdiction that has that status. A case can be made that there is sufficient State practice and *opinio juris* to support the conclusion that in respect of a select group of crimes, the commission of which offend international public order, any State in which the offender is found has a right to prosecute him, irrespective of the place of commission of the crime, his nationality, or that of the victim. The only comment by the Tribunal on this question supports this conclusion: in *Furundžija*, the Tribunal held that a consequence of the *jus cogens* character of the prohibition of torture is the right of every State to prosecute accused persons "present in a territory under its jurisdiction".[63] Whether a specific crime has reached the level of State practice and *opinio juris* to qualify as one that attracts universal jurisdiction under customary international law is a matter that has to be determined on an individual basis. It seems that, at this stage, this category of crimes does not extend beyond piracy, slavery, war crimes, crimes against humanity, genocide and torture.

43. As to the second question, while the Tribunal applies customary international law, it cannot do so when its application would be incompatible with the jurisdictional scheme set out in its Statute. In other words, in light of the provision in the Statute that the Tribunal's jurisdiction relates to the commission of crimes in the territory of the former SFRY, there can be no reliance on a

[60] *Prosecutor v. Ntuyahaga*, Decision on Prosecution Motion to Withdraw the Indictment, 18 March 1999.
[61] ICTR Statute, *supra* n 31.
[62] *Prosecutor v. Georges Ruggiu*, Judgement and Sentence, Case No. ICTR-97-32-I, 1 June 2000.
[63] *Supra* para. 18, n 39.

customary rule that would give the Tribunal jurisdiction over a crime committed in any place but the territory of the former SFRY.

44. It is now settled that the Statute is interpreted as a treaty. In that regard, there is an established rule that parties to a treaty are not to be presumed to dispense with a rule of customary international law even when no express provision is made for it in their treaty. Thus, the ICJ held in the *Ellectronica Sicula*[64] case that even though no provision was made for the exhaustion of local remedies in a Friendship, Commerce and Navigation Treaty between Italy and the United States of America, it was not to be presumed that the intention was to dispense with such an important rule of customary international law.[65] The Tribunal itself has not been reluctant to rely on customary international law as a basis for its jurisdiction. Even though there is no express provision in the Statute for jurisdiction in relation to conflicts not of an international character, the Tribunal has assumed jurisdiction over those conflicts on the basis that violations of common Article 3 of the 1949 Geneva Conventions are prohibited by customary international law.[66]

45. But the situation is different in relation to the application of universal jurisdiction by virtue of customary international law. Universal jurisdiction in the sense of jurisdiction over a crime not committed in the territory of the former SFRY is plainly incompatible with the jurisdiction and mandate of the Tribunal set out in its Statute, which confines jurisdiction to the territory of the former SFRY. Such an assumption of jurisdiction would be *ultra vires* the Statute.

46. It seems that when it is said that the ICTY is an example of universal jurisdiction, what is meant is that, since the crimes in respect of which it has jurisdiction attract universal jurisdiction, the Security Council relied on such jurisdiction in establishing the Tribunal. It may be that this is said on the basis of a comparison with the manner in which the Allies combined the universal jurisdiction that each of them had over the specified crimes to establish the Nuremberg Tribunal. But the comparison between the establishment of a criminal tribunal by States on the one hand, and the Security Council on the other, is not apt, because in respect of the latter, the source of the Council's power is its right under Chapter VII of the United Nations Charter to adopt measures for the maintenance of international peace and security. Of course, the Security Council could, in the exercise of its powers under Chapter VII of the Charter, establish a tribunal that would have universal jurisdiction over certain crimes. Thus, it could set up a tribunal with jurisdiction over genocide, war crimes and crimes against humanity, irrespective of the place of commission of the offences, or the nationality of the accused or victims. But where, as is the case with ICTY, the

[64] *Case Concerning Ellectronica Sicula S.p.A (E.L.S.I.) (United States of America v. Italy), ICJ Reports* 1989, p. 15.
[65] *Ibid*, para. 50.
[66] *Tadić Jurisdiction Decision, supra* n 59, para. 137.

focus of the tribunal's mandate is on crimes committed in a specified country, there is no scope for the application of the territorial aspect of universal jurisdiction.

47. It remains now to consider whether, even if the Tribunal is entitled to exercise universal jurisdiction over the crimes with which the accused Ojdanić is charged, such an assumption of jurisdiction would resolve the issue raised by the Motion. His submission is that the Tribunal lacks jurisdiction over him because he is a national of the FRY, which was not a member of the United Nations at the time of the adoption of the Tribunal's Statute and at the time of the commission of the crimes in Kosovo, a part of the FRY.

48. Let us assume that the submission was that the Tribunal lacks jurisdiction because the crimes were committed, not in the territory of the former SFRY, but in a country that was not a part of that territory; since universal jurisdiction applies irrespective of the place of commission of the crimes, it would, *ex hypothesi*, answer the submission that the crimes were not committed in the territory of the former SFRY. But that is not the submission; rather, the submission is that the crimes were committed in a country that was not a member of the United Nations. I very much doubt that universal jurisdiction meets that submission. It may be argued that the Security Council could establish a Tribunal with jurisdiction over States non-members of the United Nations, in respect of war crimes and crimes against humanity. But if the Council has that power, it possesses it not by virtue of the principle of universal jurisdiction; such a power would arise by virtue of its responsibility under Chapter VII of the Charter for the maintenance of international peace and security.

49. In all the circumstances, I question the relevance and applicability of universal jurisdiction to the issues raised by the Motion.

Done in English and French, the English text being authoritative.

Patrick Robinson

Dated this sixth day of May 2003
At The Hague,
The Netherlands

[Seal of the Tribunal]