

# Symposium: The International Tribunal for Former Yugoslavia Comes of Age

## Nuremberg Revisited: The *Tadic* Case

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'sur une base fragile, on n'édifie rien de solide'

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The forthcoming trial of Dusko Tadic, the Bosnian Serb charged with violating international humanitarian law, including genocide, grave breaches of the Fourth Geneva Convention, and crimes against humanity, is likely to be foundational, political and epic.<sup>1</sup> Like the Nuremberg and Tokyo trials, the trial of the first defendant in the custody of the new ad hoc war crimes tribunal for the former Yugoslavia<sup>2</sup> is foundational in that it seeks not only to effect legal justice for Tadic but to reinvigorate the Nuremberg principles, and indirectly, the rule of law. It is political insofar as intended to deter future war crimes, make reconciliation possible in the former Yugoslavia, and help restore peace. It is epic since, beyond Tadic's guilt or innocence, what is at stake is the Security Council's power to direct the first international criminal proceedings since World War II through ad hoc tribunals created by Council fiat.<sup>3</sup>

Even before the trial of Tadic begins, its likely legacies are emerging, thanks to pre-trial defense motions challenging (1) the legality of the establishment of the Tribunal, (2) its primacy over national courts, and (3) its subject matter jurisdiction. This comment focuses on the trial and appellate chambers' responses to the first two sets of defense arguments.<sup>4</sup> In these decisions, issued in August and October 1996

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1 See David Luban, *Legal Modernism* 335-78 (discussing Nuremberg) and 379-91 (discussing the foundational, political and epic aspects of particular trials)(1994).

2 Established by Security Council Resolution 827, S/Res/827, May 25, 1993.

3 The Council has also created an international tribunal for Rwanda. Security Council Resolution 955, S/Res/955, Nov. 8, 1994.

4 Tadic argued, among other things, that the Tribunal was illegal because: the UN drafters had not envisaged it, the Assembly was not involved in its creation, the text of the Charter did not grant the Council the authority, the Council had not consistently created such tribunals in other instances, the Council could not act on individuals, there was no real threat to the peace, the Tribunal would not promote

respectively, the Tribunal's judges attempt to justify their Tribunal's existence.<sup>5</sup> Although, predictably, both trial and appellate chambers affirm the legality of Tadic's prosecution by the Tribunal, the legal arguments used to reach this result -- compromised from the outset -- are, by themselves, not sufficient to legitimize a Tribunal with such foundational, political and epic goals.

## I. A Tribunal Divided: Trial versus Appellate Chambers

The results in the trial and appellate chambers scarcely differ. Both chambers reject the defense argument that the Tribunal is empowered to 'judicially review' actions by the Security Council, including its article 39 determination of 'threat to the peace,' yet both nonetheless address the substance of the defendant's challenges to the Security Council's establishment of the Tribunal. Thus, both trial and appellate chambers agree that the Council did not act arbitrarily in establishing the Tribunal; both affirm that establishment was an appropriate response, taken under UN Charter article 41, to a justifiably determined 'threat to the peace;' and both reject challenges premised on violation of either sovereign or human rights.

Although the two chambers reached similar results, the respective majority opinions, bearing the signatures of Judge McDonald at the trial level and Judge Cassese on appeal, could hardly differ more.<sup>6</sup> This is especially true of the respective chambers' views of the Security Council. The trial judges see Chapter VII decisions as simply 'not reviewable.'<sup>7</sup> For the trial chamber, the International Court of Justice (ICJ) has itself confirmed that the World Court (and by extension, this Tribunal) has no powers of judicial review, especially over the Council.<sup>8</sup> That chamber contends that it has no choice but to follow Council dictates, indicating that the Council simply did not 'intend' to permit the Tribunal's judges to 'question the legality of the law which established it.'<sup>9</sup> Although the trial judges go on to address, presumably through non-binding dicta, the merits of some of Tadic's arguments, they repeatedly disclaim any intention of setting out limits for the Council, stating that they cannot 'judge the reasonableness of the acts of the Security Council.'<sup>10</sup> For that chamber, both the Council's article 39 determination of 'threat to the peace' and its choice of means to meet that threat constitute fact-based, non-justiciable policy

peace, a political body cannot create a judicial organ, and the Council could not violate national sovereignty. See, e.g., *Dusko Tadic*, Case No. IT-94-I-T, Aug. 10, 1995 (henceforth 'Trial Chamber'), para. 2.

5 Trial Chamber, *supra* note 4; *Dusko Tadic*, Case No. IT-94-I-AR72, Oct. 2, 1995 (henceforth 'Appellate Chamber').

6 Except as otherwise indicated, reference to the decisions by the 'trial chamber' or 'appellate chamber' refers to these respective majority opinions. Where reference is made to the opinions of individual judges, the judge is indicated by name.

7 Trial Chamber, para. 6.

8 Trial Chamber, paras. 10-13.

9 Trial Chamber, at para. 8.

10 Trial Chamber, at para. 16.

determinations.<sup>11</sup> The trial chamber's opinion even cites the criteria for 'political questions' delineated by the U.S. Supreme Court in *Baker v. Carr* (369 U.S. 186, 217 (1962)) in arguing that it is for the Council alone to decide whether what it does under Chapter VII is lawful.<sup>12</sup>

Given its views of the primacy of the Council, the trial chamber deals only perfunctorily with *Tadic's* claims. It sees the principle that tribunals be 'established by law' as permitting ad hoc bodies.<sup>13</sup> It finds the principle of *jus de non evocando* inapplicable given UN members' 'surrender of sovereignty' to the Council.<sup>14</sup> It dismisses for lack of standing and nonreviewability *Tadic's* claim that national sovereignty is violated by the Tribunal's primacy over national prosecutions.<sup>15</sup>

The appellate chamber, by contrast, takes an expansive view of its power to determine its own jurisdiction - even at the expense of the Council. The masterful opinion for the majority on appeal finds that 'jurisdiction' is not merely a question of determining whether a case is properly within the time and subject matter scope of the Tribunal's statute.<sup>16</sup> It argues that international tribunals constitute 'self-contained' systems with 'inherent' judicial powers over *Kompetenz-Kompetenz* (or *compétence de la compétence*) and can respond to a challenge to their lawful constitution, even when this is not expressly indicated in their constitutive instruments.<sup>17</sup> To limit the Tribunal's inherent power to determine its jurisdiction to what the Council intends is to suggest that the Tribunal remains 'totally in [the Council's] power and at its mercy.'<sup>18</sup> Such a limitation, contends the appellate chamber, would undermine the Tribunal's judicial character, cannot be inferred, and would require express derogation from a 'well-entrenched principle of general international law.'<sup>19</sup> The appellate chamber argues that what the Council intended was, instead, to create an independent subsidiary body, along the lines of the Administrative Tribunal considered in the ICJ's *Effect of Awards Case*.<sup>20</sup> In contrast to the trial chamber, this opinion cites ICJ Advisory Opinions to support the idea that an independent tribunal can review the legality of Council acts if this is 'incidental' to the determination of its jurisdiction<sup>21</sup> and to reject, as 'unfounded in law,' the 'political question' doctrine.<sup>22</sup>

11 Trial Chamber, paras. 24 and 28.

12 Trial Chamber, para. 24. Thus, the trial chamber concludes that the establishment of the Tribunal is 'not a justiciable issue.' Trial Chamber, para. 23.

13 Trial Chamber, para. 34.

14 Trial Chamber, para. 37 (noting Charter article 2(7)'s exception for enforcement actions).

15 Trial Chamber, para. 41.

16 Appellate Chamber, para. 10.

17 Appellate Chamber, para. 11-12, 14, and 18.

18 Appellate Chamber, para. 15.

19 Appellate Chamber, para. 19.

20 Appellate Chamber, para. 16, citing *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. Rep. 47 (Advisory Opinion of 13 July).

21 Appellate Chamber, at para. 21 (citing the ICJ's *Namibia* and *Effect of Awards* Advisory Opinions).

22 Appellate Chamber, at para. 24 (citing the ICJ's *Certain Expenses* Advisory Opinion).

These determinations lead the appellate chamber to a more detailed examination of the merits of Tadic's claims. The results are conclusions as to the scope of the Council's powers (and possible limits thereon) more detailed than any contained in recent ICJ opinions.<sup>23</sup> Among other things, the appellate judges conclude that: the Council's powers are wide but limited to 'specific' powers short of 'absolute fiat';<sup>24</sup> there is a varying political content to possible determinations under article 39 of the Charter and while a finding of a 'threat to the peace' is more political than a determination of 'aggression,' even the former is constrained by the Purposes and Principles of the Charter;<sup>25</sup> 'internal armed conflicts' may constitute a 'threat to the peace' under settled UN practice;<sup>26</sup> article 39 channels and limits the Council's powers to the means provided in articles 41 and 42;<sup>27</sup> and establishment of the Tribunal constitutes a 'measure not involving the use of force' under article 41,<sup>28</sup> does not constitute either an improper delegation nor a usurpation of judicial powers,<sup>29</sup> lies within the wide discretion of the Council as to chosen means, and should not be tested by the likelihood of success or failure in achieving the Council's goals.<sup>30</sup>

The appellate chamber rejects on the merits the defendant's contention that the Tribunal is not 'established by law' as provided for in human rights conventions, arguing that whatever this provision means has been fulfilled through the creation of a fair tribunal by a body constitutionally authorized to take binding action.<sup>31</sup> The appellate judges disagree with the trial chamber and find that an individual faced with criminal prosecution necessarily has standing to raise a possible issue of violation of state sovereignty. They conclude that Tadic has standing to object to the Tribunal's primacy over national jurisdictions.<sup>32</sup> They nonetheless reject that defense on the merits because of the UN Charter article 2(7)'s exception for 'enforcement action.'<sup>33</sup> Finally, the appellate chamber rejects defendant's plea of ius de non evocando because it finds that this principle only prevents the creation of unfair tribunals.<sup>34</sup>

23 Compare Appellate Chamber, paras. 28-48 with, for example, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.)*, Provisional Measures, 1992 ICJ Rep. 3, 114 (henceforth *Lockerbie*).

24 Appellate Chamber, para. 28.

25 Appellate Chamber, para. 29.

26 Appellate Chamber, para. 30.

27 Appellate Chamber, paras. 31-32.

28 Appellate Chamber, paras. 33-36.

29 Appellate Chamber, para. 38.

30 Appellate Chamber, para. 39.

31 Appellate Chamber, paras. 39-45 (discussing, for example, article 14 of the International Covenant on Civil and Political Rights which, among other things, assures criminal defendants the right to 'a fair and public hearing by a competent, independent and impartial tribunal established by law').

32 Appellate Chamber, para. 55.

33 Appellate Chamber, para. 56.

34 Appellate Chamber, paras. 61-62.

## II. Tensions and Problems

Given recent scholarly debates about the power of the ICJ to engage in 'judicial review' over the actions of the post-Cold War Security Council, it is ironic that the first international judicial body actually to do so, in a binding context, is an ad hoc war crimes tribunal established by the Council itself.<sup>35</sup> The trial and appellate opinions issued in the *Tadic* Case should be of great interest to those engaged in those debates and should give considerable comfort to those who favor keeping the Council in check through 'judicial review.' Together, these opinions suggest that there are many potential (de)legitimizing forums, and not just the ICJ; that 'judicial review' can have many meanings and is not limited to an immediately effective judicial finding that renders Council action 'null and void'; that, notwithstanding the textual indeterminacy of Chapter VII, judges are apt to find some constraints on Council action; and that, consequently, the only 'check' on the Council need not be the veto.<sup>36</sup> They show how difficult it is for an international court, established alongside an institution governed by a charter, to avoid some aspects of judicial review. These opinions also counter those who tend to see only friction, and not fruitful interaction, between Council 'police' action, attuned to politics, and General Assembly pronouncements in defense of the 'temple' of law and justice; at a minimum, the Tribunal has demonstrated that there are other actors involved in the defense of this 'temple' apart from the General Assembly.<sup>37</sup> The majority appellate opinion strongly supports those who see the UN Charter not as unblinkered license for police action but as an emerging constitution of enumerated, limited powers subject to the rule of law.<sup>38</sup>

That trial and appellate chambers come to nearly opposite conclusions regarding the Tribunal's review powers over the Council would not, in the normal case, be troubling. Different levels of judicial consideration usually result in a strengthened final result. But the differing perspectives of trial and appellate chambers here do not promote such closure with respect to the fundamental issues raised. As those

35 The elliptical responses so far issued by the ICJ in response to interim measures requests by Libya and Bosnia have not yet resolved the judicial review question in the views of most observers. On the contrary, the ICJ's curt responses in *Lockerbie*, *supra* note 23, have lead to nearly as many readings as there are readers. See, e.g., Paul J. I. M. de Waart, 'The UN System at a Crossroads: Peoples' Centre or Big Brothers' Small Club,' in N. Blokker and S. Muller (eds.), *Towards More Effective Supervision By International Organizations* (1994) 49, at 62 (seeing those orders as affirming Council supremacy); Franck, 'The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?,' 86 *AJIL* (1992) 519 (seeing them as a step towards *Marbury v. Madison* review); Reisman, 'The Constitutional Crisis in the United Nations,' 87 *AJIL* (1993) 83 (criticizing these orders as an erroneous step in-between).

36 See Jose E. Alvarez, 'Judging the Security Council,' 90 *AJIL* (1996)1.

37 Cf. Martti Koskenniemi, 'The Police in the Temple: Order, Justice and the UN: A Dialectical View,' 6 *EJIL* (1995) 325.

38 Compare Franck, *supra* note 35 with Serge Sur, *Security Council Resolution 687 of 3 April 1991 in the Gulf Affair: Problems of Restoring and Safeguarding Peace* (Research Paper No. 12), UN Doc. UNIDIR/92/53 (1992) 8, 61.

who have followed the ICJ/Council 'judicial review' debates know, the competing paradigms followed by the trial and appellate chambers concerning the scope/meaning/reviewability of Chapter VII acts remain highly debatable and have not yet been resolved by any UN organ, including the ICJ. It would be naive to believe that this Tribunal, whose questionable pedigree is at stake in this very case, has now conclusively settled issues that the World Court itself has ducked. Neither the trial nor the appellate chamber's respective answers are likely to draw uniform praise. While the trial judges' U.S.-centric reliance on the 'political question' doctrine is not likely to find much support,<sup>39</sup> their general conclusion, supported by Judge Li's separate opinion on appeal, that the Council is both legally all-powerful and unreviewable has considerable adherents, as does the opposite position which the appellate majority tend to support.<sup>40</sup>

Such basic disagreements about the status and powers of the Council dim the prospects for judicial legitimation of war crimes adjudications by Council-generated ad hoc bodies. One might have hoped that at least this Tribunal's judges would have taken a definite position with respect to this court's 'independence' from the Council, including with respect to whether any UN organ can interfere with the Tribunal's procedures in this or other cases or otherwise alter its statute or rules of procedure in ways detrimental to the rights of those indicted or their alleged victims.<sup>41</sup> Worse, neither the trial nor appellate chambers' alternative views of the status of the Tribunal vis-a-vis the Council are altogether coherent.

Despite the trial chamber's reliance on non-reviewability, those judges 'felt it proper' to address the substance of many of the defendant's contentions even though 'many' of these go to the 'unreviewable lawfulness of the actions of the Security Council.'<sup>42</sup> Unfortunately, despite the singular importance of the issue, the trial chamber fails to identify which issues it regards as justiciable. Instead, the trial judges frequently aver that a particular issue is non-justiciable while at the same

39 For rejection of similar arguments by the ICJ, see *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ Rep. 392 (Nov. 26); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ Rep. 3 (May 24). To the extent the political question doctrine rests on a view of the Council that is analogous to that of the U.S. executive as portrayed in decisions such as *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), the attribution of comparable expertise or legitimacy to the Council is not likely to win many adherents among non-permanent members of the Council, many of whom have been critical of the Council. Moreover, even with respect to the United States, the political question doctrine has been severely criticized at least as it applies to foreign affairs. See, e.g., Harold H. Koh, *The National Security Constitution* (1990); Thomas M. Franck, *Political Questions/Judicial Answers* (1992). Finally, if something like a political question exists under the Charter, the doctrine need not preclude any judicial consideration of all aspects of Chapter VII determinations. See generally, Franck, *supra*.

40 See *supra* notes 35, 36 and 38.

41 Nor are these the only issues left unresolved. The Yugoslav tribunal has been delegated some tasks with respect to Rwanda. See S/Res/955, Annex (statute for Rwandan Tribunal). Is the Council free to expand or contract the jurisdiction of the Yugoslav Tribunal without limit? Would it be free to turn the Tribunal into a de facto permanent criminal court? Given the trial and appellate chambers' views of the expansive nature of Chapter VII, the Council would have a ready license to do either since the failure to punish war crimes, wherever they occur, arguably constitutes a 'threat to the peace.'

42 Trial Chamber, para. 40.

time purporting to dismiss it, albeit perfunctorily, on the merits.<sup>43</sup> But if, as the trial judges frequently state, there is 'no law' to apply at least with respect to some of these non-justiciable issues, they would appear to have no business saying anything about such questions. This is the position of Judge Li, who in a separate opinion on appeal, argues that judicial statements about either the Council's article 39 determination or its chosen means to deal with a threat to the peace are 'imprudent and worthless both in fact and in law.'<sup>44</sup>

The trial chamber takes this seemingly incoherent stance probably because, as the judges acknowledge, criminal law is only efficacious if the body that determines criminality is 'viewed as legitimate.'<sup>45</sup> Most of the judges at the trial and appellate levels reject Judge Li's absolutist position because, however logical, it simply will not do for an international criminal court to say to a defendant that he/she is subject to any capricious whim of the Security Council instead of the rule of law. Yet the cogency of Judge Li's position is inadvertently supported when the trial chamber inconsistently avers that the Security Council is free to abolish the Tribunal at any time, 'in midstream as it were, for wholly political purposes'<sup>46</sup> or that article 41 provides no limits on the discretion of the Council to take measures short of force.<sup>47</sup>

The trial chamber's unsatisfactory treatment of either its power to 'review' the Council or, more generally, of the scope of the Council's powers reflects unreconciled conflicts between the rights of states and human rights. As the Tribunal occasionally recognizes, this case concerns the rights of individuals: *Tadic's* and the rights of his alleged victims. What the Council sought to establish was a forum in which both sets of rights would be fairly adjudicated, that is, where the criminal defendant's rights under article 14 of the International Covenant on Civil and Political Rights would be protected while deterring others and redressing the rights of victims to promote peace. Yet to determine that the Council acted lawfully, the Tribunal found that it must privilege the rights of states (and of permanent Council members in particular) over claims that the Council may, at least potentially, ride roughshod over state sovereignty as well as the rights of individuals (defendants and victims alike). Thus, the trial chamber wrestles unsuccessfully with inconsistent propositions: that the Tribunal must be both fair and independent but still follow Council dictates, that the crimes charged are universally enforceable but can be selectively enforced by the Council, that individuals have a right to a fair judicial forum but that a non-judicial body, the Council, may 'indirectly' impose criminal liability, that individuals gain *human* rights under human rights conventions and *jus*

43 Thus, despite strong statements concerning the non-reviewability of Chapter VII decisions, see, e.g., para. 6, the trial chamber concludes that the Council 'did not act arbitrarily.' Trial Chamber, para. 16. There are also findings that the establishment of the Tribunal is consistent with the Charter text, its Principles and Purposes, general principles of international law, and/or *jus cogens*. Trial Chamber, paras. 17, and 27-31.

44 Separate Opinion, paras. 2-4.

45 Trial Chamber, para. 6.

46 Trial Chamber, para. 20.

47 Trial Chamber, para. 26.

*de non evocando* but that courts need not enforce these because *states* generally and the Council in particular have said otherwise, and that individuals may have legitimate expectations to be tried in (national) courts but that they have no *locus standi* to assert these rights.

At times, the trial chamber steps to the edge of the state's/human rights chasm as when, in dismissing Tadic's plea for the primacy of national prosecutions, it proclaims that enforcement of these universal crimes 'transcend' the rights of any one state since 'the sovereign rights of States cannot and should not take precedence over the right of *the international community* to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world.'<sup>48</sup> Invoking the rights of the 'community' instead of human rights prompts more questions than it answers. Evidently, the chamber does not want to say that human rights necessarily prevail (especially since it has just found that Tadic has no standing to assert certain rights, reserved to sovereign states).<sup>49</sup> But some might question the existence of the chamber's (mythical?) community while others might wonder why a *group* of states is any more entitled to override the rights of individuals than a single state. Yet others might suggest that the General Assembly, as opposed to the 'unrepresentative' Council, is more entitled morally, if not legally, to render the judgment of the 'community of states' by establishing this tribunal and the scope of its jurisdiction.<sup>50</sup>

The chamber's proposition that the Council can act 'indirectly' on individuals<sup>51</sup> prompts a parade of horrors not likely to win hearts and minds. If what the chamber means is that Council actions, such as sanctions, can indirectly have an effect on individuals, this is unsurprising but irrelevant. The question is whether the Council can create a denationalized body capable of depriving individuals of their liberty without national court appeal or involvement. In establishing this Tribunal, the Council went beyond what it did in Council resolutions 731 and 748,<sup>52</sup> cited by the chamber in support, since at least in that (already controversial) instance the accused Lockerbie bombers would still be tried by established national court(s) with some connection to the underlying charges. Is the 'surrender of sovereignty' that the chamber finds in Chapter VII of the Charter unbounded? Could the Council under Chapter VII, direct a national court to try particular individuals? Further, since the chamber's response on this issue does not rely on universal jurisdiction over war crimes, is it suggesting that the Council might have a Chapter VII license to direct

48 Trial Chamber, para. 42 (emphasis added).

49 Trial Chamber, para. 41

50 Cf. Koskenniemi, *supra* note 37. But see Judge Sidhwa, Separate Opinion, para. 73 (suggesting that establishment of the Tribunal by the Assembly would require Charter amendment). Given Judge Sidhwa's own views of UN implied powers, see *infra* note 73, it is not clear why this would be so.

51 Trial Chamber, para. 36.

52 Security Council Resolution 731, S/Res/731, Jan. 21, 1992 (urging Libya to respond to requests to cooperate with respect to the prosecution of alleged Lockerbie bombers); Security Council Resolution 748, S/Res/748, Mar. 31, 1992 (imposing Libyan sanctions). The United States and the United Kingdom were demanding, among other things, the transfer of the alleged Lockerbie bombers, Libyan nationals, for trial in U.S. or U.K. courts.



national courts to try persons charged with ordinary crimes?<sup>53</sup> Finally, in indicating that this issue is 'unreviewable,' is it saying that the only protection UN members and individuals have from these outcomes is the lack of nine votes in the Council?

The trial chamber's views of UN institutional law leave unanswered other questions. Although the chamber stresses that it is enforcing law that is 'beyond any doubt part of customary law' and not 'novel,'<sup>54</sup> it acknowledges that the Council undertook a 'novel' approach in creating the Tribunal<sup>55</sup> without addressing why the novelty of the choice of means is irrelevant. As the chamber notes, the Council has sought to address similar humanitarian concerns through more traditional methods (such as sanctions or peacekeeping).<sup>56</sup> Alternatives arguably exist.<sup>57</sup> Is considered rejection of these necessary to a determination that the Council did not act 'arbitrarily'?

Elsewhere, the chamber disparages arguments that the Charter framers did not intend to have the Council establish such a judicial body.<sup>58</sup> The chamber does not address the problem that given the ambiguities in the scope of article 41, there may be a need, under the Vienna Convention on Treaties, to examine the Charter's travaux.<sup>59</sup> By not rebutting this argument through, for example, citation to Justice Spender's arguments rejecting originalism in interpreting the Charter,<sup>60</sup> the chamber fails to present the strongest answer to *Tadic*. The chamber also presumes the validity of Council action but does not explain why this presumption should apply in a context where the UN might be overriding the rights of sovereigns and individuals.<sup>61</sup>

Since the majority of the appellate judges accept that the Tribunal must examine the legality of its creation, that majority opinion is more coherent and does not straddle quite as many inconsistent positions with respect to state's/human rights. Nonetheless, that opinion is not free of unreconciled tensions and the failure to confront them weakens it. Thus, in suggesting that the Tribunal has 'inherent' jurisdiction to determine whether it has been validly constituted, the appellate chamber fails to resolve the 'controversial' proposition that the Council could have prevented the Tribunal from passing on such a question; it also skirts the question of what the

53 Or alternatively, could the Council direct national courts *not* to hear certain cases for the sake of national reconciliation, and therefore international peace? Compare the appellate chamber's attempt to buttress the primacy of the Tribunal over national courts by reference to the international nature of the crimes at issue. Appellate Chamber, para. 32.

54 Trial Chamber, para. 19.

55 Trial Chamber, para. 22.

56 Trial Chamber, para. 22.

57 Countries emerging from totalitarian rule have attempted national reconciliation through alternatives such as 'truth commissions', prosecutions in domestic courts or specially created national courts, or even differing versions of national amnesties.

58 Trial Chamber, para. 27 (stating that these are 'nothing to the point').

59 Vienna Convention on the Law of Treaties, UN Doc. A/CONF. 39/27, May 23, 1969, article 32.

60 See Judge Spender, Separate Opinion, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, 1962 ICJ Rep. 151, at 184-97.

61 See, e.g., Trial Chamber, para. 27. Cf. *Certain Expenses*, *supra* note 60 (applying the presumption of validity in the context of an Assembly determination regarding peacekeeping expenses).

Council might legally do in the future.<sup>62</sup> As a result, Tadic, other potential defendants, and all the victims of the Yugoslav conflict fail to get judicial reassurance of the Tribunal's (or its prosecutor's) likely independence from the Council.

Similarly, the appellate chamber's expeditious dismissal of Tadic's contention that the Council has improperly delegated some of its own functions,<sup>63</sup> fails to seize the opportunity to pronounce that the Tribunal is, in no sense, an extension of the Council. That the Charter contains some concept of 'improper delegation' is not farfetched. It is presumptively illegal for the Council to attempt, for example, to 'delegate' its role in the admission, suspension, or expulsion of members.<sup>64</sup> It would also probably be improper for it to delegate to a sanctions committee or the Secretary-General<sup>65</sup> the ultimate determination of whether a 'threat to the peace' exists or continues. On vital issues of peace and security, it seems that the Charter anticipates that the Council alone is authorized to act.<sup>66</sup> Given this, as well as the text of the two Charter bases for this Tribunal (articles 41 and 29), there are justifiable fears that, as is suggested by the trial chamber, the Council legally retains the power to terminate any on-going prosecutions if it finds that a 'breach of the peace' no longer exists or if it finds that 'maintaining the peace' is best accomplished by ceasing further any or particular prosecutions. This prospect, troubling to anyone concerned with the sweeping goals for this Tribunal, is not clearly resolved by the appellate chamber's opinion.<sup>67</sup>

On the other side of the state's/human rights divide, state centrists (among others) are not likely to be satisfied with the appellate chamber's expansive notion of *compétence de la compétence*. Although the appeals chamber is probably correct in determining that it has the competence to determine its own jurisdiction, the appellate majority does not convincingly explain why this Tribunal, jurisdictionally limited both geographically and substantively, has necessary 'inherent' competence over foundational 'constitutional' issues pertaining to the UN legal order, including questions which some would deny even to its principal judicial organ. The appellate judges do not adequately answer those who would contend that international bodies

62 Appellate Chamber, para. 19. The appellate chamber does hint, however, that it would not take kindly to such an attempt, suggesting that this would undermine the Tribunal's judicial character. *Ibid.*, paras. 15 and 19.

63 Appellate Chamber, para. 38.

64 See UN Charter, articles 4, 5, and 6; also see *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 ICJ Rep. 1.

65 Cf. Judge Sidhwa who raises but does not address whether the 'structuring of the Tribunal was not outside the scope of the Secretary-General's powers under article 29 . . . .' Separate Opinion, para. 35.

66 Article 41 permits the 'Security Council' and 'members' to take the measures indicated. As the appellate chamber indicates elsewhere, the Charter 'speaks the language of specific powers, not of absolute fiat.' Appellate Chamber, para. 28.

67 Judge Sidhwa in his separate opinion states that the 'Tribunal was established, under the umbrella of an enforcement measure under Chapter VII, as a subsidiary organ of a judicial nature within the terms of Article 29 of the Charter . . . .' Separate Opinion, para. 64. But are subsidiary bodies like UN sanctions committees created under Chapter VII the relevant analogy - as compared to non-subsiary independent bodies charged with the peaceful settlement of disputes (such as ad hoc arbitral bodies) which, under article 33 of the Charter, the Council does not create (or control)?

created for limited purposes such as prosecution of war crimes or human rights determinations are 'ill-equipped' to review, de novo, complex issues outside their areas of expertise and should adopt an exceedingly deferential stance towards them,<sup>68</sup> or that reliance on general international legal principles such as *compétence de la compétence* constitutes resort to an unsubstantiated 'brooding omnipresence.'<sup>69</sup> Nor is the appellate chamber's citation to ICJ advisory opinions<sup>70</sup> for the expansive nature of 'incidental' jurisdiction necessarily compelling, not for those who would argue that the teleological non-binding opinions of that Court, issued in response to hypothetical questions posed by a coordinate body, have little relevance to the options available to a criminal court with a narrower jurisdiction base.<sup>71</sup>

With respect to the merits of *Tadic's* claims, the appellate chamber's sliding scale view of the discretionary powers of the Council's Chapter VII powers permits it to straddle the state's/human rights divide.<sup>72</sup> But the elegance of this approach will not conceal from critics that it is a judicial creation, with no clear textual support in either the UN Charter or the Tribunal's Statute. And some of the appellate chamber's arguments with respect to the Council's discretion withstand scrutiny more than others. Its textual argument that article 41 supports establishment of a judicial body because that article contains a negative definition of what it permits (all measures not involving force),<sup>73</sup> is more convincing than the contention that since the organization can take measures through the intermediary of its members, it 'logically' must be able to act on its own.<sup>74</sup>

With respect, the appellate chamber is wrong when it states that '[i]t is only for want of resources that the United Nations has to act through its Members.'<sup>75</sup> Quite apart from express or implied limits in the Charter itself, the 'brooding omnipresence' of international law principles that the appellate judges use to inform their concept of 'incidental' jurisdiction also seems to contain implicit understandings by

68 Cf. Separate Opinion of Mr. Frowein, *Piersack v. Belgium*, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) (1981) 26-28. Instead, thanks to the appellate chamber's view of incidental jurisdiction, the Council is now faced with judicially implied limits on its Chapter VII powers.

69 Cf. Reisman, *supra* note 35, at 91 n. 33. Positivists might also complain that the appellate chamber does not clarify where in the article 38 sources of law *compétence de la compétence* fits: general principle of law, treaty (as an implicit term of the Tribunal's Council-sanctioned statute), or rule of custom.

70 See also Judge Sidhwa's Separate Opinion, at paras. 27-31.

71 But see Judge Sidhwa, Separate Opinion, para. 34 (suggesting that the Yugoslav Tribunal's obligatory jurisdiction imposes on it a greater obligation to exercise incidental review power).

72 '[T]he wider the discretion of the Security Council . . . the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.' Appellate Chamber, para. 21.

73 But see Judge Sidhwa, Separate Opinion, para. 71 (drawing not only on article 41 but also on the doctrine of 'implied powers' to justify the Tribunal's creation). Notably, Judge Sidhwa relies on the wide notion of implied powers, suggesting that all that is required is a 'concrete link' between the desired power and the functions of the organization. *Ibid.*, cf. *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Rep. 174, at 182 (finding UN implied powers where these are 'conferred upon it by necessary implication as being essential to the performance of its duties')(emphasis added).

74 Appellate Chamber, paras. 35-36.

75 Appellate Chamber, para. 36.

UN members that some actions which the organization may direct, including economic sanctions, the use of force, and deployment of peacekeepers, *must*, at least at this stage in the development of the law of the Charter, involve national intermediaries. Even these UN collective actions contain unstated but considerable limits on the scope of the *organization's* discretion to itself enforce compliance.<sup>76</sup> Some of these restraints may help protect human rights - at least to the extent one believes that subsidiarity owes something of its rationale to the protection of these rights.<sup>77</sup> The appellate chamber does not adequately rebut Tadic's argument that among the 'sovereign' powers retained by UN members is the right to prosecute in their own courts.<sup>78</sup>

The appellate chamber's cursory treatment of the Council's determination of 'threat to the peace' is not likely to be comforting to non-permanent members of the Council.<sup>79</sup> At stake in this case is the legally binding nature of a quasi-legislative/quasi-judicial action by the Council. While it may be 'settled practice' that the Council has indicated, through prior quasi-legislative/quasi-judicial determinations, that 'internal armed conflicts' constitute such threats, reliance on such findings to determine the legality of the particular finding in this case is circular and unhelpful.<sup>80</sup> Further, the Tribunal's bald statement that Council practice has now 'internationalized' internal conflicts might be seen as suggesting that the Council is now (properly) reading article 2(4) of the Charter as prohibiting the internal use of force. While some might favor this interpretative move and while this conclusion is consistent with the Tribunal's expansive view of the applicable humanitarian law in this case,<sup>81</sup> this is not what article 2(4) states and it is unlikely that many UN members are seriously willing to so enlarge its scope. On its face and as applied, Article 2(4) bans interstate aggression, not intrastate conflicts. By putting the issue so

76 Consider, for example, the circumspect treatment of certain types of national command functions for peacekeepers. See, e.g., Report of the Secretary-General, A/49/681 (distinguishing, for example, 'operational command' from 'full command' and noting that troop discipline remains subject to national control). With respect to the enforcement of sanctions, the Council has not (at least not yet) given UN sanctions committees enforcement powers over those states which defy sanctions programs and it has not yet purported to interfere with domestic court or executive branch determinations on domestic implementation of UN sanction programs.

77 Compare Judge Sidhwa's more restrained approach to the discretion accorded the Council under article 41. See Separate Opinion, para. 63 (justifying the Tribunal because it is temporary, bears a nexus to the breach of the peace justifiably found by the Council, and is established for a limited purpose, limited territory and for appropriate offenders).

78 See also Judge Sidhwa, Separate Opinion, para. 85 (affirming a sovereign's right to try its own nationals or persons within its jurisdiction).

79 Appellate Chamber, paras. 28-30.

80 Cf. Justice Spender, Separate Opinion, *Certain Expenses*, *supra* note 60, at 184-197 (questioning the use of institutional practice, particularly when it is the practice of one UN organ or goes against the text of the Charter). This Tribunal does not seem to know quite what to make of Council practice. Although Judge Sidhwa insists that Council determinations under article 39 do not constitute 'precedents,' see Separate Opinion, para. 22, the appellate chamber appeals to Council decisions on a number of occasions, see, e.g., Appellate Chamber, para. 114 and 133. Such reliance puts the Tribunal at the mercy of inconsistent Council actions, as when Judge Li relies on the different jurisdictional basis conferred on the Council's Tribunal for Rwanda. Judge Li, Separate Opinion, para. 11.

81 See *infra* notes 102-103 and accompanying text.

starkly, the appellate decision unnecessarily provokes many governments already concerned that the Council may be inclined to stifle legitimate claims for self-determination or interfere in 'police' actions that they regard as legitimate.<sup>82</sup> Moreover, the appellate majority's stance on civil wars seems an unnecessary assault on sovereign realpolitik. As other judges on appeal indicate, the Council did not clearly characterize the Yugoslav conflict as 'internal.' Further, even if the Tribunal believed it had to resolve that issue for purposes of subject matter jurisdiction over particular crimes, the characterization of the conflict for that purpose did not need to be used to justify the determination of 'threat to the peace.'

More credible and less damaging is the more cautious stance of Judge Sidhwa. In his separate opinion, Judge Sidhwa reviews the facts leading to the Council's determination of a 'threat to the peace.'<sup>83</sup> He concludes that such a threat 'does not necessarily mean one relative to the States embroiled in an internal or international armed conflict, but one relative to others also, particularly adjoining States, which are likely to be and usually are affected.'<sup>84</sup> By identifying the many reasons meriting the designation of 'threat to the peace' in this instance, including the stream of refugees and the numerous breaches of humanitarian law and human rights, Judge Sidhwa emphasizes the uniqueness of the particular Council determinations at issue. His justification for the Council's determinations does not rely on the questionable legitimacy of UN intervention in civil wars.

The tension between state's and human rights comes most clearly to the surface in the appellate chamber's rejection of the contention that the Tribunal was not 'established by law,' as provided in article 14 of the International Covenant on Civil and Political Rights and other human rights instruments. The appellate judges' reliance on three somewhat inconsistent reasons for rejecting this claim suggests not the weakness of *Tadic's* position but its arguable force. One solid persuasive rebuttal might have been better than the multiple but weak answers actually given. The first response given by the appellate chamber, that the need to be 'established by law' cannot apply when no 'legislature' exists, is easily answered. That the international system lacks a legislature does not necessarily mean that the 'established by law' principle 'finds no application in an international law setting.'<sup>85</sup> It could mean that given the need for unquestioned legality of criminal prosecutions, these should only be conducted by national courts, even if courts specially created by national legislatures. Alternatively, it could mean that international criminal courts should only be created by established methods for making international law, in accordance with

82 Cf. Judge Sidhwa, Separate Opinion, para. 23 (noting that it is 'high time' that the organization provide some effective remedy against ultra vires Council action so that 'aggrieved parties may get some opportunity for a review of the Council's decision'). Here and elsewhere, Judge Sidhwa's separate opinion suggests, albeit weakly, the spirit of Justice Pal's (in)famous dissent against the 'imperialist' origins of the Tokyo prosecutions. Cf. Justice Pal, Dissenting Opinion, 21 *Tokyo War Crimes Trial* (R. Pritchard and S. Zaide, eds. 1981).

83 Judge Sidhwa, Separate Opinion, paras. 38-56.

84 Judge Sidhwa, Separate Opinion, para. 61.

85 Appellate Chamber, para. 43.

accepted sources, i.e., the treaty route now being urged for creation of a permanent criminal court (in part as a reaction to the perceived illegitimacy of continued creation of ad hoc bodies by the Council).

The chamber's second answer - that 'established by law' might mean creation by a non-legislative body able to take binding action - assumes what is contested: that the UN Charter authorizes the Council to create ad hoc tribunals. Those European human rights cases that have approved of courts created by methods not involving a legislature have done so in contexts where there is, nonetheless, clear pre-existing constitutional or statutory sanction.<sup>86</sup> But there is nothing in the Charter explicitly conferring this power on the Council. The appellate majority only weakens their response when they add that the Council's creation of the Tribunal 'has been repeatedly approved and endorsed by the 'representative' organ of the United Nations, the General Assembly.'<sup>87</sup> If the Council is legally authorized to create the Tribunal, it is hard to see what Assembly ratification (or involvement by other groups) adds.<sup>88</sup> Instead, the reference to the more 'representative' Assembly only heightens the disparity between the ways criminal courts are normally authorized and the way this Tribunal was created. Moreover, it suggests the troubling possibility that the General Assembly, along with the Council, retains some residual power with respect to the operation of this or similar tribunals.

Finally, the appellate chamber's third argument that all that is required is procedural fairness renders the right to a court 'established by law' redundant, a result at odds with settled rules of construction. It is also not consistent with how this phrase has been interpreted at least by some human rights entities, namely as a distinct requirement separate from other guarantees for criminal defendants.<sup>89</sup>

Further, the trial and appellate chambers' repeated references to the need to avoid scrupulously any appearance of unfairness in answer to this argument, as well as to other defenses raised by Tadic such as *jus de non evocando*,<sup>90</sup> only stresses the significance of the Tribunal's rules of evidence and procedure. It serves to put off questions until after the trial, when the fairness of the Tribunal rules as applied can be subject to close examination. But if the overall legitimacy of the Tribunal rests ultimately on a successful replication of the guarantees given domestic criminal defendants, the Tribunal may be in trouble. Its rules of evidence and procedure, applicable in this non-jury setting, are an unlikely mélange of common law and civil law approaches to criminal prosecutions, replete with innovative compromises un-

86 See, e.g., *Zand v. Austria*, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70 (1979); *Piersack v. Belgium*, *supra* note 68.

87 Appellate Chamber, para. 44.

88 One suspects that the appellate chamber as a whole, as well as Judge Sidhwa (see separate opinion, para. 73), draw on the ostensible support of the General Assembly to give the Tribunal political legitimacy. Judge Sidhwa's separate opinion, which attempts to make the case that the Tribunal was established by 'popular will,' (separate opinion at paras. 67-69), raises fascinating questions about the applicability of democratic models to the UN.

89 See, e.g., *Zand v. Austria*, *supra* note 86; *Piersack v. Belgium*, *supra* note 68.

90 See also Trial Chamber, para. 8, Appellate Chamber, paras. 61-62.

likely to satisfy lawyers from either common law or civil law jurisdictions.<sup>91</sup> Indeed, given the trial chamber's decision that the prosecutor is free to present evidence given by some witnesses whose identities need not be revealed to Tadic or his attorneys, common law lawyers who take cross-examination rights as a given, are likely to be skeptical about the Tribunal's prospects for fairness.<sup>92</sup>

The state's/human rights conundrum renders unconvincing the appellate chamber's response to Tadic's arguments that the Tribunal should not have primacy over national prosecutions. Having eloquently affirmed that a criminal defendant's right to a 'full defense' entitles him/her to raise issues of the violation of state sovereignty,<sup>93</sup> it seems perverse to dismiss summarily on the merits that defense on the grounds that states have renounced these rights.<sup>94</sup> When the judges add that '[i]t would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights,'<sup>95</sup> one is entitled to ask why states should be permitted to bargain away their nationals' rights to national prosecutions - if that is what they did in article 2(7) *sub silentio*.<sup>96</sup>

As the Tribunal's responses to all of Tadic's defenses illustrate, the UN Charter's Purposes and Principles in articles 1 and 2 are cited as a makeweight<sup>97</sup> and play a minimal role in either chamber's decision. If the Tribunal had actually examined those Purposes and Principles, it would have had to confront, at the outset, the tensions between arguably conflicting UN goals, such as between sovereign equality/Council primacy in enforcement actions, self-determination/the prohibition on use of force, and peace and security/human rights. This might in turn have resulted in some discussion, much needed, of the relation between UN Purposes and Principles and *jus cogens*<sup>98</sup> and between those Purposes and Principles and a finding of

91 The Tribunal's rules for testimonial evidence are vitally important since, unlike Nuremberg and its reliance on an extensive paper trial, the Yugoslav prosecutions are expected to rely much more extensively on such evidence. For an early survey of some potential problems from the standpoint of the common law bar, see ABA Task Force, *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia* (1993).

92 See *Dusko Tadic*, Case No. IT-94-I-T, Aug. 10, 1995 and see especially, Judge Stephen, Separate Opinion (dissenting in part). Some common law lawyers criticized Nuremberg's relaxed use of evidence. See, e.g., John Mendelsohn, "Trial by Document: The Problem of Due Process for War Criminals at Nuremberg," 7 *Prologue* (1975) 227.

93 Appellate Chamber, para. 55.

94 Appellate Chamber, para. 56 (citing article 2(7)). That the trial chamber also uses article 2(7) to deny Tadic standing to raise this defense shows the negligible difference between the chambers on this question despite the rhetorical differences.

95 Appellate Chamber, para. 58.

96 Judge Sidhwa, by contrast, attempts to reconcile article 2(7) with the UN's responsibilities to respect human rights under articles 1(3), 55 and 56. He argues that Tadic is only entitled to non-derogable rights in human rights conventions, and none of these have been violated by the Tribunal's primacy over national courts. Separate Opinion, at paras. 86-89.

97 See, e.g., Trial Chamber, para. 14; Appellate Chamber, para. 29.

98 Compare Trial Chamber, para. 17 (dismissing, without explanation, Council limits premised on *jus cogens*) with Judge Lauterpacht, Separate Opinion, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugo. (Serbia and Montenegro))*, Provisional Measures, 1993 ICJ Rep. 325, at paras. 100-104 (discussing possible *jus cogens* limits on

'non-arbitrary' Council action.<sup>99</sup> It might also have led to some attempts to reconcile state's and human rights, as through an explanation of which human rights are so fundamental that they must be deemed to be encompassed by the UN's Purposes and Principles.

### III. The Yugoslav Tribunal's Legacy

It is appropriate that the 50th anniversary of the Nuremberg Trials has produced a new international juridical body that is attempting to reinvigorate their legacy. It has been argued that the legacies of Nuremberg were compromised, among other reasons, because Nuremberg did not follow through on its original vision: to vindicate and enforce the rights of human beings no matter when these are violated or by whom. David Luban, for instance, has argued that by limiting the scope of Nuremberg to crimes committed in the course of aggressive war by those defeated in that war, and not, for example, prosecuting crimes committed in Germany before the onset of war or by Allied war criminals, the creators of Nuremberg undermined their intended legacy.<sup>100</sup>

Luban sees in this a failure to resolve the tension between statism and human rights. By vindicating only those human rights that result from a violation of a state sovereignty (because only when committed in the course of aggressive war) and only if committed by the agents of some defeated states, Nuremberg sent mixed signals about the primacy of human rights over claims of violations of state sovereignty. To help remedy this, Luban advocates that crimes against humanity be permitted to 'flower . . . into the politics of human rights' by permitting such charges whether or not committed in the course of interstate conflict; the emphasis would be on 'wars that violate human rights' and not on 'wars that violate state sovereignty.'<sup>101</sup>

the Council). It seems absurd, for example, to defend the legality of these prosecutions on the grounds that the unreviewable Council has itself the power to assist in the commission of genocide. Cf. Judge Lauterpacht, Separate Opinion, *supra*, at para. 100.

99 While the appellate chamber justifies the Council's choice of means in terms of the Council's wide discretion, Appellate Chamber, para. 39, the trial chamber argues that the Council did not take precipitous action because it followed a 'careful, incremental' approach. Trial Chamber, para. 16. But even incremental action might be 'arbitrary' if in violation of the Charter's Purposes and Principles. Thus, while it might be that the prosecution of individuals is best pursued through a judicial remedy, see Trial Chamber, para. 18, it is not as clear that the prosecution of individuals is the best approach to facilitate the reconciliation of the territories of the former Yugoslavia consistent with the desires of particular groups for self-determination, also arguably required by the conflicting Purposes of the Charter. Some argued, for example, for creation of a 'Truth Commission' (as done in El Salvador), rather than a war crimes tribunal. Cf. *Testimony by Thomas Buergenthal before the Commission on Security and Cooperation in Europe*, Apr. 21, 1993 (suggesting that establishment of both a truth commission and a tribunal was possible).

100 Luban, *supra* note 1, at 335-62.

101 Luban, *supra* note 1, at 344 and n. 21.



For many, the grandest legacy of the *Tadic* trial might be the Tribunal's jurisdictional holding: its finding that charges can be brought against *Tadic* even for acts committed in the course of an 'internal' conflict.<sup>102</sup> These Tribunal findings go a considerable way towards Luban's position. Whether or not one believes the Tribunal when it asserts that it is only applying 'established' law, its holdings with respect to the scope of humanitarian law, not discussed here, repeatedly emphasize that a 'State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.'<sup>103</sup> The Yugoslav prosecutions may also reflect progress from the standpoint of Nuremberg in another sense: as a product of Council action, they are less susceptible to criticism that they constitute victors' justice.<sup>104</sup>

But, as the foregoing criticisms of the *Tadic* opinions suggest, while the judges resolved some of the statism/human rights dilemmas faced by the Nuremberg judges, they faced new statism/human rights challenges *because* their Tribunal was created by the Security Council. To justify prosecutions that are more consistent with a human rights paradigm than were those at Nuremberg, the judges found themselves privileging Council statism. The judges could not adequately bridge this new statism/human rights chasm because international law has, as yet, no adequate tools to do so.

Answering *Tadic*'s defenses more fully would have required articulating a model of legitimation from among several possibilities: 'democratic legitimacy' generated by perceptions of broad participation, 'formal legitimacy' produced by democratic institutions adhering to established rules, or 'social legitimacy' connoting commitment to particular values.<sup>105</sup> Ideally, it would have required adopting some model of judicial review and of UN constitutional interpretation. These choices include: (1) a consent-based model, grounded in the proposition that whatever judges do is subject to correction via Charter amendment or, alternatively, needs to find support in original intent; (2) a participation-based model, premised on protecting the participation rights of UN members; (3) a minority protection model, premised on protecting the substantive interests of particular states or a minority group of states whenever the majoritarian or hegemonic processes of the Council threaten them; or (4) a teleological model, grounded in achieving, for example,

102 Appellate Chamber, paras. 65-142. The Tribunal specifically finds that the nexus required at Nuremberg between crimes against peace and crimes against humanity is no longer required by customary international law. *Ibid.* paras. 138-142.

103 See, e.g., Appellate Chamber, para. 97. Of course, to the extent the Tribunal is applying new law, the prospect of *ex post facto* imposition of criminal liability looms. Cf. Luban, *supra* note 1, at 349-357 (discussing the *ex post facto* problem as applied to Nuremberg); Hans Kelsen, 'Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?', 1 *Int'l L. Q.* (1947) 153, at 164-165 (same).

104 Compare Luban, *supra* note 1, at 360-362 (criticizing Nuremberg for failure to prosecute Allied war criminals) with Judge Sidhwa, Separate Opinion, para. 72 (arguing that while Nuremberg can be termed victors' justice, no such grievance applies to the Yugoslav Tribunal). Human rights advocates might also see progress in the Council's refusal to accept the death penalty, trials in absentia, or liability for membership in a 'criminal' organization.

105 See generally, Joseph Weiler, 'The Transformation of Europe,' 100 *Yale L. J.* (1991) 2403, at 2468-69.

international peace and security or, alternatively, human rights at all costs.<sup>106</sup> Hints of these approaches appear throughout the *Tadic* opinions, but no one model is uniformly adopted by any one appellate judge, much less by either chamber. This is hardly remarkable since the ICJ, despite its prominent role in interpreting the Charter, has failed to articulate which of these, if any, are appropriate.

Consider as a more concrete example of the inadequacies of international law that *Tadic's* judges faced the problem of the effect of a finding of illegality. The appellate majority assume that they are free to determine that establishment of the Tribunal or that any aspect of its jurisdiction is ultra vires. Since the judges do not find any illegality, however, they are not forced to confront the problem that there are no clear international legal rules as to the effects (if any) of a judicial finding of illegality.<sup>107</sup> Judge Sidhwa, in his separate opinion, readily acknowledges the difficulty and speculates as to possible solutions. He indicates that were the Tribunal to find such illegality, it might make 'a simple declaration to that effect and leave it to the Security Council . . . to correct the situation, or having made such a declaration, continue as an ad-hoc tribunal til the said body or Organisation comes to its aid.'<sup>108</sup> While Judge Sidhwa is probably correct that such possibilities are theoretically open, he does not address the possible consequences on the Tribunal's independence or on the rights of defendants. A Tribunal that indicates, as part of its 'incidental, inherent' jurisdiction, that some aspect of Council action is illegal and goes on to correct that illegality -- as through a modification of the Tribunal's Statute (originally approved by the Council) - would boldly give priority to human rights over Council statism. On the other hand, a deferential Tribunal that permits a criminal prosecution subject to a fundamental legal flaw to continue, subject to *possible* correction by a political body like the Council, would appear to violate the human rights ethos that created it in the first place.

Thanks in part to such gaps in international law, the Tribunal's judges are cast adrift, buffeted by the pleas of Judge Abi-Saab for teleological interpretation and the positivist inclinations of Judge Li, by resort to Council determinations to support propositions of substantive law to no less numerous affirmations that the Council is a 'political' body incapable of 'legislative' action, and by denials of the power of 'judicial review' amidst abundant de facto demonstrations of review by any other name. Given such shifting cross-currents within its judges' opinions, reflective of unresolved tensions among international lawyers generally, supporters of the Tribunal, and of ad hoc war crimes tribunals, will need to complement the Tribunal's opinions with other arguments.

106 See Alvarez, *supra* note 36, at 19. Cf. Judge Sidhwa, Separate Opinion, para. 17 (outlining different national approaches to 'judicial review').

107 See, e.g., Elihi Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations,' in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965) 88. Domestic courts have varied in their responses to this issue: See, e.g., Donald W. Jackson and C. Neal Tate (eds.), *Comparative Judicial Review and Public Policy* (1992).

108 Judge Sidhwa, Separate Opinion, para. 36.

That is no surprise. The equivocal judgments of the proceedings at Nuremberg and Tokyo have been only partly inspired by the judicial pronouncements issued during those trials. Supporters and detractors of Nuremberg have long debated philosophical and other issues that cannot, realistically, be expected to be part of any judicial record.

Supporters of today's ad hoc war crimes tribunals might argue that the Council's choice to enforce only some war crimes in some parts of the world is no more damaging to the rule of law than that only some drug traffickers are caught and prosecuted by national authorities. Critics might contend that *Tadic* is no less a victim of illegitimate or selective enforcement than the Nuremberg defendants on at least three grounds: (1) because the definition of cognizable war crimes under international law still remains statist, excluding (at least in the views of many), for example, human rights violations that the permanent members of the Security Council continue to accept such as aerial bombardment or the threat or use of nuclear weapons;<sup>109</sup> (2) because unlike drug traffickers who face a uniform threat of national prosecution and are appropriately on notice, war criminals (at least outside of the former Yugoslavia and Rwanda) face an unequal prospect of international prosecution; or (3) because the enormity of the crimes likely to be left unaddressed given the unlikely prospects of effective enforcement within the confines of the former Yugoslavia 'mocks justice.'<sup>110</sup> The 'selective' enforcement charge is made more likely if, as some contend, the UN is either purposely or ineptly denying the Tribunal's prosecution office the financial support required for it to do a credible job.<sup>111</sup>

Supporters and detractors are also likely to differ on whether the Yugoslav Tribunal, or any ad hoc body created by the Council, is the appropriate body to judge its own legality. Supporters might rely, as the *Tadic* judges did, on the Tribunal's juridical nature to demonstrate that it is an 'objective' forum capable of credibly addressing such issues. Critics might suggest that whatever the judges' capabilities with respect to determining guilt or innocence, these do not apply to issues that strike at the very heart of the enterprise of which the judges are a prominent part. They might find it incredible that judges selected with one purpose in mind - to help convict alleged war criminals - are ever likely to vote themselves out of job through an 'objective' finding that the Tribunal is ultra vires. Critics will find support in those portions of the *Tadic* opinions that suggest a politicized show trial coming to

109 See generally, Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War,' 35 *Harv. Int'l L. J.* (1994) 49.

110 See, e.g., Kenneth Anderson, 'Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials,' 7 *Harv. Int'l L. J.* (1994) 281, at 292. For these reasons, unlike most commentators, Anderson suggests that a military victory on par with that in WWII, is 'not simply a practical prerequisite to a trial . . . but a moral necessity. . . . to hold a war crimes trial in the former Yugoslavia today would be like holding Nuremberg after acquiescing in the German annexation of Poland, the Ukraine, and the rest of the eastern lands.' *Ibid.* at 292-93.

111 Cf. Iain Guest, 'Will the UN Smother Its Conscience?,' *New York Times*, Dec. 17, 1994. For one survey of arguments, pro and con, on the establishment of the Tribunal, see 'Symposium,' 6 *Pace Int'l L. Rev.* (1994) 1.

foregone conclusions - as when the judges turn to 'necessity' as an ultimate justification to dismiss Tadic's arguments.<sup>112</sup>

Yet necessity was ultimately the justification offered by the Secretary-General. The Secretary-General was much more direct and frank than any of the judges. He simply said that the normal treaty route to establishing such a tribunal would be too time-consuming and possibly ineffective at achieving relevant participation.<sup>113</sup> He rejected a constitutive role for the General Assembly on the grounds of the need for 'urgency.'<sup>114</sup> He saw establishment by the Council as the only viable route to expeditious and effective prosecutions. Judges, being judges, must be more circumspect since they are restricted to traditional 'legal' arguments and constrained to 'legal' sources. This is both their strength (from the perspective of potential legal legitimacy) and their weakness - as when the law fails them.

Fortunately for those who support prosecutions of these horrible crimes, the fulfillment of particularistic legal niceties may not be the sole test of legitimacy. Just as compliance with law does not ensure justice, justice may not always comply strictly with law. Like Nuremberg, the Yugoslav Tribunal might, in the end, be vindicated on the basis of broader inquiries, including those suggested by the Secretary-General. Ultimately, it is likely to be judged precisely on those criteria that the judges, appropriately, avoided: its contribution to deterrence, reconciliation, peace.

112 See, for example, the appellate judges' contention that Tribunal primacy over national prosecutions is needed because the 'very purpose of the creation of an international criminal jurisdiction' would otherwise be defeated. Appellate Chamber, para. 58.

113 Secretary-General's Report Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, May 3, 1993, at paras. 19-20.

114 Ibid. at para. 21. Significantly, the Secretary-General did not suggest that the General Assembly was not legally capable of establishing an ad hoc war crimes tribunal. Cf. *supra* note 50 (views of Judge Sidhwa).