Commentary

Jurisdiction and competence of the Tribunal

The word "*jurisdiction*" comes from Latin roots: "*jus*" or "*juris*", which means "law" and "*dicere*", which means "to say" or "*to read*". Therefore, "jurisdiction" can be understood to mean: "to say the law". In principle, in States that operate under the doctrine of separation of powers, it is the legislature which "says" the law. The judicial power is theoretically limited to reading the law and to applying it to the facts that are brought before it. However, in practice, courts and tribunals often have to interpret and must "complete" the law as enunciated by the legislature, particularly in both the common law system and in the international context.

When the Appeals Chamber of the International Tribunal for the former Yugoslavia (ICTY) in the Tadić case referred to its "legal and legitimate power to *state* the law",[1] it clearly asserted that the power of the Tribunal was not limited to applying the law and adjudicating a case, but extended to its "*jurisfaction*",[2] meaning its power to "create" law. This self-proclaimed power to create the law is probably one of the most controversial aspects of the International Criminal Tribunals.

Jurisdiction is generally equated with a State's "*imperium*", or sovereignty. It has to do with the political legitimacy of the organ that sets up the court and the legal delegation of the power to judge to the court or tribunal. A court or tribunal which would derive its power "to say the law" from an illegal or illegitimate organ would simply not be heard and obeyed by reason of the law. This was the main defence of former President Milošević before the ICTY: he considered that he only had to refer and give accounts to his own constituency, the Serbian people and to the Serbian institutions.

The "competence"[3] of a court or tribunal is less a matter of sovereignty than a question of ability to deal with a certain matter in a particular case. Jurisdiction and competence are often, but incorrectly, used interchangeably. If the test of the establishment of a court or tribunal "by law" is only a matter of jurisdiction, its independence or impartiality can be analysed either by determining its jurisdiction or of its competence, depending on whether it is a general or abstract question or a specific or concrete concept.[4]

The question that we will consider in the cases *Prosecutor v. Milošević, Prosecutor v. Hadžihasanović, Alagić and Kubura* and *Prosecutor v. Strugar, Jokić and others* is whether the ICTY was empowered and entitled to say the law (a question of "jurisdiction") and to consider a particular case (a question of "competence").

In October 2001, the Trial Chamber of the ICTY had been seized of two preliminary motions filed on behalf of Mr. Milošević concerning the legality of the establishment of the ICTY. It was not the first time that this had been raised before the court. Indeed, the establishment of the ICTY had been challenged in 1995 by the first person accused before it. Duško Tadić, who denied the power of the Tribunal to adjudicate his case.[5] Later, the jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) was also challenged in Kanyabashi in 1997.[6] In those two cases, the defence argued that the Tribunal had been established illegally,

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1 ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, IT-94-1-AR72, A. Ch., 2 October 1995, Klip/ Sluiter ALC-I-33, par. 10; H. Fischer, Commentary, Klip/ Sluiter ALC-I-140.

2 Term created out of the Latin words "*juris*" and "*factio*", the latter meaning "the power to do, the right of doing, of making".

3 In Latin, the word "competentia" means "the proportion, the right balance".

4 See Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice: International Organizations and Tribunals, 29 British Yearbook of International Law 1952, p. 1 *et seq.*; Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure, 34 British Yearbook of International Law 1954, p. 1 *et seq.*; Veijo Heiskanen, Jurisdiction v. Competence: Revisiting a Frequently Neglected Distinction, 5 Finnish Yearbook of International Law 1994, p. 1 *et seq.*

5 ICTY, Decision on the Defence Motion on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch. II, 10 August 1995, Klip/ Sluiter ALC-I-13; T. Van Boven, Commentary, Klip/ Sluiter ALC-I-31 ; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, A. Ch., 2 October 1995, Klip/ Sluiter ALC-I-33, par. 10; H. Fischer, Commentary, Klip/ Sluiter ALC-I-140.

6 ICTR, Decision on the Defence Motion on Jurisdiction, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, T. Ch. II, 18 June 1997, Klip/ Sluiter ALC-II-13; C. Kreß, Commentary, Klip/ Sluiter ALC-II-23.

should be barred due to the improper grant of primacy to the Tribunals over national courts and lacked subject matter jurisdiction. The arguments of the defence were dismissed on all grounds in both cases.

Mr. Milošević reiterated the defence first raised in Tadić and challenged the power of the Security Council to establish an International Tribunal on the basis of Articles 39 and 41, as well as on Article 29 of the UN Charter. This ground was rightly dismissed by the Tribunal precisely because it had already been considered by the Appeals Chamber in the Tadić case. Indeed, the Tadić case is a precedent decided at the highest level of the ICTY – the Appeals Chamber – which is binding on Trial Chambers of the Tribunal (see the Aleksovski case at the Appeals Chamber).

In addition, this question had already been widely discussed and approved (with a few exceptions) by commentators.[7] Nevertheless, the Trial Chamber reaffirmed that Article 41 of the Charter clearly provided an adequate and sufficient basis for the Security Council to adopt any measure capable of restoring international peace and security, including the establishment of an international tribunal.

Mr. Milošević submitted that the Tribunal had no right and no legitimacy to judge him because it had been specifically established and designed to target one country, one nation and one limited group, which made it unfit to deliver justice. In fact, there are two arguments encompassed in this general submission. The first one concerns the right for the Security Council to "target" leaders from the former Yugoslavia for the purpose of prosecution. The second is whether this specific "targeting" creates a problem of bias (or appearance thereof) on the part of the Tribunal. In both cases, Mr. Milošević also implied that the Tribunal violates the principle of equality before the courts.[8]

Articles 39 and 41 of the UN Charter only allow the Security Council to take measures which serve to implement its decision to maintain or restore peace. Therefore, the establishment by the Security Council of a general and permanent criminal tribunal might be regarded as an exorbitant use of its powers. Yet, the specific "targeting" by the Security Council of the jurisdiction of the ICTY to the territory of former Yugoslavia (and of Rwanda) demonstrates precisely that the Security Council used restrained powers for the implementation of earlier Resolutions aimed at restoring peace in the territory of former Yugoslavia. In addition, even though some have denounced the selectivity and fragmentation of judicial power within international society,[9] this selectivity is inherent to the system of international law, and in particular to the judicial system of the international society. One should also consider that, contrary to the Nuremberg and Tokyo Tribunals, the ICTY was established, not through the exercise of municipal military jurisdiction of a few States, but by a permanent organ of the United Nations.

The Trial Chamber in this case stated that the extraordinary character of a tribunal and its exceptional task to judge crimes which have been committed within the borders of a single state do not by themselves prevent it from guaranteeing a fair trial to the accused, as had already been agreed by various courts specialising in human rights. In particular, the Trial Chamber considered that the Prosecutor did not lack the necessary independence even though the Security Counsel urged her to investigate the violence committed in Kosovo, as no evidence was presented that the final decision to indict Mr. Milošević was taken upon instructions from any particular government.

The Trial Chamber correctly concludes that a court or tribunal is not necessarily biased merely because it has been created on an *ad hoc* basis. Arbitration courts are the best example of *ad hoc* tribunals which are

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[7] In favour of the power of the Security Council to establish a criminal tribunal, see for example: Marco Sassoli, La première decision de la Chambre d'appel du Tribunal penal international pour l'ex-Yougoslavie: Tadić (competence), 100 Revue Générale de Droit International Public 1996, p. 101-134; critical: Gaetano Arangio-Ruiz, The Establishment of the International Criminal Tribunal for the Former Territory of Yugoslavia and the Doctrine of Implied Powers of the United Nations, in Flavia Lattanzi and Elena Sciso (eds.), Dai Tribunali Penali Ad Hoc a una Corte Permanente, Ed. Scientifica, Napoli 1996, p. 31.

[8] See the minority opinion of Messrs Henkin, Lallah, Tawfik Khalil, and Vella, and Mrs Medina Quiroga in the case Human Rights Committee, *Kavanagh v. Ireland*, Communication No. 819/1998, views adopted on 4 April 2001, UN Doc CCPR/C/71/D/819/1998, par. 2.

[9] See George Abi-Saab, Droits de l'homme et juridictions pénales internationales. Convergences et tensions, in Jean-René Dupuy, L.A. Sicilianos (eds.), Mélanges en l'honneur de Nicolas Valticos. Droit et justice, Pédone, Paris 1999, p. 245, 249; Lyal Sunga, Full Respect for the Rights of Suspect, Accused and Convict: From Nuremberg and Tokyo to the ICC, in Marc Henzelin and Robert Roth (eds.), Le droit pénal à l'épreuve de l'internationalisation, L.G.D.J., Paris, 2002, p. 217, 226.

intended to function in a satisfactory way for all parties. However, an arbitration court is usually chosen by the parties, contrary to a criminal court. Moreover, the consequences of a judgment issued by a criminal court are generally more important for the accused than for a party in a civil or commercial case. Consequently, the independence and impartiality of a criminal court must be considered even more carefully. In principle, a permanent or well established court or tribunal is more likely to deliver proper justice than a court or tribunal which sits for a short time and adjudicates only one or a small number of cases.[10]

Even if the question was not very carefully considered by the Trial Chamber in this instance, we can still defend the Tribunal. Indeed, it is now a decade old, and has gained legitimacy with the passing of time. It has already judged dozens of accused who come from the entire range of the political and ethnical spectrum of the former Yugoslavia. Moreover, the judges have not been selected from within a narrow circle of "victors" but from all State members of the United Nations (apart from the former Yugoslavia and Rwanda).

Last but not least, the sixteen permanent judges of the ICTY and up to nine *ad litem* independent judges are not designated by any political executive power, which would possibly have a score to settle with the accused, but are in fact elected by the General Assembly of the United Nations, having been proposed by the Security Council, which shortlists candidates nominated by member States. The permanent judges are elected for a term of four years from a list of nominations received from States submitted by the Security Council, taking due account of adequate representation of the principal legal systems of the world.[11] Therefore, it is hard to categorise the Tribunal as "biased" because of its *ad hoc* nature.

In the end, the main reproach to be made against the present system is that it is the Tribunal itself which has to justify its independence and its competence. It would be far better if another, superior court, such as a constitutional court in the States systems, could consider this kind of argument. Some commentators have suggested that this could – or should – have been the International Court of Justice (ICJ).[12] However, this reference to the ICJ would have put it above the Security Council itself, which is probably unacceptable for this political institution and certainly for some major actors of the international arena. In any case, if it is true that, in principle, international courts have the *competence de la competence*, it is not the Tribunal itself which has to be convinced of its independence and competence but the general public. Here we are faced with the structural deficiency of the international system. It is history which will, in the end, judge the judges.

Mr. Milošević also raised a slightly different issue – that the ICTY could not guarantee that he would receive a fair trial as the judges of the Tribunal in general are biased in favour of the prosecution and are not free to judge on the merits of the case. Mr. Milošević argued that the specific task of the judges of the ICTY is to repress crimes committed in the territory of the former Yugoslavia rather than to judge independently acts submitted to the Tribunal.

The ICTY has dealt on several occasions with the challenge that an individual judge was not impartial, such as in the Delalić and others cases,[13] or in the Furundžija case.[14] It has never, to my knowledge, considered

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10 George Abi Saab, *o.c.*, p. 249.

11 Articles 11-14 ICTY Statute, as amended by UN Security Council Resolution 1329 (2000) of 30 November 2000 (UN Doc. S/Res/1329 (2000), Annex I). On the importance of the process of selection and election of the Judges, as well as of the general structure of the court or tribunal to decide on its impartiality and independence, see European Court of Human Rights, *Morris v. The United Kingdom*, 26 February 2002, Application No. 38784/97, Third Section, 23 Human Rights Law Journal 2002, p. 225-236.

12 For a criticism of the "self-contained" power or the ICTY to rule on its own jurisdiction, and a proposal that the ICJ should review the jurisdiction of the ICTY, see Luigi Condorelli, Legalità, Legittimità, Sfera di Competenza dei Tribunali Penali Ad Hoc Creati dal Consiglio di Sicurezza delle Nazioni Unite, in Flavia Lattanzi and Elena Sciso, *op. cit.*, p. 47.

13 ICTY, Decision of the Bureau on Motion on Judicial Independence, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-T, Bureau, 4 September 1998, Klip/ Sluiter ALC-III-343; M. Veldt, Commentary, Klip/ Sluiter ALC-III-357; ICTY, Decision of the Bureau on Motion to Disqualify judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-T, Bureau, 25 October 1999, Klip/ Sluiter ALC-IV-129; M. Kuijer, Commentary, Klip/ Sluiter ALC-IV-139.

14 ICTY, Decision on Post-Trial Application by Anto Furundžija to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Bureau, 11 March 1999, Klip/ Sluiter ALC-III-355; M. Veldt, Commentary, Klip/ Sluiter ALC-III-357; ICTY, Judgement, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, A. Ch., 21 July 2000, Klip/ Sluiter ALC-V-291, par. 189; M. Kuijer, Commentary, Klip/ Sluiter ALC-IV-139.

the challenge that it was biased as a whole. This argument raises two questions. The first is whether an accused before the ICTY can put forward arguments involving human rights not expressly recognized in the Statute of the Tribunal. The second is whether the Tribunal and/ or the Chamber is, in fact, sufficiently independent and impartial to deliver a fair and adequate judgement.

The right to be judged by an "independent and impartial tribunal", if not expressly provided for by the Statute of the ICTY, is clearly recognized by Article 14, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR), by the Basic Principles on the Independence of the Judiciary, adopted in 1985,[15] and by regional instruments such as the European Convention on Human Rights (ECHR Article 6, paragraph 1[16]). Article 75 paragraph 4, Protocol I to the Geneva Conventions of 1949 speaks of an "impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure". Obviously, the Tribunal cannot afford to operate under lower standards than a national court having jurisdiction to judge persons in an armed conflict, as the Tribunal itself emerged from an armed conflict. Taking due account of the ICCPR, of the ECHR and the important case law developed by the Human Rights Commission (HRC) and by the European Court of Human Rights respectively is also all the more important, since the former Yugoslavia was a Party to both the ICCPR and the ECHR at the relevant time and the Tribunal cannot be seen as applying lesser standards than those set by the two instruments.

However, the Trial Chamber again did not enter into a discussion of applicable norms,[17] preferring to refer to Article 21, paragraph 2, of the Statute of the ICTY, which guarantees defendants a "fair and public hearing". An integral component of the fair trial guarantee is "The fundamental right of an accused to be tried before an independent and impartial tribunal is generally recognized as being an integral component of the requirement that an accused should have a fair trial".[18] Therefore, instead of applying directly the standards set forth by the Covenant, Protocol I or the ECHR as applied by the European Court of Human Rights, the Trial Chamber prefers to refer to customary law, probably to give the impression that it is not bound by other instruments and standards, in particular the ECHR.

The independence of the Tribunal is confirmed by the European Court of Human Rights itself, which twice declined to bind the ICTY with the ECHR. For example, in the case *Naletilić v. Croatia*,[19] the European Court of Human Rights stated that the rules contained in the Statute of the ICTY and in its Rules of Procedure meant that the requirement of "an independent and impartial tribunal established by law" formulated in Article 6, paragraph 1, of the ECHR was met (in practice) by the ICTY and that, consequently, there was no risk of a flagrant denial of fair trial. One should stress that the application by Naletilić was made against Croatia, a State Party to the ECHR, and related to the conduct of that State before the surrender of the applicant to the ICTY. The Court did therefore not examine as such the conditions for a fair trial before the ICTY.

Following a different channel, Mr. Milošević requested that the District Court of The Hague release him from custody. His release was denied in early September 2001 on the ground that the court lacked jurisdiction pursuant to the Headquarters Agreement between the Netherlands and the United Nations, acting on behalf of the ICTY and the ICTR. The District Court considered that the host State had transferred the power to deal with such requests to the Tribunals. Mr. Milošević then turned to the European Court of

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[15] Basic Principles on the Independence of the Judiciary (1985), Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 26 August to 6 September 1985, Milan, UN Doc. A/CONF.121/22/Rev.1, p. 59.

[16] On the aim of "independence and impartiality of the court" according to Article 6, paragraph 1, ECHR and the case law of the European Court of Human Rights, see Mark Janis, Richard Kay, Anthony Bradley, European Human Rights Law, 2nd edition, Oxford University Press, Oxford 2000, p. 438-449; Mark Villiger, Handbuch der Europäischen Menschenrechtskonvention (EMRK), 2nd edition, Schulthess, Zürich 1999, p. 262-271.

[17] In 1995, the ICTY had stated in the Tadić case that human rights treaties such as the ECHR did not apply directly to proceedings before international tribunals, see M. Kuijer, Commentary, Klip/ Sluiter ALC-IV-142. For a detailed discussion of this issue, see Antonio Cassese, L'influence de la CEDH sur l'activité des Tribunaux pénaux internationaux, in Antonio Cassese and Mireille Delmas-Marty (eds), Crimes internationaux et juridictions internationales, Presses Universitaire de France, Paris 2002, p. 143.

[18] ICTY, Judgement, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, A. Ch., 21 July 2000, Klip/ Sluiter ALC-V-291, par. 177.

[19] European Court of Human Rights, *Naletilić v. Croatia*, 4 May 2000, Application No. 51891/99, Fourth Section, Reports 2000-V, p. 494.

Human Rights, asking it to find a violation of Article 6, paragraph 1, since the ICTY was not an "independent and impartial tribunal established by law". The question remained unanswered as the Court declared the application non admissible on the grounds of non-exhaustion of national domestic remedies.[20]

On the other hand, one cannot see why the Trial Chamber did not refer to UN instruments such as the ICCPR or the Basic Principles on the Independence of the Judiciary, as both instruments were adopted by the General Assembly, a formal member of the "UN family", and both instruments are widely considered as reflecting customary law.

Concerning the matter of the independence and impartiality of the Tribunal itself, the Trial Chamber considered that the accused did not suggest actual bias on the part of the Trial Chamber but only that there was an appearance of bias which an observer, properly informed, would reasonably apprehend. Yet, the Trial Chamber gave no explanation as to why it could not have been regarded as being biased by an outsider and instead simply dismissed the argument. Even though this may be understandable given that the accused did not advance any reason why the Chamber could be regarded as biased, it is unfortunate that this ground was dismissed without proper consideration, particularly as some scholars and practitioners complain that the *ad hoc* Tribunals sometimes lacked the appearance of independence, appeared to be influenced by politics or blindly followed the Prosecution.[21] Of course, this conclusion did not prevent the accused from arguing that some individual judges were biased, as had already been done in previous cases. The Trial Chamber also quickly dismissed the argument that the denial of access by the accused to the media violated his right to freedom of expression and that this restriction showed a lack of independence on the part of the Chamber.

The Trial Chamber reaffirmed that the status of Mr. Milošević as a former President of the Federal Republic of Yugoslavia did not prevent him from being judged before the ICTY. Indeed, Article 7, paragraph 2, of the Statute expressly provides that the official position of an accused, even as Head of State, does not relieve him of criminal responsibility. This is also recognized in various other international criminal law instruments, such as the Nuremberg Statute or the Statute of the International Criminal Court and it also clearly represents customary law.

Yet, one may argue that this reference to Article 7, paragraph 2, of the ICTY Statute is wrong in principle as it does not consider the competence of the Tribunal, but only individual criminal responsibility. Indeed, Article 7 only aims to prevent the accused from raising the "Act of State" defence, according to which an individual cannot be made responsible for an act which he performed as an instrument or as an "organ" of his state, since responsibility for such violations rests in principle on the "community of individuals", which is the State.[22]

Contrary to Article 27 of the Rome Statute, which considers both the jurisdiction of the Court over Heads of States and the exclusion of their exemption from criminal responsibility,[23] Article 7 of the Statute of the ICTY is not intended to deal with challenges to the jurisdiction of the Tribunal. Article 7 only excludes the defence of official capacity and allows for the prosecution of a former official of a State where his conduct had fulfilled all definitional elements of a crime.[24] Consequently, the proper response of the Tribunal should have been that if a former Head of State cannot raise his former capacity as a defence, then the Tribunal has, *a fortiori*, the jurisdiction to judge him.

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20 European Court of Human Rights, *Milošević v. Netherlands*, 19 March 2002, Application No. 77631/01, Second Section, 23 Human Rights Law Journal 2002, p. 65-67. See Lucius Caflish, The Rome Statute and the European Convention on Human Rights, 23 Human Rights Law Journal 2002, p. 1-12.

21 See for example Philippe Weckel, Chronique de jurisprudence internationale, Revue Générale de Droit International Public 2001, p. 235-236; Sylvia de Bertodano, Judicial Independence in the International Criminal Court, 15 Leiden Journal of International Law 2002, p. 411-430, 417-419.

22 Massimo Scaliotti, Defences before the international criminal court: Substantive grounds for excluding criminal responsibility – Part 2, 2 International Criminal Law Review 2002, p. 1-46, 38.

23 *Ibid.*, p. 41-43; Otto Triffterer, in Antonio Cassese, Paola Gaeta and John Jones, Commentary on the Rome Statute of the International Criminal Court, Nomos, Baden-Baden 1999, p. 507-508.

24 Albin Eser, "Defences" in War Crime Trials, in Yoram Dinstein, Mala Tabory (eds.), War Crimes in International Law, Kluwer, The Hague/ Boston/ London 1996, p. 251-273 at p. 251.

The reference by the Trial Chamber to the Pinochet Case – quoting Lord Millet – to say that a former Head of State is not entitled to immunity in respect of acts of torture and conspiracy to commit torture, is certainly not convincing. Indeed, the House of Lords did not clearly state what acts could be considered as acts of function, for which a former Head of State would benefit from immunity. This reference to Pinochet also weakens the principle of the absence of the defence of the official position before an international court.

In addition, if the Tribunal deliberately avoids reference to the European Court of Human Rights and its case law, one can hardly understand why it chooses to refer to judgments of the highest Court of England. If the Trial Chamber follows the "savage" approach of national case law, to use a term of Prof. Cassese,[25] then one would prefer that it follows the highest international authorities instead of national ones.

Lastly, the Trial Chamber had to consider the argument alleging the illegality of the surrender of Mr. Milošević to the ICTY. For Mr. Milošević, this transfer would not only affect the competence of the Tribunal but it would also hamper the legality of his detention, which would have no title. In particular, the accused argued that the Serbian Government which surrendered him to The Hague was not bound by the same obligations to cooperate with the Tribunal as the Federal Republic of Yugoslavia. The Tribunal dismissed the argument, noting that it was the Serbian Government which took the initiative to surrender Mr. Milošević to the Tribunal, even though the request of assistance had been addressed by the Tribunal to the Federal Republic of Yugoslavia. Indeed, all State members of the United Nations, including the Republic of Serbia, had an obligation to cooperate with the Tribunal, and it therefore did not matter which State surrendered Mr. Milošević to the Tribunal. The Trial Chamber also made it clear that any problem of procedure in relation to his transfer would not undermine the jurisdiction of the Tribunal but should be resolved at a procedural level, including by taking the human rights of the accused into consideration.

In *Prosecutor v. Hadžihasanović, Alagić and Kubura*,[26] the jurisdiction of Trial Chamber II was challenged again. The defence argued that the application of the doctrine of command responsibility to the accused, for crimes that had been committed in the course of an internal armed conflict, not only created a problem of the competence *ratione materiae* of the Tribunal, but was also a violation of the principle of *nullum crimen nulla poena sine lege*. The Trial Chamber quickly dismissed the first argument without much explanation, and then stated that the latter question could be considered when passing judgment on the merits, as the accused would in any case continue to be detained on other grounds.[27] Strangely enough, the Chamber did not even refer to the Tadić case to support its first conclusion.

In *Prosecutor v. Strugar, Jokić & others*,[28] the defence argued that the Tribunal had no jurisdiction *ratione materiae* over the alleged offence of attacks against civilians and unlawful attacks on civilian objects, as these offences did not form part of customary international law at the relevant time. In particular, the defence considered that Articles 51 and 52 of Additional Protocol I, which set out this prohibition, were not part of customary law at the time of the alleged offences, and therefore could not be relied upon to apply Article 3 of the Statute as "a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 and 5."[29] Indeed, this link, referred to in the Tadić case, can only be made when the

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25 Cassese, *op. cit.*, p. 146-149.

26 The accused lodged an appeal against the decision of the Trial Chamber, see ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadžihasanović, Alagić and Kubura*, Case No. IT-01-47-AR72, A. Ch., 16 July 2003. The Appeals Chamber held, par. 33, that "at all material times it was part of customary international law that there could be command responsibility in respect of war crimes committed in the course of an internal armed conflict."

27 The Trial Chamber pronounced its Decision on Joint Challenge to Jurisdiction on 12 November 2002, dismissing the motion challenging its jurisdiction. The two accused filed an Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction which was dismissed unanimously by the Appeals Chamber in ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadžihasanović, Alagić, Kubura*, Case No. IT-01-47-AR72, A. Ch., 16 July 2003.

28 The accused lodged an appeal against the decision of the Trial Chamber, see ICTY, Decision on Interlocutory Appeal, *Prosecutor v. Strugar, Jokić and others*, Case No. IT-01-42-AR72, A. Ch., 22 November 2002. The Appeals Chamber upheld, at par. 14, the decision of the Trial Chamber that the Tribunal had "jurisdiction over the Appelant under the customary principles recognized (by the relevant Articles of the Additional Protocols)."

29 ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, IT-94-1-AR72, A. Ch., 2 October 1995, Klip/ Sluiter ALC-I-33, par. 89, 94.

rule constituted either treaty law or customary law at the time of the offence. Consequently, the argument of the defence as to the subject-matter jurisdiction of the Tribunal under Article 3 of the Statute conflicts with the argument of *nullum sine lege praevia.*

The Trial Chamber declined to decide the issue on the basis that all constituent states of the Federal Republic of Yugoslavia and of the Socialist Federal Republic of Yugoslavia were bound by the two Additional Protocols. Instead, it dealt with the customary nature of Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II. In conclusion, it held correctly that the principles set out in these provisions constituted norms of customary international law at the time of their adoption and that their violation would entail individual criminal responsibility. Once again, the Tribunal can be lauded for the role it has played in recognizing and establishing customary law in the field of international humanitarian law.

On the other hand, one can only be amazed by the ease with which the Tribunal "recognized" a customary norm. To this author's knowledge, customary law is still a matter of State practice. A Tribunal can indeed recognize that a norm is of a customary nature. But is the Tribunal able to recognize it with little or no support from State practice? It seems that, the ICTY has sometimes taken this power into its own hands, even if not in a particularly shocking way in this case (at least compared with the extension of the jurisdiction of the ICTY found in the Tadić case to encompass war crimes committed during internal conflicts). Some commentators have argued that the main victim of this self-proclaimed power of the ICTY was, in the end, the distrust of some States in the reliability of the International Criminal Court, which led to the adoption of Article 22, paragraph 2, of the Rome Statute, and probably the reluctance of those States to ratify it.[30] As some said in the past, law cannot be detached from power.

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[30] William Schabas, Droit penal international et droit international des droits de l'homme: faux frères? in Marc Henzelin, Robert Roth (eds), Le droit pénal à l'épreuve de l'internationalisation, Bruylant, Bruxelles 2002, p. 165-181, p. 169.