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Delegation of powers to United Nations Subsidiary organs

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Contents

SUMMARY	1
PREFACE	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Subject and Purpose	5
1.2 Method and material, problems	6
1.3 Limitations	7
2 SUBSIDIARY ORGANS	8
2.1 Establishment of a subsidiary organ	8
2.1.1 <i>Definition</i>	10
2.1.2 <i>Types of subsidiary organs (functions)</i>	12
2.1.3 <i>Composition</i>	13
2.2 Article 22, the General Assembly	14
2.2.1 <i>Background</i>	14
2.2.2 <i>The scope of powers of the GA</i>	14
2.2.2.1 The Administrative Tribunal	15
2.2.2.2 UNEF	17
2.2.2.3 Discussions of an international criminal court	19
2.2.3 <i>Conclusions</i>	21
2.3 Article 29, the Security Council	22
2.3.1 <i>Background</i>	22
2.3.2 <i>The scope of powers of the SC</i>	22
2.3.2.1 Peacekeeping forces	24
2.3.3 <i>The veto-power of the Permanent Five</i>	25
2.3.4 <i>Conclusions</i>	26
2.4 Delegation of powers – introduction	27
2.5 The implied powers doctrine	28
2.5.1 <i>Personal comments</i>	31
3 THE BOUNDARY DEMARCATION	32
3.1 Background	32
3.2 Relevant resolutions of the SC	33
3.2.1 <i>Resolution 687 (1991)</i>	34

3.2.2	<i>The demarcation</i>	35
3.2.2.1	The lawfulness of the decision	37
3.3	Conclusions	38
4	THE ICTY	41
4.1	Background	41
4.2	Relevant Documents of the UN	41
4.3	The ICTY Statute	43
4.4	Legal basis of the Tribunal	44
4.5	The <i>Tadic</i> Case	46
4.5.1	<i>Arguments made by the defence (trials chamber)</i>	46
4.5.2	<i>Arguments and decisions of the Court (trials chamber)</i>	47
4.5.3	<i>Arguments and decisions of the Court (appeals chamber)</i>	49
4.5.3.1	Article 39 determination?	50
4.5.3.2	Legal Establishment?	51
4.6	The decision to establish ICTY	52
4.6.1	<i>Enforcement under the UN Charter</i>	55
4.6.1.1	Chapter VI	55
4.6.1.2	Chapter VII	56
4.6.2	<i>Some views concerning the establishment</i>	57
4.6.2.1	Establishment of the ICC as a future obstacle?	58
4.7	Conclusions	59
5	CONCLUDING REMARKS	61
5.1	The Demarcation Commission	62
5.2	The ICTY	63
5.3	Final comments	64
	SUPPLEMENT A	65
	Relevant articles of the UN Charter	65
	Relevant articles of the Statute of ICTY	66
	BIBLIOGRAPHY	70
	TABLE OF CASES	74

Summary

I have in this thesis set out to answer questions surrounding the delegation of powers to subsidiary organs of the UN. In the first chapter, there is an introduction on how the subsidiary organs are established, the rules and guidelines that have to be followed. These can be found in the UN Charter, articles 7 (2), 22, 29 and 68, and in the chapter on limitations I have a description on why I have decided to look at only the three first of these articles. In order to establish a subsidiary organ, the principal organ – the creator of the subsidiary – has to delegate a portion of its own powers to this organ. This is the task, which the subsidiary is set out to fulfil. In order for the principal to be able to delegate powers, it has to possess the power it is to delegate according to the principle of *nemo dat quod non habet* - what you do not have you cannot give away. The definition of a subsidiary organ has been a question without a clear answer in many of the books I have read on the topic, and this discussion is also one I have decided to look into in the first chapter. Since the subsidiary organs established by the principal organs of the UN are all different, I have included a description of the composition and functions of the subsidiary organs already established. In this chapter, there is also a description of a few subsidiary organs established by the SC and the GA respectively, and most important of all, a discussion around the *implied powers doctrine*, a doctrine used most frequently by the American Congress in its interpretation of the United States constitution. It is therefore disputed whether this doctrine can be used analogically in an international organisation such as the UN. This is a question, which the ICJ has ruled on in an advisory opinion, *Reparation for Injuries* case.

In the following two chapters, Chapters 3 and 4, I have analyzed two subsidiary organs established by the SC, namely the Boundary Demarcation Commission, a part of the peace-agreement between Iraq and Kuwait after the first Gulf War, and also the International Criminal Tribunal for former Yugoslavia, ICTY. This is a subsidiary organ of the SC, which has actually decided its own competence in a judgment called the Tadic Case, a case which I have analyzed in chapter 4. These are both subsidiary organs who possess powers not expressly given to the SC by the UN Charter and hence important to the discussion of delegation of powers by principal organs of the UN. These two chapters are followed by my personal conclusions on the subject.

A distinction has to be made between those powers set out expressly in the UN Charter, and those that can be implied by looking at the purposes and principles of the organisation. Since there in my opinion, and in the opinion of many of the scholars who I have studied over the past few months, exist implied powers in the UN Charter, the question becomes a much more complex one than it is at first glance. I have in my conclusions a discussion around this.

Preface

Ever since I was in the ninth grade I have wanted to study law, and it was an obvious choice when I applied to university studies. This thesis concludes my almost five years of studying law at the University of Lund. The past year and a half I have studied public international law, something that from the first time I came into contact with the subject caught my interest. In a way, my interest in international relations was a significant factor when I was going to decide on a topic for this final essay. The longer I studied the subject, the more I knew that this is what I would like to spend my career doing, and therefore it was not a hard task to complete.

I have been given a lot of the support I needed from the scholars whose work I have studied over the past semester, and also came to use in my conclusions in the thesis. I would mostly like to thank them, but also aim a thank you to my supervisor Ulf Linderfalk for his time, and to the ones who entertained me and listened to my troubles during the coffeekbreaks at Juridicum.

Abbreviations

AJIL	American Journal of International Law
BYIL	British Year Book of International Law
CEDAW	Convention on the Elimination of Discrimination Against Women
ECOSOC	Economic and Social Council of the United Nations
EJIL	European Journal of International Law
GA	General Assembly of the United Nations
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
NYUJILP	New York University Journal of International Law and Politics
SC	Security Council of the United Nations
SG	Secretary General of the United Nations
UN	the United Nations
UNAT	United Nations Administrative Tribunal
UNEF I	United Nations Emergency Force in the Middle East
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIKOM	United Nations Iraq-Kuwait Observation Mission
UNPROFOR	United Nations Protection Force
UNSF	United Nations Security Force
VCLT	Vienna Convention on the Law of Treaties 1969

1 Introduction

When the United Nations was created in 1945, nobody could comprehend the reach of the functions it would have in a world constantly evolving. Today the UN has more than three times as many members than it did when it was first created, since many states have been divided into two or more new states, and some have become one. All in all, our map, and the United Nations, look a lot different than they did only 15 years ago. As one of the authors I have studied over the last few months put it:

The history of the United Nations confirms that the Charter has in fact been a flexible instrument, susceptible of growth and development to the extent that the Member States have been prepared to see it grow and develop.¹

Many of us have a clear view of what the United Nations is, and what it does. In the last few years the organisation has faced a lot of new challenges, and has been forced to evolve in new ways. The Secretary General has recently launched a report with suggestions for changes in the composition of the Security Council,² and around the world, there are still disputes and situations that need constant attention from the world's largest established organisation for preservation of peace. As the evolution goes on, the organs of the UN have to pass resolutions, and make decisions, in many different directions. The organs established by the Charter face difficulties in their work, and one way to ease the burden of work is to establish so called subsidiary organs to assist in the everyday work.

As we will see in the introductory chapter of this thesis, there are a lot of different subsidiary organs active today. Some subsidiary organs established have already finished their tasks and therefore no longer exist, and some have become permanent and have never-ending tasks to fulfil. Nevertheless, however the subsidiary organs work, there are a few rules concerning their establishment. These rules are set out in the UN Charter, in articles 7(2), 22, 29 and 68. Once a principal organ decides to establish a subsidiary organ, there has to be a pre-written agenda for what that organ is to do. This is where the question of delegation of powers appear. The principal organs all have express powers in the different chapters of the UN Charter, and these powers can be delegated to subsidiaries with very few exceptions.

However, there have been instances when subsidiary organs with powers other than the ones expressed in the UN Charter have been established. Examples of this are the International Criminal Tribunal for the former Yugoslavia, a criminal court qualified to pass judgment over individuals, and a Commission established by the SC after the first Gulf war, called the Boundary Demarcation Commission. This commission had the task of

¹ Moskowitz, M., p. 22

² Kofi Annan, Secretary General 1997-, *In larger freedom – Towards Development, Security and Human Rights for all*.

demarcating a boundary between Iraq and Kuwait, technically on the ground. These are clearly tasks, which the SC does not possess the power to fulfil itself.

Therefore, I have in my thesis analyzed the legality of the delegation of powers to these two subsidiary organs, a task which may not have been exactly what I thought it would be. As time went by, and I had studied several scholars and looked at their opinions and arguments, I have to say that there was a lot more to it than I thought! But it has been a fun journey, and I hope that the readers will enjoy the subjects as much as I have come to enjoy writing this master thesis.

1.1 Subject and Purpose

My subject of this thesis – Delegation of powers to United Nations subsidiary organs – is a rather wide one. In the chapter on limitations, I have tried to narrow it down to only a few parts of the United Nations. The purpose of this thesis is to evaluate whether or not it is possible for the principal organs of the United Nations, in particular the General Assembly and the Security Council, to delegate certain powers – which they do not themselves explicitly in the UN Charter possess – to subsidiary organs. In order to do this I have studied two separate subsidiary organs of the Security Council, the so-called Boundary Demarcation Commission in Iraq 1991 and the International Criminal Tribunal for former Yugoslavia (hereinafter ICTY), which was established in 1994. The decisions from the International Court of Justice, *Certain Expenses case* and *Effect of Awards case*, regarding the General Assembly have been my guide to the part of the GA. There are many question marks when it comes to both these decisions, and therefore they have been of interest to me.

The question I have set out to answer is: Can the principal organs of the United Nations, in particular the Security Council, delegate powers which they do not themselves possess to subsidiary organs? This question can – at a first glance – be answered with a simple; no, they cannot delegate powers they do not have. Nevertheless, during the time I have spent on the subject, I have discovered that certain of the decisions to establish subsidiary organs have in fact included decisions to delegate powers beyond the ones expressly given in the UN Charter. My findings are clear in the final chapter of the thesis. From this question, there arise a lot of new questions that need to be answered in order for us to understand the outcome. One of these questions, which I find it important to discuss – before I start to evaluate the main question – is the definition of the word delegation.

By *delegation* I mean the transferring of certain powers, expressed in a resolution, from a principal organ of the UN to a subsidiary organ established by this principal organ. The establishment of subsidiary organs will be discussed below. When a principal organ of the UN establishes a subsidiary organ, there has to be a certain specific task that the subsidiary

organ will complete. In order to complete this task, the subsidiary has to be able to make binding decisions, and it also needs to have a clear mandate of what it is to do. When this mandate is given, the principal organ establishing the subsidiary, transfers powers to the subsidiary. It does not completely resign the powers to the subsidiary, because then it would in the end be difficult for the principal to complete its own work in the same area as the subsidiary, but it lets the subsidiary use some of its own powers, powers which the principal is free to take back at any time it sees fit.

I have also looked, but merely from an extremely basic point of view, at the special discretion of the SC to determine a threat to international peace and security in accordance with article 39. The SC cannot delegate this power – actually the only power in the Charter of the United Nations that cannot be delegated – and it has a significant value to the work of the SC in the maintenance of international peace and security. The reason why this is a power that cannot be delegated is not clear. In my opinion, the reason has to be that since the SC has been given the primary responsibility of maintenance of international peace and security specifically in the UN Charter, and therefore it cannot give this power to an organ not established by the Member States. This would be going too far against the purposes of the organisation. In a way, it is not that strange a fact to state, nevertheless a question that could be the topic of an entire thesis. The relevance to this thesis is that there are other powers that can seem of equal importance, such as those enforcement powers under Chapter VII delegated to the ICTY, yet these can be delegated. I will get back to this further below.

1.2 Method and material, problems

The method I have decided to work with is purely a literary study. I have tried to find as wide a selection of material as have been useful in order to answer my introductory question. Mainly, I have looked at articles in various journals of international law, but some books have also been of use to me. The book – and the article for that matter – by Danesh Sarooshi has very much influenced my outline, since it is one of the only books written on the subject I have chosen to analyse.³ It is one I highly recommend if you wish to read more on the subject of delegation of powers within the UN system, not just delegation to subsidiary organs, but also to member States, other organs of the UN etc. One of the main obstacles I faced was the fact that there have been very few books written with a negative attitude towards the UN and its decisions. This will probably have effect on the outcome of my conclusions in this essay, since the material I have been using is mainly positive towards the UN.

Towards the end, I still managed to find some sources that were not as positive as some others, but it is still not as much as I had hoped for in the beginning. It is not necessarily a bad thing, but it has, without a doubt,

³ Sarooshi, D., 1999. Also Sarooshi, D. in *BYIL* 1996.

influenced my analysis. The fact that many of the scholars I have studied have a positive attitude towards expansion of the powers of the UN in certain areas have also influenced my conclusions. Yet, I find that since it is in fact a political organisation, the discussions around the organisation also tend to be of a political nature. This gives us another problem, namely the connection between politics and international law, something that is intertwined in many ways.

1.3 Limitations

I have in my thesis decided not to discuss the subsidiary organs of ECOSOC established by article 68 of the Charter of the United Nations. The subsidiary organs established by a treaty, such as the treaty-based organs in the Human Rights field (CEDAW, ICCPR etc.), will neither they be taken into account.

Once I started writing on the subject, I found that the work of the SC was without a doubt the most interesting. The GA consists of all the member States of the UN, and therefore its work is based on the consensus of all States. This being the case, there are few – if any – occasions when the work of the GA is questioned. I have therefore limited my thesis to include the analysis of two occasions when the SC has delegated powers to subsidiary organs, namely the Boundary Demarcation Commission in the Iraq-Kuwait conflict, and the ICTY.

2 Subsidiary Organs

2.1 Establishment of a subsidiary organ

Most of the international organisations in the world have a clear definition of the powers the organisation possesses. This definition is usually in the form of a Charter or another document or treaty to this end. In the documents, the structure of the organisation is set out, and an example of this is the Charter of the United Nations, hereinafter referred to as UN Charter. The organs establish principal organs to perform the functions of the organisation. International organisations are moulded in the same shapes for the most part, and the United Nations is not an exception to this mould. In order for the organisation to be efficient, there need to be a specific division of what powers the different organs possess, and they have to be able to establish subsidiary organs when there is a need for this.⁴

In the case of the UN, the establishment of subsidiary organs is a question, that has come up with the creation of the organisation in the aftermaths of the Second World War. The predecessor of the UN, the League of Nations, did not expressly authorize the establishment of subsidiary organs in its Covenant, as the UN Charter does in its Article 7(2).⁵ The principle of decentralization as it is set out in the UN Charter was a decisive factor in the creation of the new organization. The idea was that the principal organs were to be independent and have separate powers. Therefore, it was also important that they had the power to establish subsidiary organs at their own choice.⁶ In the following chapter, I will explain the process of establishment and termination of the UN subsidiary organs. This process has to be distinguished from the lawfulness of the tasks of the subsidiary organ given to it by the creator, *i.e.* the principal organ, which I will later analyze.

The main article in the UN Charter that gives the power to establish subsidiary organs is – as mentioned above – Article 7(2). Here we find the term first mentioned.⁷ Three of the principal organs – namely the General Assembly, the Security Council and ECOSOC – have in the Charter received specialized powers to establish subsidiary organs. These powers can be found in articles 22, 29 and 68 of the UN Charter. I will not, as aforementioned, focus on article 68 in this thesis.⁸

⁴ Torres Bernárdez in Dupuy, p. 117.

⁵ Hilf in Simma, 1995, p. 381.

⁶ This was evident at the San Francisco Conference, where there was no argument around the articles that give the power to establish subsidiary organs. See The Dumbarton Oaks Proposals.

⁷ For full text of this article, see Supplement A. The UN Charter can be found at <http://www.un.org/aboutun/charter/index.html>.

⁸ For full text of articles 22 and 29, see Supplement A.

The lawful establishment of a subsidiary organ of the UN is under two preconditions. First, a principal organ of the United Nations must create it; and second, it must be under the control and authority of that principal organ or another principal organ, which the establishing organ has chosen for the authoritative task.⁹ However, in order for us to understand how this works we have to understand the rules set out in the UN Charter and how the United Nations is structured.

The structure of the UN is determined by the Charter. In article 7 we find the six principal organs, and in the second paragraph of this article lay the opportunity for the establishment of subsidiary organs. Article 7 (2) is very broad in scope. The only two criteria that have to be met are that the subsidiary organs – established with reference to this article – are “found necessary” and that they are “established in accordance with the present Charter”.¹⁰ Since this only gives a general base for the establishment of subsidiary organs, it is not intended that all principal organs should use this article to establish subsidiaries. The criteria that it has to be in accordance with the Charter makes a clear reference to the purposes determined in other parts of the Charter. This would mean that the organs established, not only with reference to articles 22 and 29, but also any other body set up by the principal organs in accordance with the purposes of the Charter would be considered a subsidiary organ, within the meaning of article 7(2).¹¹

Article 7(2) can, on the other hand, be used when two or more of the principal organs jointly establish a subsidiary organ.¹² Sometimes the authorization to set up a subsidiary organ may be implied from the powers and functions of the principal organ indirectly, as the principal organ has the power to adopt its own rules of procedure.¹³ I will get back to this question further below. But, when this is the case it is important to understand that the power given by article 7(2) is not in all cases the same as the power given to the principal organs in articles 22, 29 and 68. This is why Article 7(2) then, has to be distinguished from the three articles that give the SC, the GA and ECOSOC specific powers to establish subsidiary organs, since it is somewhat of a *lex generalis* when compared to these articles. This could give rise to a lot of other questions around conflicts between article 7 (2) and the other three. I think that the problem lies in that the UN Charter gives no clear distinction which article should be used in different contexts. The creators of the UN Charter apparently decided to make four separate articles for the same situation. Jaenicke states that the specific powers granted to the principal organs through articles 22, 29 and 68 to establish subsidiary organs as necessary for the performance of the functions of the principal organ, comes with a condition that the subsidiary organ established is within these functions.¹⁴ If I were to interpret this statement, I would say

⁹ Sarooshi, D., in *BYIL* 1996, p. 416.

¹⁰ The UN Charter, article 7 paragraph 2. See Supplement A.

¹¹ Kelsen, H., p. 138.

¹² Jaenicke in Simma, p. 225.

¹³ Torres Bernárdez in Dupuy, p. 120.

¹⁴ Jaenicke in Simma, p. 226.

that the subsidiary organs established under article 7 (2) would then *not* have to be within the competences of the specific organ, meaning that for example the SC could under article 7 (2) establish organs beyond its express powers granted it in the UN Charter. This is a discussion I will get back to below. Therefore, it is important to distinguish under which of the articles – 7 (2) or any of the other three articles – a subsidiary organ is established. These are also questions I will get back to further below.

But what is a subsidiary organ? The UN Charter does not offer a definition of the term, so how can we say which organs may be considered subsidiary organs of the UN? I will in the following chapter try to answer these questions.

2.1.1 Definition

The term ‘subsidiary organ’ is, as I just mentioned, not defined in the UN Charter. Neither has it been defined in any practice of the UN principal organs.¹⁵ Some authors make their own definitions, as an example, Kelsen uses the wording of articles 22 and 29 when he makes a definition of the term subsidiary, and says that these types of organs are auxiliary organs that are established to assist in the work of the organ competent to establish them.¹⁶ As for the terminology of the expression, the term “subsidiary organ” is not the only term used. Sometimes the expressions “committees”, “commissions”, “subsidiary bodies” and “subordinate bodies” are used, but they all have fall within the scope of the term “subsidiary organs” according to the *Repertory of Practice of United Nations Organs*.¹⁷ A subsidiary organ is, as we have seen above and will see below, an organ of the UN, created by one or more of the principal organs. The only document in which we can find a definition is a document from the Secretariat of the UN in 1954, during Dag Hammarskjöld’s term of office as SG where it is stated:

A subsidiary organ is one which is established by, or under the authority of, a principal organ of the United Nations in accordance with Article 7, paragraph 2, of the Charter, by resolution of the appropriate body. Such an organ is an integral part of the Organisation.¹⁸

Jaenicke argues that this definition says no more than can be inferred from the wording of article 7, but that it is not possible to make another definition which would be more substantial since the structure, among other things, is so different from one organ to another.¹⁹

¹⁵ Jaenicke in Simma, p. 196.

¹⁶ Kelsen, H. p. 137.

¹⁷ See p. 224.

¹⁸ UN Doc. A/C.1/758 para. 2 (*Summary of Internal Studies of Constitutional Questions relating to Agencies within the Framework of the United Nations*) This is a document which I have not been able to find in original, and therefore I have used the quote from Jaenicke in Simma at page 218. Also quoted in footnote 39 of Torres Bernardéz’ section in Dupuy.

¹⁹ Jaenicke in Simma, B., p. 218.

In the *Repertory of Practice of United Nations Organs*, the subsidiary organs are described as having a wide range of differences but with some features that are common to all subsidiary organs. These features are as follows:

- (a) A subsidiary organ is created by, or under the authority of, a principal organ of the United Nations;
- (b) The membership, structure and terms of reference of a subsidiary organ are determined, and may be modified by, or under the authority of, a principal organ;
- (c) A subsidiary organ may be discontinued by, or under the authority of, a principal organ.²⁰

Torres Bernárdez²¹ gives a list of ten basic principles for the definition of the concept of subsidiary organ. In my opinion, it is a very comprehensive outline, which sheds light to the problems surrounding the questions of definition.

The subsidiary organ created, is in a subordinate position *vis-à-vis* its ‘parent organ’ in the sense that the subsidiary is established by it and the parent organ has the power to modify the structure, membership and terms of reference. It is however important, that the subsidiary organ possesses a certain degree of independence from its parent organ. If this is not the case, the organ cannot be considered a subsidiary organ, but is merely a chamber that is an integral part of the principal organ.²² This being the case, the term subsidiary organ actually implies that there exists a certain degree of independence in the relationship with the principal organ. The scope of this independence is determined by the intentions of the parent body when establishing the organ and by the nature of the functions conferred on the subsidiary.²³

The principal organ also has the power to terminate the work of the subsidiary organ.²⁴ This rule applies to all of the UN principal organs. Once a subsidiary organ is established by one of the principal organs, it will be a subsidiary organ, not just of the organ that established it, but also of the organisation as a whole.²⁵ The resolutions of the SC and the GA that establish subsidiary organs are considered procedural resolutions according to Klepacki, and this would mean that they require only a simple majority of the votes to be passed.²⁶ This fact also has an importance when it comes to the question of the veto-power of the permanent members of the SC, something I will get back to in chapter 2.3.3 below.

²⁰ *Repertory of Practice of United Nations Organs* vol I, p. 228.

²¹ Torres Bernárdez in Dupuy, p. 148-149.

²² Sarooshi, D., 1999 p. 89.

²³ Paulus in Simma, p. 542.

²⁴ *Repertory of Practice of United Nations Organs*, vol I. p. 228.

²⁵ Sarooshi, D., in *BYIL*, 1997 p.414.

²⁶ Klepacki, Z., p. 17.

2.1.2 Types of subsidiary organs (functions)

When a principal organ has decided to establish a subsidiary organ, it has a special agenda for what the subsidiary organ is set out to do, the powers and assignments it is to have. The division between organs, which are principal and subsidiary, does not necessarily mean that the subsidiary organ only deals with tasks of lesser importance than those of the principal, yet there is a difference between the two types of organs. In Kelsen, we can see a tendency to view two of the organs established by article 7(1) (organs that are principal organs) as auxiliary since they have to report to the GA – namely ECOSOC – or to the SC and GA jointly – the Trusteeship Council. According to Kelsen only ICJ, the GA and the SC are the, as he puts it, ‘supreme organs of the UN’.²⁷ The qualification of principal and subsidiary organs does not place them in any kind of hierarchy apart from the fact that the principal organs have the power to discontinue the work of the subsidiary.²⁸

As we have seen when we have looked at the wording of the UN Charter, the subsidiary organs are established when the principal organs find it necessary to do so in order to perform their functions. Since they were, from the beginning, established for different reasons and all have special areas of expertise, the subsidiary organs are different in character. They can be studying specific problems or prepare decisions for their parent organ; have advisory or judicial functions;²⁹ be operational agencies; promote regional cooperation between States or even act as temporary governments or as a peacekeeping force.³⁰ Their powers depend on the functions they are set out to have. Many of the subsidiary organs are established for the sole purpose of preparing the work of the principal organs, and in many cases, these specific organs are referred to as committees. They are important to the work of the principal organs, since the principal then need not collect material or evaluate the attitude of single Member States in the larger group that is the principal organ, a task that would otherwise take a considerable amount of time from the work of the principal organs.³¹

The principal organs usually establish a subsidiary organ for a limited period – *ad hoc* organs – but there are also examples of permanent committees. The subsidiary organs established for a limited time usually have a life span that covers the amount of time it takes to complete their task.³² This is especially evident when the subsidiary organ has been

²⁷ Kelsen, H. p. 145.

²⁸ Torres Bernárdez in Dupuy, p. 113.

²⁹ Examples of these are the Administrative Tribunal, which is established by the GA, and the ICTY and ICTR, established by the SC. The establishment of the ICTY will be examined below.

³⁰ Jaenicke in Simma, p. 220 f. Peace keeping forces are created under chapter VII of the UN Charter and have special functions. I will not go any further into the definition and functions of the peace keeping forces since this would be sufficient to write a full essay, therefore for further information see below in chapter 2.3.2.1.

³¹ Klepacki, Z, p. 17.

³² Jaenicke in Simma, p. 223.

established as a temporary government of a former colonized area or a peacekeeping force, organs which by the nature of their assignment can only be temporary. Other subsidiary organs are permanent from the moment of establishment and some get to be permanent – or as they are sometimes called – standing committees. Examples of permanent organs are UNHCR, which is a so-called operational agency established by the GA in Resolution 319 (IV) of Dec. 3 1949, the ILC, which for example prepares Draft treaty texts for further discussion in the GA, and the Human Rights Commission, the main organ within the UN for the monitoring of human rights situations in the world.³³

2.1.3 Composition

The principal organs establish subsidiary organs – as I have mentioned earlier – for a variety of reasons. Since they all have different tasks to complete, they are also very different in character. As Sarooshi puts it, “[i]ssues of form are not of major importance when considering what constitutes a UN subsidiary organ”.³⁴ Some of the subsidiary organs are composed of States, meaning that government delegates represent the States in question. However, if this is the case, there is a requirement that the State is a member of the UN. Sometimes the principal organ, for example the GA, uses committees to help in their work. These committees are composed by State representatives, and are identical in membership to the principal organ itself.³⁵ These committees must be distinguished from subsidiary organs in the sense that they do not have the same degree of independence from the principal organ as the subsidiary organs do.³⁶ However, if the committee continues its work when the GA is not in session, the organisation and its members can consider the committee a subsidiary organ.³⁷ There is a special circumstance regarding the subsidiary organs of the GA, since these are not to meet during sessions of the GA if not explicitly authorized according to paragraph 34 of Decision 34/401 of the GA. If this were the case, it would mean that the committees meeting in between sessions would in fact be in violation of the rules of the GA, no matter what they were characterised as.³⁸ In some cases, the State, which is a member of a committee, need not be a member of the UN, but then it must have some sort of interest in the task given to the committee, and receive contributions from the GA under this particular area of interest.³⁹

Other subsidiary organs are composed of individuals who have personal expertise in the field of the functions of the organ.⁴⁰ For example, when the

³³ Jaenicke in Simma, p. 220.

³⁴ Sarooshi, D in *BYIL* 1997, p.414.

³⁵ *Ibid*, p.417.

³⁶ I will get into this further below when discussing the specialised powers of the GA and the SC.

³⁷ Sarooshi, D in *BYIL* 1997, p.417.

³⁸ See arguments made in footnote 17 in Sarooshi, D *BYIL* 1997, p. 417.

³⁹ Sarooshi, D in *BYIL*, p. 414.

⁴⁰ Jaenicke in Simma, p. 219.

SC decides to appoint a mediator for a conflict, they choose the person because of his or her personal capacity. Even though a mediator is only one person, it is still a subsidiary organ. This is the case for example with the United Nations Mediator in Palestine, as which the Swedish count Folke Bernadotte was appointed after the creation of Israel in 1948. Examples of other organs with more than one representative chosen in their individual capacity are the ILC and the United Nations Administrative Tribunal, both subsidiary organs of the GA.⁴¹

There are usually previously established criteria determining how to distribute the seats within the subsidiary organ when it is composed of a specified number of States. These criteria vary from case to case, and take into consideration – among other things – the interest of the different States in the specific field of the subsidiary organ, and other aspects such as the principal economic or legal systems in the Member States, the importance of an equitable geographical distribution of the seats etc.⁴²

2.2 Article 22, the General Assembly

2.2.1 Background

In 1955, after only ten years of practice, the General Assembly had already established nearly one hundred subsidiary organs to assist with their work.⁴³ They were all different in character and functions and some had already been dissolved since their task was completed. The GA established all the organs directly by resolution, but the method of determining the membership of the different organs was not uniform. In the *Repertory of Practice* the organs established are divided into six groups with varying specifications.⁴⁴ A main feature for all these organs was that they had to report, either to the GA or to another organ, which the GA decided in the resolution of establishment, all in accordance with the UN Charter.

2.2.2 The scope of powers of the GA

The GA has a very broad scope of powers, and the best way to describe them is probably to determine in the negative *i.e.* to state which powers it does not possess. The main purpose of the UN is spelled out in the preamble of the Charter; the maintenance of peace and security and reaffirming fundamental human rights, to maintain respect for international law and to promote social progress.⁴⁵ Needless to say, these are wide in scope, and the GA as the ‘main’ principal organ has a large degree of powers in all of these

⁴¹ Torres Bernárdez in Dupuy, p. 114.

⁴² *Ibid.*, p. 114.

⁴³ *Repertory of Practice of United Nations Organs*, vol I, p. 663.

⁴⁴ *Ibid.*

⁴⁵ UN Charter, *supra* note 7.

fields. The only real limit to the powers of the GA are in the fields in which the SC has the primary competence – or as the article reads, primary responsibility – *i.e.* determining threats to, and the maintenance of, international peace and security.⁴⁶ This is an area where the GA has no power.⁴⁷ The fact that the SC has the primary responsibility does not mean that it has any sort of exclusive competence in this area. In the *Nicaragua* case⁴⁸ for example, the ICJ said that since the SC and the Court have separate functions, the fact that a matter involves the use of force is not an impediment for the ICJ to start judicial proceedings.⁴⁹

The power to establish subsidiary organs in accordance with article 22 is also broad in scope. The sole restriction placed on the GA is that the subsidiary should be necessary for the performance of the functions of the GA.⁵⁰ The object of article 22, according to the ICJ, is:

... to enable the United Nations to accomplish its purposes and to function effectively. Accordingly, to place a restrictive interpretation on the power of the General Assembly to establish subsidiary organs would run contrary to the clear intention of the Charter.⁵¹

I will now give a few examples of subsidiary organs, established by the GA, which have been either controversial or just discussed because of the fact that the GA had no powers in these fields expressed in the UN Charter. Despite this, the organs were established and also accepted as subsidiary organs of the UN.

2.2.2.1 The Administrative Tribunal

In 1949 the GA decided to establish an Administrative Tribunal – UNAT – and its statute was adopted by Resolution 351 (IV). The statute in its article 2 gives the Tribunal its mandate:

1. The Tribunal shall be competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members...⁵²

In the present resolution the GA also appointed the members of the Tribunal. It is composed by seven members appointed for three years at a time. In time, the tribunal's competence has been extended to include also programs financed by voluntary contributions, such as the UNHCR and

⁴⁶ UN Charter art 24 (1).

⁴⁷ This is not entirely true since there is a way around this, even though the SC has the primary responsibility, via the Uniting for Peace Resolution as we can see below.

⁴⁸ Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1984.

⁴⁹ Merrills, J. G., p. 234.

⁵⁰ Article 22 of the UN Charter, also *Application for Review* case, p. 173.

⁵¹ *Application for Review* case, p. 172.

⁵² GA Res. 351 (VI), 255th Plenary Meeting, 24 November 1949.

UNICEF.⁵³ The Tribunal has the competence to rule over decisions made by the GA, yet it is a subsidiary organ of the same. In the decision by the ICJ on *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, the competence of the tribunal was discussed.⁵⁴ The issue of the case was whether the GA could refuse to give effect to an award issued by the Tribunal. The court considered if the tribunal was a judicial body, and found that it was in fact a judicial body since the following conditions were met:

1. The Tribunal was under the Statute Article 2, para. 1, “competent to hear and pass judgment upon applications”.
2. In the event of a dispute as to whether the Tribunal has competence, the matter should be settled by the Tribunal itself, according to Article 2 para. 3.
3. Under Article 10 of the Statute, the judgments of the Tribunal are final and without appeal, and the Tribunal shall state the reasons on which they are based.⁵⁵

All in all, the ICJ found that the provisions set out above were evidence of the judicial nature of the Tribunal:

This examination of the relevant provisions of the Statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions.⁵⁶

Another provision mentioned by the Court was the fact that the independence of the members of the Tribunal was ensured by Article 3 of the Statute, and therefore it had many of the attributes usually associated with a judicial body.⁵⁷ The decisions by the Tribunal are binding on the organization, and therefore also binding on the principal organ that established it, the GA. *Ergo*, UNAT was considered to be a permanent judicial tribunal established by the GA, in the sense that the tribunal would issue awards of compensation in all cases where Staff members needed assistance in these matters. This ultimately gave the tribunal the power to issue decisions which were in fact binding on the GA. However, the GA had no such power – to judge over decisions taken by any of the bodies of the UN and make binding decisions that gave rights to individuals – expressly under the UN Charter. The only responsibility the GA had in this regard was the primary responsibility for budgetary and staff questions. This is the reason why the UNAT is of interest to my thesis, the GA did not possess the power to issue awards of compensation to individuals, yet they did establish a subsidiary organ with this task. The fact that the UNAT was a judicial tribunal is also of interest, since the main judicial organ of the UN is the

⁵³ <http://untreaty.un.org/ola-internet/unat.htm> Last visited 050321.

⁵⁴ *Effect of Awards* case, p.48.

⁵⁵ *Ibid.* p. 51.

⁵⁶ *Ibid.* p. 53.

⁵⁷ *Ibid.* p. 52.

ICJ, and the ICJ has no jurisdiction aimed at individuals. Therefore the ICJ had to examine the possibility of the power of issuing these awards being implied under any of the rules set out in the UN Charter. It did so under article 101 of the UN Charter, which gives the GA power to establish regulations regarding the appointment of staff by the SG, in combination with Articles 7 (2) and 22, establishment of subsidiary organs.⁵⁸

The *Effect of Awards* case becomes important to this thesis in the following way. Here we have an independent judicial tribunal, established as a subsidiary organ of the UN, a tribunal which can issue decisions binding on its establisher, the GA. This is not in itself a problem, but the fact that the GA could establish an independent tribunal with jurisdiction over issues relating to individuals is where the UNAT suddenly becomes interesting. The GA does not possess any judicial powers under the UN Charter. Therefore, the Advisory opinion of the ICJ is of major importance to the outcome of this thesis. The ICJ discusses the implied powers doctrine, set out in the *Reparation for Injuries* case. The Court had to rule on two questions regarding this, and these questions are more of statements made by the GA, namely that:

1. An implied power can only be exercised to the extent that the particular measure under consideration can be regarded as absolutely essential.
2. ...while an implied power of the General Assembly to establish an administrative tribunal may be both necessary and essential, nevertheless, an implied power to impose legal limitations upon the General Assembly's express Charter powers is not legally admissible.⁵⁹

The Court found no bearing behind the questions, and its ruling stood. The fact that the GA had established the Administrative Tribunal and was – as its parent organ – able to discontinue its work did not constitute reason enough to say it could not issue binding decisions on the GA. Therefore, the GA did not have the power to deny effect to any awards issued by the UNAT. This case is the first one where the ICJ explicitly discusses the implied powers doctrine, something that I will get back further to below.

2.2.2.2 UNEF

Before the outbreak of the hostilities in the area of the Middle East in the aftermaths of the creation of the State of Israel in 1948, the SC came up with a resolution, consisting of six requirements that had to be met, so that the States in question – Israel and Egypt – should settle their differences by negotiation.⁶⁰ When the Israeli troops entered Egypt in the end of October of 1956, the SC was unable to act since there was a deadlock owing to the veto of two of the permanent members, France and the United Kingdom. Since the gravity of the situation was recognised by other Member States,

⁵⁸ *Ibid.* p. 58.

⁵⁹ *Ibid.* pp. 58-59.

⁶⁰ http://www.un.org/Depts/dpko/dpko/co_mission/unef1backgr2.html, Background information around the UNEF force taken from the UN homepage. Last visited 050322.

Yugoslavia suggested the interference by the GA in the matter. This was done under the Uniting for Peace Resolution,⁶¹ which gives the GA the right to act in instances of threats to international peace and security if the SC is unable to act. The Uniting for Peace Resolution has not been used in any other circumstance in the area of maintenance of international peace and security in the sense that the GA has established a peacekeeping force. Therefore, the decision has been much debated and is in fact a rather controversial one.

This is, ergo, a right that the GA has given itself in order for the organisation to be efficient even in the instances where the veto-power is used by a permanent member. The GA summoned an emergency-session, and passed several resolutions in order for the situation to end. France and the UK were both involved in the military activity in Egypt, and would only withdraw under the condition that both the Israeli and the Egyptian government agreed to have a United Nations force in the territory. During the session, the GA asked the SG to submit a plan for the creation of an Emergency Force in the area. The SG answered by doing just that, and this led to two resolutions; resolution 1000 (ES-I) which established a UN command for the Force; and resolution 1001 (ES-I) which created UNEF I, passed on November 7th by the GA.

The terms of reference of the Force were to secure and supervise the cessation of hostilities in accordance with the terms of GA Resolution 997 (ES-I). Matters of importance were that the Force should not influence the military balance in the conflict and it should be of a temporary nature. The permanent members of the SC were not to send troops. The Force would enter Egyptian territory only when the Egyptian Government consented that it could do so.⁶² There was no room for any other rights other than the ones necessary for the execution of the functions of the Force, and it should all be done in the cooperation with the local authorities. When the First Emergency Session of the GA ended, ten days after the start, seven resolutions had been passed, and the SG had the authority needed to help bring about the cessation of hostilities in Egypt.⁶³

UNEF I is the first, and – as of today – only, peacekeeping operation established by the GA. As I mentioned in the previous chapter, the GA has to abide by the UN Charter and not interfere in the areas where the SC has primary responsibility, and this is, without a doubt, one of these areas. UNEF I has also been widely criticised because of this fact. Nevertheless, the GA has stood by the fact that its establishment was legal under the Uniting for Peace Resolution, and the discussions have ended there. This makes it difficult to say otherwise, the Uniting for Peace Resolution is passed in the GA, and because of this it is valid. The main reason that it was ultimately accepted was the fact that the Force had a mandate only as long as the two parties of the conflict accepted the presence of the force within

⁶¹ GA Res 377 (V), 302nd Plenary Meeting, 3 November 1950.

⁶² *Supra* note 60.

⁶³ *Ibid.*

their respective borders.⁶⁴ Yet, despite the fact that the GA and the Member States considered the Force legal – and in all essential still do consider it legal – there are still question marks raised when UNEF I comes into discussion. The establishment of UNEF I, is another instance where the GA has created a subsidiary organ that has powers the GA does not have, if we follow the UN Charter and what is expressed there. Perhaps this is not that clear an example of implied powers as is the UNAT, but I still feel that it is important to use UNEF I as an example seeing that there has been so much discussion around the force. It is of importance when speaking of the division of the powers in the UN Charter, something I will get back to when it comes to the establishment of the ICTY but in that sense the division between the powers of the SC and the ICJ.

2.2.2.3 Discussions of an international criminal court

Early on in the life of the UN, there were discussions regarding the establishment of an international criminal court.⁶⁵ The main reason for this discussion was the trial of persons charged with the crime of genocide, but also other violations of human rights. After the Second World War, the Nuremberg and Tokyo tribunals had tried persons charged with crimes such as these, but the fact remains that these tribunals were military tribunals.⁶⁶ As such, they were governed by the winning powers of the war, and the persons tried were mainly officials from the defeated States. The GA wanted to explore the different possibilities as to how this could be done in a non-military way, and invited the ILC to study the possibility of establishment of an international judicial body.⁶⁷

In order for the court to be established as a new principal organ of the UN, there was a need for amendment of the Charter in accordance with art 108. However, the ILC meant that article 7 merely enumerated the principal organs of the UN, and did not preclude the possibility of establishing such a criminal court as a subsidiary organ. Therefore, the ILC voted that it was possible to set up a judicial organ within the existing structure of the UN, without amendment to the Charter. The GA then assembled a committee, which was set up to establish draft conventions, and to explore further how the court could be administered. This committee came up with alternatives to establishing the court by resolution of the GA, and decided that the best

⁶⁴ http://www.un.org/Depts/dpko/dpko/co_mission/unef1backgr1.html Last visited 050504.

⁶⁵ See for example Ely, Robert B. III in *Temple Law Quarterly*.

⁶⁶ The principles of international law used by the Tribunal were affirmed by the GA in Resolution 177 (II) of 1950, and can be found on the internet. <http://deoxy.org/wc/wc-nurem.htm>, Last visited on 050502. The Nuremberg Tribunal was established in 1945, in pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, see article 1 of the Constitution of the Nuremberg Tribunal, <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>. Last visited 050502.

⁶⁷ See for example GA Resolution 687 (VII) of 5 December 1952 on International criminal jurisdiction.

way to accomplish the goals of the proposed court was to establish the court by convention between the States who wished to become members. The report of the committee stated:

Under the Charter, the court could only be established as a subsidiary organ. The principal organ would presumably be the General Assembly, but a subsidiary organ could not have a competence falling outside the competence of its principal, and it was questionable whether the General Assembly was competent to administer justice. Furthermore, the court would become subordinate to the Assembly, which in many respects was undesirable, and its continued existence would be made subject of shifting political currents, in so far as it might always be dissolved by a resolution of the Assembly.⁶⁸

This was also the decision of the committee, which voted in favour of establishing the court by a convention concluded between States.⁶⁹

However, is there any other way that there could be established an international court with jurisdiction over individuals? The principal judicial organ of the United Nations, ICJ, has under its Statute no such jurisdiction, nor does it have the power to establish subsidiary organs under the UN Charter.⁷⁰ This, Ely argues, has left international law not able to be “the basis of world order”⁷¹ as it in his opinion could be. His article dates all the way back to 1950, but even then, the discussion on the topic of an international court to have jurisdiction over individuals was ongoing. He explored different options on how a court like this could be established, and concluded that it could not be done by amendment to the Statute of the ICJ. This would have to be done in much the same manner as an amendment to the UN Charter, and therefore he argued that a judicial organ with this competence had to be established as a subsidiary since the only principal judicial organ is the ICJ.⁷² The ICJ does not itself possess the power to establish subsidiary organs; which would lead us to the conclusion that it would have to be either the GA or the SC who would have to be the creator. In his article, he argues that the SC does not have this kind of power:

...it is still doubtful that the creation of subsidiary courts lies within its [the Security Council's] jurisdiction. It is assigned by Article 24 the principal function of the maintenance of international peace and security, and it is difficult to prove that international disputes involving individuals affect that “peace and security” in any direct fashion. ---We are left, then, with the General Assembly as the last choice within the United Nations as creator of subsidiary judicial organs. *Prima facie* we seem here to be on solid ground.⁷³

⁶⁸ This quote comes from the document GA (VII), Suppl. No. 11 (A/2136), para 21, as it is quoted in the *Repertory of Practice of United Nations organs* vol. I, and as I have not been able to locate the first-hand source I have to refer to this source, p. 680.

⁶⁹ *Repertory of Practice of United Nations organs*, vol I, p. 680.

⁷⁰ Statute of the International Court of Justice, Article 34.1. This can be found at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>

⁷¹ Ely, R. B., p. 421.

⁷² *Ibid*, p. 422.

⁷³ *Ibid*, p 423.

He also states that if it was so that the original Members of the UN did not confer the power to establish subsidiary judicial organs to any of the principal organs, then the Member States themselves would have to possess that power. The fact that the creation of the organisation as a whole was once possible would then, in his mind, speak in favour that additional organs necessary for the progressive development of the organisation could be established.⁷⁴ This is in my opinion true still today, especially since the organisation develops in new directions. All in all, the view that was taken by both some authors of the time and the committee set up by the GA was that the way to establish a subsidiary judicial organ of the UN would be either for the GA to do so, or to establish the court through a convention between States.

2.2.3 Conclusions

The views by Ely at the end of the former chapter are good to keep in mind when we get back to the discussion on the ICTY in chapter 4, and also when it comes to the conclusions I will make at the end of the thesis. Although they are from, as I previously stated, over half a century ago, I still find that they have bearing on the subject.

The subsidiary organs established by the GA are not, apart from UNEF, in my opinion especially controversial. The scope of powers of the GA are so wide that the establishment of a subsidiary organ hardly ever has the capacity to become *ultra vires*. Therefore the question on the legal establishment of subsidiary organs under article 22 is rather open. The ICJ has in a few decisions had the subject on the agenda, and these are of vital importance to the analysis I will attempt at the end of this thesis. In my opinion there is merely one individual case in which the GA has established subsidiary organs that are interesting to my final conclusions, and that is the UNAT. Therefore I will only let the decisions by the ICJ be of guidance in my analysis of the works of the SC. Establishment of subsidiary organs of the SC are somewhat different than establishment by the GA, and in the following chapter I will describe this procedure.

The fact that the GA is consisted of representatives of all the Member States of the UN puts the work of the GA in a different perspective than that of the SC. Every State has a saying when it comes to decisions of the GA, and therefore it can be said that decisions made in the GA in some ways reflect the general opinion of the States. Evidence of this is found in the decisions of the First Emergency Session of the GA in 1956, when the States opposing the Resolutions abstained from voting instead of giving a negative vote. This fact makes decisions by the GA – adopted by consensus at least or with a clear majority – less likely to be disputed by the community of States. In the case of UNEF I, the main reason that the Force could ever come into being was that the Egyptian Government cooperated with the UN

⁷⁴ *Ibid.*

Member States who were part of the Force. That fact makes it hard to dispute the Force, since there was consent involved. Moreover, since the Force itself is seldom disputed, neither is the way in which the Force was established in the first place.

The discussions regarding the creation of an international criminal court are interesting to the outcome of this thesis. Now that the ICC has been set up and is working, through the exact procedure discussed by the Members of the UN back in 1950, one could say that the existence of the two *ad hoc* tribunals is no longer interesting since they would no longer be necessary in the work of the SC. This is something I will get back to later in the final chapter of the thesis.

2.3 Article 29, the Security Council

2.3.1 Background

When it comes to the SC, there have not been established as many subsidiary organs as have been established by the GA. This has to do with the fact that the SC was rather disarmed during the cold war, during which there were only 77 subsidiary organs established. This is a number, which doubled during the years 1990-1996.⁷⁵ In the aftermaths of the cold war, and the fall of the Eastern bloc, there have been a significant number of subsidiary organs established, due to the fact that the veto is no longer used with the same frequency as it was before 1990.

Article 29 only concerns the legal basis for establishment, and the procedural rules around this matter, as is the case with article 22. It does not set out any limits as to which organs may be established nor does it state which powers the SC can delegate to the subsidiary organs. These aspects of the establishment have to be found, according to Paulus, in the rules and principles of the Charter and general principles of international law.⁷⁶ The subsidiary organs of the SC are divided only into three groups as opposed to the GA, which, as we saw earlier, had six. There are a few permanent or standing committees established by the SC, such as the Committee on Admission of new members and the Committee of Experts. These were established in 1946 and are still active today.

2.3.2 The scope of powers of the SC

If we define the scope of powers of the GA in the negative, it is better to define the SC:s powers in the positive, since it is the powers of the SC that narrow the powers of the GA. The UN Charter gives explicit powers to the SC in article 24.⁷⁷ Under this article, the SC has the primary responsibility

⁷⁵ Paulus in Simma, p. 546.

⁷⁶ *Ibid.* p. 541.

⁷⁷ For full text of this article, see Supplement A.

of maintenance of international peace and security. Even though it is a primary responsibility, it is not exclusive. The GA also has powers in this regard. In chapters VI, VII, VIII and XII the specific powers are set out, which are granted to the SC. These are exclusive, but the list is neither conclusive nor final. Apart from the specific powers, the SC also has general powers deriving from the purposes and principles of the organisation as a whole.

When someone writes about subsidiary organs of the SC, mostly they refer to the field commissions established in order to maintain or restore peace and security. These commissions come in different shapes; good offices, investigations, mediation or observation missions of a cease-fire or a truce.⁷⁸ Even though the commissions are considered a homogenous group, they are very different in character. As I have mentioned earlier they can be composed either of States or of persons in their individual capacity. Apart from the field commissions and the standing committees there are also *ad hoc* committees to assist with specific tasks at the SC headquarters. The latter are usually for the collection of information needed in the everyday work of the SC.⁷⁹

Paulus argues that article 29 is *lex specialis* compared to article 7 (2), which means that the SC should only use article 7 (2) when establishing mixed subsidiary organs *i.e.* organs that report to several Charter organs.⁸⁰ Opposing this opinion is Sarooshi, who argues that article 29 only comprises those subsidiary organs established that are necessary for the performance of the functions of the principal, whereas article 7 (2) also covers implied powers. This argument being true, it would mean that the SC could lean on article 7 (2) in order to give the subsidiary functions it does not itself possess.⁸¹ But, all arguments aside, the subsidiary organs of the SC all have their procedural basis in article 29.

But are there any differences in the articles that give the power to establish subsidiary organs? What article 22 says is already established above, and now I will examine whether there are any differences when it comes to article 29.

In the two cases, *Effect of Awards* and *Application for Review*, the ICJ did not in any way distinguish between the articles in the UN Charter which give the power to establish subsidiary organs, *i.e.* articles 7 (2), 22 and 29.⁸² All three articles posit two conditions; the organ established must be subsidiary and its establishment must be deemed necessary.⁸³ But, apart from these conditions, article 29 also has the condition that the necessity is connected to the performance of the functions of the principal organ. This is

⁷⁸ *Repertory of Practice of United Nations organs*, Vol II, p 120.

⁷⁹ See for example note 30 and corresponding text above.

⁸⁰ Paulus in Simma, p. 541.

⁸¹ Sarooshi, D. in *BYIL*, p. 424.

⁸² *Effect of Awards* case, p. 58, *Application for Review* case, pp. 172-173 para. 16.

⁸³ Paulus in Simma, p. 542.

especially so when we are dealing with subsidiary organs working for the maintenance of peace and security. The connection to the performance of the functions of the SC does not have to rely on express powers of the SC. In the *Effect of Awards* case, the ICJ used the implied powers doctrine to determine that the scope of powers of the subsidiary was within the functions of the GA, and this can analogically be used to cover the SC also.⁸⁴ The decision whether a subsidiary organ is of necessity for the performance of the SC:s functions is under the discretion of the SC itself. This discretion is very broad. Therefore, the discussion whether or not a subsidiary organ has any connection to the performance of the functions of the SC is, in my opinion, sometimes hard to understand. If the SC itself decides which powers it has, then it has to also decide what powers the subsidiary organs it creates will have. This conclusion comes from the fact that the answer whether or not it is within the functions of the SC, lies with the SC itself.

Below I will examine the establishment and work of two subsidiary organs of the SC, the Boundary Demarcation Commission and the International Criminal Tribunal for the former Yugoslavia, but first I would like to say something about peacekeeping forces, since they are a special form of subsidiary organs of the SC.

2.3.2.1 Peacekeeping forces

All peacekeeping forces have been established as subsidiary organs of the SC with the mere exception of the early forces in the Middle East, UNEF I, based in Egypt/Israel and UNSF, based in the territory of West Irian. The peacekeeping forces are established by the SC under their general power in article 24 (1) of the UN Charter of maintenance of international peace and security, and are therefore created according to article 29.⁸⁵ Even though the powers are based in article 24 (1) they must also have a clear mandate by either Chapter VI, which requires the consent of the parties involved, or by Chapter VII, under which the SC can act without consent of the parties. There have sometimes been talks about a “Chapter VI ½” when peacekeeping is on the agenda, since the only thing distinguishing it from peace enforcement is that there is consent by the parties to the conflict when peacekeeping operations are in place. According to the UN homepage, each peacekeeping operation has a specific set of mandated tasks, but all share certain common aims - to alleviate human suffering, and create conditions and build institutions for self-sustaining peace. These are the aims set out in the UN Charter. The substantial presence of a peacekeeping operation on the ground contributes to this aim by introducing the UN as a third party with a direct impact on the political process. In exercise of its tasks, the UNDPKO – Department of Peace Keeping Operations – work to minimize the many risks to which the people working with the operations may be exposed in the field.⁸⁶

⁸⁴ *Effect of Awards* case, pp. 56-57.

⁸⁵ Paulus in Simma, p. 554.

⁸⁶ <http://www.un.org/Depts/dpko/dpko/info/page3.htm> Last visited 050324.

Peacekeeping operations may consist of several components, including a military component. This military component may or may not be armed, and there can also be various civilian components encompassing a broad range of disciplines. Depending on their mandate, peacekeeping missions may be required to prevent the outbreak of conflict across borders; stabilize conflict situations after a cease-fire; assist in implementing comprehensive peace agreements or function as a transition Government before elections can be held.⁸⁷ I will not go any further into the work of the peacekeeping operations, since it would take up too much space. All I will say is that these operations have no express basis in the UN Charter, but have become a well-established custom in the relations between States and the UN. The peacekeeping operations are characterized by the consent of the parties, voluntary sending of troops, impartiality and the use of force only in self-defence.

2.3.3 The veto-power of the Permanent Five

When it comes to decisions made by the SC, there is the question on the veto-power of the permanent members. When a decision is made in the SC, there is a difference between procedural and non-procedural matters. If a question is considered a non-procedural matter, then it is subject to the veto.⁸⁸ The veto was frequently used during the period of the cold war, and this made it difficult for the SC to make any decisions regarding important matters of international peace and security.

The establishment of subsidiary organs is a procedural matter, and as such it is not subject to the veto.⁸⁹ The fact that I mentioned earlier – that the SC established very few subsidiary organs – can be questioned now that we have concluded that establishment of subsidiary organs is a procedural matter. Yet, the establishment of subsidiary organs is an integral part of the work of the SC, and since the SC could not work at all during certain periods of the cold war, this was a natural cause of events. Since this is the case, I think it important to discuss the subject, even if my main purpose is to look at the delegation of power to, and not the actual establishment of subsidiary organs. Below, the question of whether or not the establishment of some subsidiary organs might be non-procedural will probably shed more light on when the discussion of the veto could be important when it comes to delegation of powers to the subsidiary organs.

In the Covenant of the League of Nations there was no explicit paragraph that gave the principal organs the right to set up subsidiaries, but its article 5 (2) recognized this capacity indirectly by saying that committees could be set up for the investigation of special matters. The decisions to set up

⁸⁷ *Ibid.*

⁸⁸ UN Charter art 27 (3).

⁸⁹ Sarooshi, D., 1999, p 127.

committees like this were considered a procedural matter.⁹⁰ If we stay in the UN Charter – just to complicate things further – the establishment of a subsidiary organ supposed to exercise non-procedural powers would then be a non-procedural matter and hence subject to the veto of the permanent members of the SC. If the SC could establish such organs, possessing the power to exercise non-procedural powers, then it would in my opinion be to bypass the veto, and then the veto-power would once again be the subject of argument by the States of the UN not possessing it. Sarooshi argues that:

...if the Security Council were to establish a subsidiary organ to which it purports to delegate certain of its Chapter VII decision-making powers then the establishment of the subsidiary is arguably subject to the veto of any of the five Permanent Members. ... Were it otherwise, it may have been possible for the Security Council to decide to establish a subsidiary organ to exercise its Chapter VII powers without this decision being made subject to the veto.⁹¹

When it comes to the establishment of peacekeeping forces or an international criminal tribunal, these decisions are according to Paulus subject to the veto, since the forces have the substantial competence of the SC.⁹² Yet he argues that the practical relevance of this is limited due to the double veto. The SC cannot delegate the veto-power to apply also to decisions made by the subsidiary organ. Neither can the SC, as mentioned above, delegate any of the article 39 determinations of breaches of the peace. This further undermines the practical relevance of the use of the veto when it comes to establishment of subsidiary organs.

Hence, when the SC establishes a subsidiary organ, there is no question of use of veto by the permanent members. I find this discussion interesting, and the views by Sarooshi that the establishment of the ICTY could in fact have been subject to the veto is good to keep in mind. I think that the possibility of any of the permanent members' use of the veto in this particular instance would have been an argument against the legal establishment of the tribunal. Then, it would have been the decision not to use the veto that would have come into play, and the consent of the permanent members would have been far too important a question to overlook.

2.3.4 Conclusions

As we can see, the power of the principal organs to establish subsidiaries is very wide in scope. The discretion of the principal organs is large and this gives them big opportunities to decide their own competence, something I will get back to further on in this thesis. When it comes to the SC, I have had trouble finding any legal scholars who are opposing the discretion of the SC, a fact that in principle gives the SC the sole power to say which organs to establish. The SC has no organ to control its decisions, but this is also one

⁹⁰ *Ibid.*

⁹¹ Sarooshi, D., 1999, p. 127.

⁹² Paulus in Simma, p. 544.

of those questions that alone could be the topic of an entire thesis and as such I cannot get into it any further.

The articles in question are clear when it comes to the language used and do not leave much room for discussion. We can say for certain when it comes to the wording that the principal organs can establish subsidiary organs as they deem necessary. This is a conclusion, which leaves a lot to be said.

2.4 Delegation of powers – introduction

The principal organs of the UN have different areas of expertise, and their powers derive – as mentioned above – from different articles of the Charter of the UN. Delegation of power to subsidiary organs is common in the work of the principal organs. The resolutions that establish subsidiary organs are the main documents in which the principal organs delegate powers. When the principal organ sets up a subsidiary organ, this is when the powers are, in fact, delegated. This is usually done by resolution, and the powers to be delegated are spelled out in the text of the resolution. The principal organ can only give the subsidiary organs ‘its own’ functions, *i.e.* the functions assigned to the principal organ by the UN Charter.⁹³ On this subject I find it necessary to mention that some mean that the principal organs have implied powers, powers that are not expressly spelled out in the Charter. This doctrine, the so-called *implied powers doctrine*, is something I will get back to further below.⁹⁴

The subsidiary organs cannot delegate other powers to another body than the ones they possess, according to the principle of *delegatus non potest delegare* – a delegate cannot delegate.⁹⁵ The subsidiary organs do not have any implied powers in the same way as the principal organs. This does not mean however, that the subsidiary organs cannot set up their own subsidiary organs. The fact is that the principal organs who establish the subsidiary organ can – in the resolutions that set up the organs – give the subsidiary organ the power to establish its own subsidiary bodies. An organ cannot delegate anything unless there is a clear authorisation in the constitution, in the case of the subsidiary organs that would be the resolution of establishment, and when it comes to the principal organs it is the Charter.⁹⁶ Delegation by a subsidiary to another would have to be expressed in the resolution establishing the organ. Kelsen argues that the rules set out in the Rules of Procedure of the General Assembly are covered by article 22 of the UN Charter, and hence the provisions that the committees of the GA can set up its own sub-committees also include that the subsidiary organs of the GA can establish their own subsidiary organs.⁹⁷

⁹³ Kelsen, H., p. 137.

⁹⁴ See chapter 2.5 below.

⁹⁵ Sarooshi, D., 1999, p. 15.

⁹⁶ Kelsen, H., p. 142.

⁹⁷ *Ibid.* p. 144.

This power – establishment of subsidiary organs – can be derived from art 7 (2) of the UN Charter, art 22 for the GA, art 29 for the SC and art 68 for ECOSOC. There are no restrictions as to how the principal organs may establish subsidiary organs under article 7 (2), as we have seen above. It creates what we can call a general authority to establish subsidiary organs.⁹⁸ The specific authority is found in the other abovementioned articles. The main emphasis is on the SC, but some of the work of the GA is also important to the text.

Articles 22 and 29 are worded in the same way. They say that the GA and the SC may establish such subsidiary organs as they deem necessary for the performance of their functions.⁹⁹ This power is narrower than the power deriving from article 7 (2), since it talks about the necessity for the performance of the principal organ's functions. For this reason the organs can only establish subsidiary organs in certain fields, where they themselves have competence to act. The GA and the SC have the discretion of when it is necessary to establish a subsidiary organ for the performance of their functions.

In order for the principal organs to establish subsidiary organs there are some rules that have to be followed. I have mentioned two of them above; the principal organ has to maintain control of the subsidiary organ and it is the creator. There are other criteria that also have to be met. A principal organ cannot establish a subsidiary organ that has powers other than the powers they themselves possess according to the principle of *nemo dat quod non habet*, which means just this.¹⁰⁰ This is especially important in order that the delimitation of powers set out in the UN Charter should not be violated.¹⁰¹ Another rule of establishment of a subsidiary organ is that the SC cannot delegate its powers set out in article 39. Only the SC may have the power to decide the existence of a threat to or a breach of international peace and security, and this cannot be overstepped.¹⁰²

2.5 The implied powers doctrine

As I have stated earlier in this thesis, there has been a discussion around the subject of implied powers and whether the SC has any such powers. Therefore I feel that I have to explain a little bit what the expression means, and also why this is relevant to the question of delegation of powers to

⁹⁸ Sarooshi, D., in *BYIL*, p 423.

⁹⁹ Ibid articles 22 and 29 respectively. For full text of the articles, see Supplement A.

¹⁰⁰ This principle comes to use in the *Island of Palmas* case where the dispute concerned an island, which the US considered their colony, given to them by the Spanish government. The principle is in my opinion rather self-evident; what you do not possess you cannot give away.

¹⁰¹ Sarooshi, D., 1999, p. 89. An example of this is that the GA cannot establish a subsidiary organ, which has powers similar to those under Chapter VII of the Charter since the SC has primary responsibility in this field.

¹⁰² Sarooshi, D., 1999, p. 33.

subsidiary organs. In my thesis, I will in the following chapters look into two different decisions made by the SC, and this is where the relevance of the implied powers comes in.

The expression *implied powers* suggests that there are powers beyond those clearly expressed in the founding documents of States or organizations. The use of implied powers is mainly an American phenomenon, where the implied powers of the Congress were first debated in a case from the Supreme Court, namely *McCulloch v. Maryland* from 1819. In this case, it is stated that there exist powers of congress that may be reasonably implied from the US Constitution's enumerated grants of powers to Congress. In the US Constitution there is a clause that gives the government the right to exercise powers given to it which are "necessary and proper".¹⁰³ In the US, there are two different schools concerning this doctrine, those who accept it and favor a loose interpretation of the constitution, and those opposed who favor a more strict interpretation. The latter group holds that the Constitution authorizes nothing that is not spelled out specifically.¹⁰⁴ Arangio-Ruiz holds that the constitutional practice of the USA is the place of birth of the doctrine of implied powers.¹⁰⁵

The first time this doctrine is mentioned regarding the United Nations is in an advisory opinion of the ICJ, namely *Reparation for Injuries*. In this case the Court concluded that the Members of the UN had endowed the organization with capacity to bring international claims against States when it was necessitated by the discharge of its functions. The UN Charter did not, and still does not, confer the capacity to include victims of damage in these claims, but the Court stated that it was implied:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 1926, (Series B., No. 13, p. 18), and must be applied to the United Nations.¹⁰⁶

The important passage "necessary implication as being essential to the performance of its duties" clearly points out which powers can be implied by the UN Charter – only those that are essential to the performance of the duties of the organs of the UN. This is in line with the use of the implied powers doctrine in the case of the US Constitution. Another decision by the Court where the implied powers doctrine is discussed is the *Certain Expenses* case, in which the Court states that:

¹⁰³ <http://www.mhhe.com/socscience/history/usa/brink/solc/glos06.htm>. Last visited 050513.

¹⁰⁴ *Ibid.*

¹⁰⁵ Arangio-Ruiz, G., in *EJIL* 1997, p. 2.

¹⁰⁶ *Reparation for Injuries* case, pp. 182-183.

...when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.¹⁰⁷

So, if an organ of the UN takes action beyond its *express* powers, yet still within the purposes and principles of the organization, it cannot – in the Court’s view – be *ultra vires*. This being the case, the action cannot be questioned, because it is within the limits of the powers given to the organs by the UN Charter. The implied powers doctrine has been used extensively in both national and international contexts, probably most frequently in courts and also in political bodies in the USA.¹⁰⁸ This is not if you think about it, that strange, seeing that it is the State where the doctrine first came into use. But is this a doctrine that can be used in international contexts? I will now give another side of the coin, opposing the use of the implied powers doctrine in the UN context.

In his article in the European Journal of International Law, Professor Gaetano Arangio-Ruiz of the University of Rome argues that the use of implied powers in the context of the UN is taking the UN Charter one step too far. He means that there are no similarities between the Charter and a federal constitution, and therefore there can be drawn no analogies between the two.¹⁰⁹ The phenomenon he refers to, in his words the Federal Analogy, is one which would actually extend the powers of the SC considerably. He argues that there has to be similarities in the construction of the two – namely the USA and the UN – to be able to say that the implied powers doctrine can be used in the UN system. I will not go into any depths around his arguments, but will just state that there exists, apart from the views I have previously stated, an opposing view that the use of the implied powers doctrine in the context of the UN is not valid. The main reason for these views is, I believe, that the use of implied powers in the SC could make it possible for those States who are permanent members to exercise a very broad power which can be abused towards States without the same privileges.¹¹⁰ He argues:

Unlike the private law of national communities, which is conditioned and guaranteed by a public law, international law (referring to general international law and ordinary treaty law, and leaving aside for just one moment controversial constituent instruments like the Charter) stands only on its own feet, with no public law above and around it.¹¹¹

This is another reason why the implied powers doctrine should not be used in the international organizations in his view. Another view is that the Member States, when drawing out the Charter, delegated some powers to

¹⁰⁷ *Certain Expenses* case, p. 168.

¹⁰⁸ If you do a search on the internet for the words “implied powers doctrine”, several, not to say all, hits are regarding cases from courts and decisions by Congress in the USA. This, and also the articles I have read on the subject, is where I base my assumptions that the most frequent use of the implied powers doctrine takes place there.

¹⁰⁹ Arangio-Ruiz, G., in *EJIL* 1997, p. 1.

¹¹⁰ *Ibid.*, pp. 19-20.

¹¹¹ *Ibid.*, pp. 8-9.

the organization, and they are final. By this he says that the powers delegated are merely the function of maintenance of peace and security, as spelled out in Article 2(4) of the UN Charter.¹¹² It is not set in stone, and can of course be expanded. However, the way to do it would not be by implication but rather by expanding the express powers in the Charter.

2.5.1 Personal comments

In a way, this particular chapter has been the hardest one I have written when it comes to this thesis. The realization that it would actually be of much greater importance than I imagined at first is probably the main reason for my fears.

I do agree with Arangio-Ruiz, that there is a danger in drawing analogies between national and international law, but I am not sure that the implied powers doctrine is something that can only be used in national legal systems such as the American federal system. I can also agree in the sense that there has been an increase of the powers of the SC as of late, and we cannot be sure whether this evolution is all good. However, the use of implied powers has been evident in the work of the UN, both by the GA and the SC, and this has been confirmed by the ICJ in the advisory opinions I have quoted above. Somehow it seems that the use of the implied powers doctrine by the SC is accepted, without any arguments. There is not much written on the subject as I have previously mentioned. One thing I can say for sure is that, if the SC does indeed possess this kind of powers, which I myself am bound to believe, then the question whether or not they can delegate them to subsidiary organs comes up. This is not evident, but I would have to say that the mere possession of the powers gives the SC the right to delegate, in accordance with the UN Charter. The only power that the SC cannot delegate is the power to determine threats to peace and security, as mentioned earlier.

It is hard to explain why the implied powers doctrine is a part of the powers vested in the UN, and frankly I don't think that it has to be done with any great depths. There is of course room for discussion, and this is one of the many subjects in which I could write an entire essay. Therefore I will leave with these remarks. There are probably numerous explanations pro and against the use of the implied powers doctrine in this context, and I think the important thing to do is to join either one of these with consistency.

¹¹² *Ibid*, p. 11.

3 The Boundary Demarcation

3.1 Background

In 1990, Iraq invaded Kuwaiti territory, and the conflict – although a ceasefire was agreed in 1991 – did not end until 1996. To understand this conflict it is important to know a little bit about the history of the two countries, since they have once been part of the same Empire.

Iraq and Kuwait were both parts of the Ottoman Empire, which went into the First World War as a part of the Central Powers. The Central Powers at the end of the war were the defeated by the other power-block, the Triple Alliance. These States held a conference in San Remo in October 1920. At this conference, it was decided that Iraq was to be administered by the United Kingdom as a mandate territory under the League of Nations. However, Iraq did obtain a certain degree of independence under the Mandate and became an independent State on October 3, 1932. Iraq then became a member of the League of Nations, and was also an original member of the UN in 1945.

Kuwait was a sheikdom under the Ottoman Empire, and as such not a permanent part of the Empire. It was a small but strong sheikdom, and in 1899, the sheik sought defensive arrangements with the British government. This was a secret treaty, which was in force until the end of WWI. In 1913, Kuwait had a semi-autonomous status under the Ottoman Empire and the British government helped the sheik make a treaty with Iraq. This treaty included a defined boundary but was never ratified due to the outbreak of the war. After the war, in 1923, the British government redefined the treaty and agreed to recognize the border with Iraq.

In July and August 1932, the governments of Iraq and Kuwait had an Exchange of Letters where they confirmed the border as set out in 1913 and 1923. These Letters showed an agreement of the border between the two countries. The Ruler of Kuwait asserted his claim to the border, and the British High Commissioner for Iraq accepted it. However, despite the Letters, Iraq continued to claim that Kuwait was part of its territory when the State of Kuwait became independent. The border remained as it was set out until 1961 when Iraq put troops at the Kuwaiti border and threatened to invade the country. Kuwait, not yet a member of the UN, sought help from the SC and no invasion ever took place. When the border had enjoyed a general stability in 1963, Kuwait became an independent State and a full member of the UN. On October 4 1963, delegations from both countries met in Baghdad and signed the “Agreed Minutes”, which set the boundary to the coordinates agreed in the Exchange of Letters from 1923. The Agreed Minutes were registered with the United Nations in accordance with article

102 of the Charter.¹¹³ The border remained calm until the Iraqi invasion in 1990.¹¹⁴ When the Iraqi forces were driven out of Kuwait it became obvious that the border was imprecise and that there was a need for a more precise definition. Some would even say that a “demarcation on the ground would be highly desirable, or even essential, for the restoration and maintenance of peace.”¹¹⁵

After the Gulf War, the SC established four subsidiary organs or commissions to assist in the work of restoring peace and security in the area. They were; the Boundary Demarcation Commission, which was set up to demarcate the boundary between Iraq and Kuwait; the Observation Mission (UNIKOM), created to deter violations of the boundary; Arms Control to monitor and supervise the removal or destruction of Iraq’s missile capacity and biological weapons; and the Compensation Commission, to administer the fund for compensation of the claims of reparation.¹¹⁶

The Boundary Demarcation Commission has been very much disputed, not least by the Iraqi government. The main reason for this being that the boundary, which was supposed to be demarcated, was not accepted by Iraq. Since this was the case, the question is whether the SC had the power to perform such a technical task, and in that case under which articles of the Charter this could be done. I will try to answer this question below.

3.2 Relevant resolutions of the SC

From the very beginning of the conflict in 1990, the UN took part in the conflict and condemned the Iraqi actions. When Kuwait sought help from the SC in August of 1990, the SC adopted the first resolution of many in what has become known to the world as the Gulf War, Resolution 660.¹¹⁷ In this resolution, the SC condemns the Iraqi invasion of Kuwait, demands the withdrawal of all Iraqi forces from Kuwait and urges the States to resolve their differences by negotiation. Iraq refused to do so, and the outcome of the Gulf War is known to all. Following the first resolution on the matter was Resolution 661 (1990) of 6 August, where different types of embargoes were enforced on Iraq. Among others, the sale of military equipment to Iraq, freezing of Iraqi assets abroad and exports from the country were implemented.¹¹⁸ Some of these are still valid today. On 29 November 1990, the SC took a decision in Resolution 678 to authorize the Member States to use “all necessary means”, acting under Chapter VII of the Charter. This resolution contained a choice for Iraq to either leave Kuwait or face

¹¹³ United Nations, *Treaty Series*, vol. 485, No. 7063.

¹¹⁴ The background is taken solely from the UN Blue Books Series on the Iraq-Kuwait conflict 1990-1996.

¹¹⁵ Mendelson and Hulton in *BYIL* 1993, p. 139.

¹¹⁶ Paulus in Simma, p. 551.

¹¹⁷ U.N. Doc. S/RES/660 (1990).

¹¹⁸ U.N. Doc. S/RES/661 (1990).

intervention by the other Member States of the UN by use of military force.¹¹⁹

There were a vast number of resolutions passed in regard to this conflict. When the resolution taking note of the suspension of offensive combat operations by Iraq – Resolution 686 – was passed, it was the 13th regarding the invasion by Iraq in Kuwait. In this resolution it was affirmed that all other resolutions were still in effect until Iraqi acceptance and adherence of them could be seen.¹²⁰ The final resolution on the matter, establishing measures for a cease-fire, was resolution 687 (1991). I will now look a bit closer at this resolution.

3.2.1 Resolution 687 (1991)

Probably the single most important Resolution ever passed by the SC, is resolution 687 of 3 April 1991,¹²¹ not only because it ended the Gulf War and led to another one a few years later, but because of the decisions taken. The Resolution – the longest resolution ever passed by the SC – was passed by 12 votes in favour, 1 against (Cuba) and 2 abstentions (Ecuador and Yemen). Gray says that a majority of States, then members of the SC, accepted that the situation referred to as the Gulf Crisis required extraordinary measures to be taken. It was, however, made clear that Resolution 687 was accepted only because the SC itself was not delimiting the boundary, but merely providing for its demarcation.¹²² The question if the distinction between “delimiting” and “demarcating” is clear is a whole other matter, especially since in this case the boundary was imprecise and disputed by one of the parties. This is the resolution where cease-fire, the deployment of a UN observer unit, removal of the Iraqi weapons of mass destruction and the creation of a compensation fund for damage and loss as a result of the invasion are discussed. These issues will not be discussed in this thesis due to lack of space, but they are all interesting to the questions raised. In the resolution, the SC further asks the SG to demarcate the border between Iraq and Kuwait:

Calls upon the Secretary-General to lend his assistance to make arrangements with Iraq and Kuwait to demarcate the boundary between Iraq and Kuwait, drawing on appropriate material including the maps transmitted with the letter dated 28 March 1991 addressed to him by the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations, and to report back to the Council within one month;¹²³

The map in question was of British origin and had been rejected by the Iraqis as not accurately reflecting the actual border.¹²⁴ The fact that the

¹¹⁹ *The United Nations and the Iraq-Kuwait conflict, 1990-1996*, p. 22.

¹²⁰ U.N. Doc. S/RES/686 (1991).

¹²¹ U.N. Doc. S/RES/687 (1991), 3 April 1991.

¹²² Gray, C., in *BYIL* 1994, p. 148.

¹²³ Res. 687 para. A3. (A footnote has been removed from the quote.)

¹²⁴ Harper, K., in *NYUJILP*, p. 115. In the letter from the Iraqi Foreign minister to the Security Council, where Iraq is accepting under reservation the terms of Resolution 687, it

Boundary demarcation was a part of the Resolution was the reason for the abstentions and the vote against the resolution. Cuba meant that the SC lacked authority under the Charter to undertake a role that should be exercised either by the parties themselves or with their agreement, by the ICJ.¹²⁵ Harper argues, that the decision to settle the boundary dispute was a means to restore regional peace and security, and as such indeed within the SC's powers under article 39 of the UN Charter. However, the fact remains that the decision to take the map and demarcating the boundary from it was in fact answering an implicitly legal question.¹²⁶ In making this decision, the SC had to say that the map actually reflected the boundary between the two countries.

In rejecting Iraq's claim, the Council assumed the role of a court by answering what is ineluctably a purely juridical question. --- The Council, by presuming particular answers to those juridical questions, is essentially assuming the role of a court.¹²⁷

3.2.2 The demarcation

According to Mendelson and Hulton, there are three stages in the history of a boundary. First, there is the allocation of territory, or the initial division of the territory between the two States. Second, the delimitation of the boundary and third the actual demarcation, as was the case here.¹²⁸ There is a thin line between the last two stages, and the definitions of the terms vary. A generally accepted distinction is that the delimitation is the determination of the boundary by treaty, in written terms, and the demarcation is the actual laying down on the ground of the boundary line.¹²⁹ This distinction is important to keep in mind.

The SG at the time of publishing the UN Blue Book on the Iraq-Kuwait crisis, Boutros Boutros-Ghali, says that the decision to demarcate the boundary was a technical task, not a political one. Nevertheless, demarcation was not the only thing the Commission had to do, since there was an imprecise definition of where the boundary lay, it had to interpret the delimitation of the border.¹³⁰ This led to that the Commission had to interpret what the delimitation meant, and this was a large part of the task that was not so technical, since it involved substantial decisions on how the border would run. Therefore, one could agree with Mendelson and Hulton

is stated that since the Government of Iraq was not a party to the drawing of the map in question. Neither has the map been recognised as reflecting the actual border, and therefore it was against the will of Iraq that the demarcation of the boundary took place.

¹²⁵ United Nations Blue Books Series, p. 35.

¹²⁶ Harper, K., p. 116.

¹²⁷ Ibid.

¹²⁸ Mendelson and Hulton in *BYIL*, p. 144.

¹²⁹ Mendelson and Hulton use a quote by McMahon, author of an article called 'International Boundaries'. I have not been able to locate this article; therefore I find the statement by the two authors; that the definition is generally accepted, to be valid. See p. 144.

¹³⁰ Mendelson and Hulton in *BYIL*, p. 145.

when they say that the Commission's work falls into a middle category between delimitation and demarcation.¹³¹

Yet, the demarcation was indeed very technical, as the work of the commission was to actually stake out the boundary on the ground. Pillars were risen along the line of the border using advanced technology in order not to make any mistakes as to where the border stood.¹³² These tasks were set out in the report of the SG where establishment of the Boundary Demarcation Commission takes place.¹³³ The Commission was established as a subsidiary organ, responsible to the SG. It was to consist of five representatives, one for Iraq, one for Kuwait and three independent experts deployed by the SG. To the abovementioned report is annexed a letter from the permanent representative of Iraq to the UN, stating Iraq's unhappiness with the arrangement. The minister of Foreign Affairs of Iraq writes in this letter:

With regard to the question of the boundary, the Security Council has imposed a specific position with regard to the Iraqi-Kuwaiti boundary, whereas the custom in law and in practice in international relations is that boundary questions are left to an agreement between States, because this is the sole basis that can guarantee the principle of the stability of boundaries.¹³⁴

Disputes over title to land are, according to Harper, the prototypical juridical question.¹³⁵ He argues that any international normative system that makes land disputes a political question is by doing so inviting aggression. This is quite the same argument that the Iraqi minister uses. Therefore, according to Harper, since there was clearly a dispute concerning both law and fact prior to this resolution and the efforts of the SG, the issues required a juridical analysis. Mendelson and Hulton also say that it is questionable whether the SC would normally have the power to demarcate a frontier.¹³⁶ These statements being true would indeed imply that the SC has, by establishing the Boundary Demarcation Commission, acted beyond its Charter regulated powers. Iraq was, throughout the process of demarcation of the boundary – although working with the Commission – objecting to the task. Iraq also ceased to participate in the work of the Commission on July 15 1992. However, the decisions were communicated with the Iraqi representative.¹³⁷ In the final report of the Demarcation Commission, it is once again stated that the task of the Commission was not to reallocate territory between Iraq and Kuwait but merely to:

¹³¹ Mendelson and Hulton in *BYIL*, p. 145.

¹³² United Nations Blue Books Series, p. 49.

¹³³ S/22558, 2 May 1991, *Report of the Secretary-General on establishing an Iraq-Kuwait Boundary Demarcation Commission*.

¹³⁴ *Letter dated 23 April 1991 from the Minister of Foreign Affairs of Iraq addressed to the Secretary-General S/22558, Annex II*. Reprinted in the UN Blue Books Series.

¹³⁵ Harper, K. p. 116.

¹³⁶ Mendelson and Hulton in *BYIL*, p. 147.

¹³⁷ *Final report on the demarcation of the international boundary between the Republic of Iraq and the State of Kuwait by the United Nations Iraq-Kuwait Boundary Demarcation Commission, S/25811*, at para. 21. I have used the report as printed in the UN Blue Books Series.

...carr[y] out the technical task necessary to demarcate for the first time the precise coordinates of the international boundary reaffirmed in the 1963 Agreed Minutes.¹³⁸

These statements were repeated several times to point out that the task performed was not a juridical one that would have required a decision by a judicial body. As an answer to this line of argument, Harper argues that if it is never appropriate for a political institution to answer juridical questions, then it logically follows that a juridical decision by the Security Council is inappropriate in itself.¹³⁹ Therefore, the decision to establish the Boundary Demarcation Commission would be *ultra vires*. An argument to the contrary is that the ICJ has in several opinions said that there is no strict separation of powers between the court and the SC.¹⁴⁰ They also say that the SC and the Court are complementary in their functions, and this would mean that the decision to demarcate the Iraq-Kuwait boundary would not in any way infringe on the right of judicial review of boundary disputes.

3.2.2.1 The lawfulness of the decision

The SC does not have the express power in the UN Charter to demarcate a boundary between two States. This is clear. The decision must then fall under the powers given to the SC explicitly under article 24 of the UN Charter, maintenance and restoration of peace, and under this article there has to be implied that the SC has broader competence than has been expressed in the UN Charter. Mendelson and Hulton have in their article given several reasons as to the lawfulness of the decision of the SC.¹⁴¹ Here, the SC had determined under article 39 that there did exist a breach of the peace when Iraq violated the sovereignty of Kuwait. By making this decision the SC had to acknowledge that Kuwait existed as a separate State and as such what territory it comprised. The argument may therefore be made that, in so far as the Security Council has demarcated the boundary, it has in fact decided what the territorial rights of those States are.¹⁴² In order to get Iraq to withdraw its troops from this territory, there had to be a determination on where the boundary lay, and to maintain the peace in the area there had to be respect on the part of Iraq of the international boundary, therefore it had to be precise.

Saying that this was a boundary dispute only would be to make a rude understatement. There had been a violation of the boundary by major violence on the part of Iraq and the SC had made a determination that there existed a breach of the peace as well as action taken under articles 41 and 42 of the UN Charter. There was also a continuing threat to the peace since the Iraqi troops were present at the border. All in all, these matters gave the SC the competence to demarcate the border *if* it was the only means to ensure

¹³⁸ UN Doc. S/25811, at para. 112.

¹³⁹ Harper, K., p. 133

¹⁴⁰ Clear examples of this are given in the *Tehran Hostages* case and the *Nicaragua* case.

¹⁴¹ Mendelson and Hulton in *BYIL*, pp. 145-150.

¹⁴² Akande, D., p. 321.

that Iraq withdrew its troops without exception and also to make Iraq stay out of Kuwait; maintenance of the peace. The boundary dispute was the cause of hostilities and therefore had to be resolved. The Security Council is given not only the power to determine the existence of threats to the peace but also the authority to take appropriate measures to neutralize those threats. However, the Council is limited to taking measures in accordance with articles 41 and 42, and this had been done in the case of the conflict at large.¹⁴³

Iraq gave its consent, however much disputed, to the demarcation by accepting the terms of resolution 687. Klabbers says:

Iraq made it perfectly clear that its co-operation did not rest on a voluntary basis. After all, at the very least it is highly unusual for demarcation of boundaries not to rest, in one form or the other, rest [sic] upon the mutual consent of the states involved.¹⁴⁴

The statement that they had been forced into acceptance can be disputed by looking at the VCLT article 52, which says that only an illegal threat or use of force can make a treaty null and void. In this case there was force used, but with support in the UN Charter. This is another argument for the legality of the decision of the SC to establish the demarcation commission.

When the decision of demarcation of the boundary was taken in the SC, the Ecuadorian representative interpreted the discussions to mean that “the relevant paragraphs of resolution 687 (1991) do not constitute a precedent that can be invoked in the future.”¹⁴⁵ This could be evidence of the conclusion that the SC in a way tacitly agreed to this “no precedent” claim. If this is the case, then there is an implication that the SC would be estopped from ordering boundary demarcations in the future.¹⁴⁶

3.3 Conclusions

Given all the arguments made above, it is easy to conclude that there is no question that the decision taken in the SC has full legality. However, without a doubt, I would have to say that the decision taken to demarcate the boundary is in fact a juridical one. It is in my opinion farfetched to say that the SC has this kind of power. We can see in numerous decisions by international arbitrators and the ICJ that legal institutions usually settle decisions regarding boundaries between States. There is nothing in this case that gives evidence that this path could not have been chosen regarding the boundary between Iraq and Kuwait. The ceasefire was in force, and both States accepted the terms of resolution 687. I think that – on some level even though evidence from recent events in the area shows the contrary –

¹⁴³ Harper, K., p. 141.

¹⁴⁴ Klabbers, J., p. 912.

¹⁴⁵ UN Doc. S/PV.3108.

¹⁴⁶ Klabbers, J., p. 913.

Iraq would have been more willing to accept it, had there been no decision in the resolution on the boundary demarcation.

In this case, the SC has settled a judicial decision in a resolution, it has given the power to demarcate the international border to a subsidiary organ. In order for the Security Council to resolve issues of law in this manner, it has to be consistent with its role. That role is one of an executive enforcer, and as such, it cannot resolve legal issues since that would be inconsistent, seeming that the role of enforcer and judiciary are separated. This attitude is made evident in the Charter through the clear absence of conferral of judicial powers on the Council.¹⁴⁷ Harper says that if the UN did not have a judicial organ, then it would be sensible for the SC to assume a judicial role. By not referring legal questions such as this one to the ICJ, the SC in a certain way diminishes the ICJ's legitimacy as the primary judicial organ of the UN.¹⁴⁸ I agree with these views.

The Iraqi Government's reaction to the demarcation was, as mentioned above, negative, something that could have been predicted even before the decision was made. Iraq had certain legal claims to the disputed territory, and these were decided by the SC not to have bearing. This was done without any judicial settlement or negotiation between the parties to the conflict. The absence of judicial discussion of those claims and the SC's inability to demonstrate the deployment of procedural mechanisms to ensure fair judicial settlement render suspicion to the decision. If Iraq had been allowed to adjudicate its claims in a proper forum with protective procedural guarantees, its legal, and political, ability to challenge any determination would have been severely weakened, if not to say non-existent.¹⁴⁹ The outcome of a judicial decision would probably have been the same as that of the decision of the SC; namely that the Agreed Minutes were actually evidence of the delimitation of the border. This is evident in all the articles and books I have read on the subject. However, this fact does not make it less important to try the question in a proper juridical tribunal; on the contrary, it is a clear incentive to do so.

The main limitation on the powers of the SC is the duty to act in accordance with the purposes and principles of the UN Charter.¹⁵⁰ There are specific limitations in the provisions of articles 1 and 2 of the UN Charter which mark out the powers of the organisation generally and of the Security Council particularly. One of these is that the organs of the UN are not to violate general international law unless the UN Charter specifically allows them to do so.¹⁵¹ In this case, general international law can be said to advocate negotiation and judicial settlement of disputes between two States.

¹⁴⁷ Harper, K., p. 141.

¹⁴⁸ *Ibid.* p. 142.

¹⁴⁹ *Ibid.* p. 144.

¹⁵⁰ Akande, D., p. 316.

¹⁵¹ *Ibid.* p. 317.

Klabbers considers some of the events that have taken place in the few years preceding the establishment of the Boundary Demarcation Commission, and argues that in the light of these events, it has been suggested that the United Nations Security Council is playing a much more dominant role in international affairs as of late. The SC had a lot more power during the Iraq-Kuwait conflict than it had in the years preceding the conflict and that is probably why he argues that the role is more dominant. This is not enough though, he argues that there are a lot more serious questions behind the decision, and especially the so called *modus operandi* of the Commission, that need to be issued.¹⁵²

¹⁵² Klabbers, J., p. 911.

4 The ICTY

4.1 Background

In 1995, the SC established the International Criminal Tribunal for Former Yugoslavia under its Chapter VII powers. The area of Former Yugoslavia had been in conflict since 1991, about ten years after the previous leader, Tito, had died. The SC made different efforts as to restore peace in the area; among them were the peacekeeping force UNPROFOR and various arms and trade embargoes. Horrendous crimes against humanity had taken place according to several thousand eyewitnesses. The Bosnian population in the area had been exposed to genocide for several years and, the whole world could agree on that the perpetrators of these crimes should be brought to justice. Under the Geneva Conventions, the different crimes against humanity became crimes under universal jurisdiction, meaning that all countries could prosecute persons responsible for these crimes. There was no international court in 1993 that had the power to prosecute individuals for crimes against humanity.¹⁵³ The SC adopted several resolutions at the time, expressing their grave alarm regarding the events taking place in Former Yugoslavia. In the resolution the SC finally adopted, on 22 February 1993, they determined that the situation constituted a threat to international peace and security. This resolution, SC/RES/808, is the resolution in which the SC decided to establish an international tribunal to prosecute persons responsible for serious violations of international humanitarian law in the territory of the Former Yugoslavia since 1991.¹⁵⁴

4.2 Relevant Documents of the UN

In 1991, the SC started to take the first measures for maintaining peace in the region of Former Yugoslavia.¹⁵⁵ The first resolution, 713 of 25 September 1991,¹⁵⁶ expressed the concerns of the SC that the situation might constitute a threat to the peace, and from then on, the SC passed more than 20 other resolutions dealing with the same questions i.e. the acts of aggression and the conflict that took place in the region. In 1992, the SC acted under chapter VII of the Charter of the UN, to make sure that the conflict would end, by concluding resolution 771. This resolution gave all States permission to intervene in the conflict, and the SC acted expressly under Chapter VII, meaning that the measures involved the use of force.

¹⁵³ The Rome Statute of the International Criminal Court was not adopted until 1998, and now these crimes are also under the jurisdiction of the ICC, apart from the still existing ICTY and ICTR.

¹⁵⁴ U.N. Doc. S/RES/808 (1993) 22 February 1993 p. 2.

¹⁵⁵ By Former Yugoslavia, I mean the Former Socialist Republic of Yugoslavia as it was until 1991 when the country divided into five independent countries.

¹⁵⁶ U.N. Doc. S/RES/713 (1991).

Two years later, the conflict was larger and an even more serious threat to the security in the region, and the SC requested the SG to find a solution to how persons responsible for grave breaches of the Geneva Conventions of 1949 could be brought to justice. The suggestion given was to set up an international tribunal, which could prosecute individuals who had committed grave breaches of the Geneva Conventions. This was spelled out in resolution 808, where the wording of resolution 764 was reaffirmed:

...all parties are bound to comply with the obligations under humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the conventions are individually responsible in respect of such breaches;¹⁵⁷

The SC hereby requested the SG to submit a report on all aspects of the matter, in which he should give specific proposals as to how the decision to establish a tribunal could be implemented. There had been established an impartial commission of experts, by the SG, and this commission had already submitted a report to the SC, S/25274. This commission was established pursuant to SC Resolution 780. In this report, the commission evaluated the different ways of establishing the tribunal, and the conclusion that the commission came to was, that the best way to establish the tribunal was through a resolution passed by the SC. The SC decided to look into the situation, and considered the report when passing Resolution 808. Pursuant to this resolution, the SG also drew out a report on the matter, S/25704, requested by the SC in paragraph 2 of resolution 808. This report says:

The approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g., the General Assembly or a specially convened conference), following which it would be opened for signature and ratification.¹⁵⁸

The SG did not favour this approach – establishment of the Tribunal by a treaty between States – since the disadvantages in his opinion outweighed the advantages. He also expressed in the report the view that the establishment of the tribunal by a resolution of the SC would be legally justified, considering past SC practice and the object and purpose of the decision.¹⁵⁹ The main reason why the resolution approach was the way to go – at least according to the SG – was the urgency of the situation, and the fact that the outcome, were the treaty approach chosen, would be insecure. The urgency expressed by the SC in resolution 808 was in the report said to be the reason why the GA should not be involved in the establishment of the tribunal. The reason that there would be insecurity in the treaty approach was the fact that even if the number of States needed ratified the treaty

¹⁵⁷ U.N. Doc. S/RES/764 (1991), para. 10.

¹⁵⁸ U.N. Doc. S/25704, para. 19.

¹⁵⁹ *Ibid.*, para.24.

would in fact do so, there would be no guarantee that the “right” States would ratify it.¹⁶⁰

The SG further stated:

In the light of the disadvantages of the treaty approach in this particular case and of the need indicated in resolution 808 (1993) for an effective and expeditious implementation of the decision to establish an international tribunal, the Secretary-General believes that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations.¹⁶¹

Therefore, since there was – according to the SC and the SG respectively – an urgent need to take action to help the situation, the SC adopted another resolution on 25 May 1993, 827. The SC stated specifically in the resolution that they were acting under Chapter VII of the UN Charter. In this resolution, the SC decided to:

...establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia...¹⁶²

Hence, the International Criminal Tribunal for the Former Yugoslavia, ICTY, was established. The Statute of the Tribunal gave the Tribunal its competence and the outline of how the Tribunal was to work. I will now say something about this Statute.

4.3 The ICTY Statute

In the same resolution that established the tribunal – see above Resolution 827 – the SC also approved the Statute, established by the SG in his report S/25704. The Statute has since been amended five times through resolutions of the SC, the last of which is Resolution 1481 of 19 May 2003. The Statute consists of 34 articles, starting with the competence of the tribunal and ending with annual reports that have to be made to the SC and the GA.¹⁶³ In the first articles the competence of the Tribunal and the crimes that can be prosecuted are stated. The report of the SG could in a way be said to be the *travaux préparatoires* to the Statute, with full explanations as to why the different articles are relevant.

The Statute of the Tribunal is the main document of the Tribunal, and the major amendments to the document consist of the expansion of the number

¹⁶⁰ By the wording “right States” I mean that there would be no guarantee that the States needed to make the treaty effective, such as the States of Former Yugoslavia, would sign and ratify the treaty. If this were the case, the treaty would have been of no importance *and* the tribunal would not have been able to do its work.

¹⁶¹ U.N. Doc. S/25704, para. 22.

¹⁶² U.N. Doc. S/RES/827 (1993) 25 May 1993 p. 2.

¹⁶³ For a selection of the articles useful to this thesis, see Supplement A.

of judges and trial chambers.¹⁶⁴ In the Statute, we can see the clear delimitation of which specific crimes can be prosecuted by the Tribunal. There are specific timeframes set out, and the acts that constitute crimes are clearly fixed. However, there is no final date as to which acts can be prosecuted, neither is there any lead as to when the Tribunal's work is completed.

The Statute of the Tribunal has its base in the Geneva Conventions from 1949, on the protection of civilian persons in time of war, and the laws of international armed conflicts. These conventions are the main framework of rules when it comes to the protection of victims of war, and relate to protection of all civilian interests in times of war, such as medical facilities and other civilian targets.

4.4 Legal basis of the Tribunal

The question that I have decided to focus on in this thesis; if the delegation of powers a principal organ does not possess is possible; has a lot to do with the question relevant in this Chapter. If the establishment of and the delegation of powers to the ICTY would at all be possible, the lawfulness of delegation of powers not expressed in the UN Charter would have to be a fact since the SC clearly does not have the power to prosecute and give judgment over individuals. The SG says in his report that the SC has on various occasions adopted decisions under Chapter VII, which are aimed at restoring and maintaining international peace and security. These decisions have involved the establishment of subsidiary organs for a variety of purposes.¹⁶⁵ Reference is in the report made to SC Resolution 687 (1991) and other resolutions relating to the situation between Iraq and Kuwait, some of which we have looked at in the previous chapter regarding the Boundary Demarcation Commission.

For a number of reasons, a very important issue in the establishment of the ICTY, is whether the tribunal was duly 'established by law'. This is a question that the two instances in the *Tadic* case did their best to try to answer, something I will get back to with more detail below. The fact that the Tribunal itself decided on its own competence will also be discussed below. The appellate chamber meant that the matter of determination of a threat to the peace – the power of the SC under article 39 of the UN Charter – was an essentially political question, but the choice of the mechanism used to address such a threat was a legal question. As such, it could be answered by the trials chamber.¹⁶⁶ In an early advisory opinion of the ICJ, Judge Cordova said in his dissenting opinion that:

¹⁶⁴ See the UN/ICTY homepage for the full text of the Statute together with the amendments and the resolutions thereto. (www.un.org/icty under the link Basic documents).

¹⁶⁵ S/25704 at para. 27.

¹⁶⁶ *Tadic Jurisdiction Case (Appeal)* at 24, see also Kerr, R., p. 65.

The first obligation of the Court – as of any other judicial body – is to ascertain its own competence.¹⁶⁷

The legal basis of the tribunal is, of course, taken from the competence of the SC under article 29 of the UN Charter to establish subsidiary organs, but there needs to be further basis to make sure that the tribunal has a substantive foundation. The power that the SC delegates to the Tribunal is that of the maintenance of international peace and security, a power that they have under article 24 of the UN Charter. The legal basis for jurisdiction of the tribunal hence derived from the UN Charter.¹⁶⁸ The relevant parts of this are, as I just mentioned, the powers and responsibilities of the maintenance of international peace and security, *i.e.* those powers that the SC can enforce under Chapter VII.

The Tribunal needs – partly in order for the establishment to be legal – to have a large degree of independence *vis-à-vis* the SC to ensure the legal effectiveness and the observation of basic human rights. This has come into being since the SC established the tribunal under its Chapter VII powers and more importantly article 41, which allows non-forcible measures to be taken to restore international peace and security. Somehow, this creates a relationship between the two that is opposite the relationship of other subsidiary organs and their principal. In this case the subsidiary has (judicial) control over the SC, whereas otherwise the SC is the one with control over the subsidiary. Here the judicial independence made it possible for the tribunal to review the legality of its own establishment.¹⁶⁹ This was done in the *Tadic Jurisdiction case (Appeal)*. If the trial Chamber had not asserted its independence by determining it has *compétence de la compétence*, or as it is also expressed, *Kompetenz-Kompetenz*, it would not have possessed the credibility it now does. An international tribunal has to possess a large degree of independence; otherwise, the political pressure on the decisions will be too heavy.¹⁷⁰

The fact that the tribunal has – in a way, since it is able to decide its own competence and therefore can decide on the legality of the decision to establish the tribunal – judicial control over the SC does not mean that the tribunal is not a subsidiary organ. This can easily be concluded by looking at the definitions of subsidiary organs in chapter 2. There is still the power to dissolve the tribunal, something that is still within the control of the SC. Another thing is that the tribunal does not possess the same competences regarding peace and security as the SC. They cannot issue binding decisions on States. However, the decision by the Appeals Chamber in the *Tadic* case marks the first development that a judicial review of SC decisions taken under Chapter VII is actually possible.¹⁷¹

¹⁶⁷ Judge Cordova, dissenting opinion, *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against the UNESCO*, 1956 ICJ Rep. 77, 163, (23 October 1956).

¹⁶⁸ Kerr, R., p. 63.

¹⁶⁹ Paulus in Simma, p. 555.

¹⁷⁰ Patel King, F. and La Rosa, A-M. in *EJIL*, (1997) Vol 8, No 1, p. 177.

¹⁷¹ *Ibid.*

4.5 The *Tadic* Case

The first case ever tried by the International Tribunal for Former Yugoslavia – and the first one where the jurisdiction of the tribunal is questioned, making it especially interesting to this thesis – was the case against Dusko Tadic, a/k/a “Dule”.¹⁷² As an interesting observation can be stated that when I have been searching for literature to this thesis, I do not think I have found more articles or books regarding any other case tried by the tribunal. He was tried on several accounts; with charges of grave breaches of the Geneva Conventions, violations of the laws and customs of war and crimes against humanity for participation in the mistreatment and torture of prisoners in the Omarska prison camp. The main reason why the case is interesting to this thesis is that the defence filed a motion challenging the jurisdiction of the tribunal.¹⁷³ In this motion, the defence argued that the powers of the tribunal were not legitimate, based on that there was no legitimacy in the establishment of the tribunal, that the grant of primacy to the tribunal was improper and that the tribunal did not have subject-matter jurisdiction.

The Decision on the defence motion on Jurisdiction was tried in two levels of the Tribunal, the trials chamber and the appeals chamber. The two came to the same basic decision – that the tribunal was in fact legitimate – but their reasoning to reach that decision is not the same. I will in the following chapters try to summarize the views of the two chambers in order to conclude what significance the rulings have in the further work of the tribunal. In addition, I will look at what the decisions indeed mean to the development of delegation of powers to the future subsidiary organs of the UN.

4.5.1 Arguments made by the defence (trials chamber)

Dusko Tadic, as I mentioned above, challenged the Tribunal’s power to try him for the alleged crimes on three grounds, two of which are of no further interest to this thesis. In the decision of the trials chamber, the tribunal summarizes the attack on the competence of the tribunal with these words:

... that the action of the Security Council in establishing the International Tribunal and in adopting the Statute under which it functions is beyond power; hence the International Tribunal is not duly established by law and cannot try the accused.¹⁷⁴

The defence argued that the way the International Tribunal should have been established was either by treaty or by amendment to the UN Charter. In

¹⁷² *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T (25 June 1995) Hereinafter referred to as *Tadic* case.

¹⁷³ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Decision of the Defence Motion of Jurisdiction, (10 August 1995). Hereinafter referred to as *Tadic Jurisdiction* case.

¹⁷⁴ *Tadic Jurisdiction* case, para 1.

paragraph 2 of the decision are the different arguments formed by the defence, and they are basically the same as the ones the SG considered in his report pursuant to paragraph 2 of Resolution 808. The first argument is that there had never before been established an *ad hoc* International Tribunal, and neither had there ever been any discussion that such a tribunal could be established. Another argument presented by the defence was that, had the GA been involved in the creation of the tribunal, the full representation of the international community would have been guaranteed. Since the SC took the decision into its own hands, and hence decided only among its members, this could not be done. The Charter of the UN – according to the defence – did not intend that the SC should be able to establish a criminal tribunal under Chapter VII, or that the SC, a political organ, should establish any judicial body whatsoever. There was no guarantee that a tribunal created by a political organ such as the SC would be impartial.

The SC had, as the defence correctly pointed out, never before created a tribunal to help with the maintenance of peace – the primary responsibility of the SC, something it works with to the fullest of capability – hence, the defence argued, there was no consistency in the work of the SC. Neither was there any proof that the tribunal did in fact promote peace in the area of Former Yugoslavia. The final argument made by the defence was that the fact that the tribunal had primacy over national courts was, as the motion claims, in itself inherently wrong.¹⁷⁵ I will now examine the arguments of the court in these matters.

4.5.2 Arguments and decisions of the Court (trials chamber)

If the court were to review the decision to establish the tribunal, it would mean that they had the capacity to rule upon the legality of the acts of the SC. Since the SC is a principal organ of the UN, and there is no judicial review of its decisions expressed in the UN Charter or in any decision by the ICJ. The defence argued that this question was a matter of jurisdiction, whereas the tribunal said it would have to do with the scrutiny of the powers of the SC, or even the appropriateness of the actions taken in the situation of Former Yugoslavia. Since the jurisdiction of the tribunal is limited and specific, the Court meant that it had no authority to investigate the legality of the decision on this ground only, but that – being, as it was the first time the international community created a criminal court – it had an obligation to do so. The trials chamber stated:

...even if there be such limits, that is not to say that any judicial body, let alone this International Tribunal, can exercise powers of judicial review to determine whether, in relation to an exercise by the Security Council of powers under Chapter VII, those limits have been exceeded.¹⁷⁶

¹⁷⁵ *Tadic Jurisdiction* case, para 2.

¹⁷⁶ *Ibid*, para. 17.

First of all the trials chamber looked at the UN Charter and in particular article 24(1), where the members of the UN confer the primary responsibility of peace and security on the SC. The powers of the SC are, as we have already discussed, set out in Chapters VI-VIII and XII, and the decision to establish the tribunal was taken under Chapter VII of the Charter where the SC has a large degree of scrutiny. The statute of the ICTY is “precise and narrowly defined”¹⁷⁷ and that fact is “the full extent of the competence of the International Tribunal.”¹⁷⁸ There are a number of cases in which the ICJ has determined that it has no competence to review the decisions of the SC, and the trials chamber considers these when it is examining the jurisdictional issue. Although the SC has a very broad discretion in when it comes to international peace and security, it cannot act arbitrarily.¹⁷⁹ If it was to do so, it would act outside the scope of powers delegated to it by the Charter of the UN. The trials chamber decided to make a statement concerning the lawfulness of the decision to establish the tribunal – even though it says that it is not for them to decide on – in which it stands by the decision since the SC had made so many efforts to end hostilities and restore peace in the region prior to the establishment of the Tribunal and nothing had happened. Therefore, the trials chamber argued that the cases brought up by the defence had no relevance in the case.

Chapter VII confers very wide powers upon the Security Council and no good reason has been advanced why Article 41 should be read as excluding the step, very appropriate in the circumstances, of creating the International Tribunal to deal with the notorious situation existing in the former Yugoslavia.¹⁸⁰

The fact that the SC had previously addressed humanitarian law issues as a basis for measures to be taken under Chapter VII was also an issue in the legitimacy of the tribunal. In these instances, the breaches of humanitarian law have been considered a threat to the peace. Since the question, whether or not there exists a threat to the peace is entirely a question for the SC, the establishment of the tribunal would, according to the trials chamber, definitely speak in favour of the decision, and with that said also in favour of the legitimacy of the tribunal itself.¹⁸¹

When the SC decided to establish an international tribunal, it automatically had to make a political decision, since it by doing so had to determine a threat to the peace. Therefore, it was not possible for the trials chamber to examine the validity of the decision.¹⁸² The defence had argued that a political body could not create a judicial body that could be independent or impartial and to this, the trial chamber replied that political organs have, at some point, established all national judicial bodies. Whether the court is

¹⁷⁷ The description in article 1 of the Statute of the ICTY gives the tribunal its jurisdiction. See Supplement A for the full text of that article.

¹⁷⁸ *Tadic Jurisdiction* case, para. 8.

¹⁷⁹ Bowett, D. W., p. 285.

¹⁸⁰ *Tadic Jurisdiction* case, para. 27.

¹⁸¹ *Ibid*, para. 22.

¹⁸² *Ibid*, para. 24.

impartial does not rest upon how it was created but upon how the judges function. This has to do with the precondition that it is a basic human right, set out in ICCPR article 14 that everyone is entitled to a fair trial. It is then important only what the court does once it has begun its work and not how it was created. If the judges are impartial, it is because they, in their personal capacity, are biased in any way.

Finally, the trials chamber argues that since, in the *Effect of Awards* case, the ICJ saw no limits as to the GA establishing a judicial organ; there was no reason why the SC could not do the same. Especially since, it has a broad discretion under Chapter VII. When this was established, the trials chamber saw no reason to discuss the option of amendment to the UN Charter.¹⁸³

4.5.3 Arguments and decisions of the Court (appeals chamber)

The defence launched basically the same arguments before the appeals chamber as they did before the trials chamber. Therefore, I find it unnecessary to repeat these. See instead Chapter 4.5.1 above. One more allegation was taken to the appeals chamber though, and that was error of law on the part of the Trial Chamber.¹⁸⁴

The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction.¹⁸⁵

The appeals chamber wanted to extend some of the questions raised by the trial chamber and meant that some of the formulations made in that instance were vague. In the 14th paragraph of the decision in the appeals chamber, there is a quote taken from the 8th paragraph of the decision in the trials chamber. In reference to this quote, the appeals chamber says that the trials chamber must have meant that the jurisdiction of the Tribunal can be determined solely by reference to or interference from the intention of the SC. When this is said, the trials chamber has totally ignored the residual powers, which may be derived from the requirements of the judicial function itself. Therefore, the appeals chamber stated that this question had to be examined properly in order to establish the jurisdiction of the Tribunal.

To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council “intended” to entrust it with, is to envisage the International Tribunal exclusively as a “subsidiary organ” of the Security Council, a “creation” totally fashioned to the smallest detail by its “creator” and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for

¹⁸³ *Tadic Jurisdiction* case, para. 35 and 38.

¹⁸⁴ *Tadic Jurisdiction* case (*appeal*), para. 2.

¹⁸⁵ *Ibid*, para. 13.

setting up such a body), it also clearly intended to establish a special kind of “subsidiary organ”: a tribunal.¹⁸⁶

There are clear parallels to the *Effect of Awards case* that can be drawn here. The UNAT, established by the GA, decided its own competence by relying on the inherent jurisdiction of any judicial tribunal, the principle of *Kompetenz-Kompetenz* (or *compétence de la compétence*). This principle means that a judicial tribunal has the “jurisdiction to determine its own jurisdiction”, and that is – according to the appeals chamber – a necessary component in the exercise of the judicial function.¹⁸⁷ In the decision, a quote is taken from a dissenting opinion by Judge Cordova of the ICJ who argues that this competence is an obligation that any court has. The decision that the tribunal has jurisdiction is essential if it is to be able to decide the case at the merits stage, but the appeals chamber points out that it has never been intended that the tribunal should be a constitutional court that can review its creator or any other organ of the UN for that matter. This is stated in the Statute of the tribunal.

4.5.3.1 Article 39 determination?

The wording of article 24 gives the SC a very wide discretion when it comes to matters regarding peace and security.¹⁸⁸ However, the powers are limited in the sense that the SC is an organ of an international organisation, and as such subject to constitutional limitations. These are stated in the first few articles of the UN Charter, and contain the purposes and principles of the organisation as a whole. The SC also has to report annually to the GA, which can be seen as a limit to the discretion. In order for the SC to be able to act, and put to use the powers it has under article 24, it has to make a determination that there exists a threat to or breach of the peace. The appeals chamber tried to come up with what the limits to the power set out in article 39 are, and the conclusion is that it is the SC that makes the determination that there exists one of the situations justifying the use of exceptional powers in Chapter VII. The SC also chooses the reaction to such a situation. This is where the other two articles, 41 and 42 comes into play.

There are in the article three situations that justify action by the SC, “breach of the peace”, “act of aggression” and “threat to the peace”. All of these three situations are of a highly political nature, but in the case of an act of aggression, there can be a legal determination required. In the case of the former Yugoslavia, the fact that there was evidence of an armed conflict was beyond doubt. The SC had pointed out this fact in several resolutions prior to resolution 827, in which the international tribunal was established.¹⁸⁹ The defence’s view that the fact that the conflict in former Yugoslavia was an internal conflict had no bearing on the fact that it was a

¹⁸⁶ *Tadic Jurisdiction case (appeal)*, para. 15.

¹⁸⁷ *Ibid*, para. 18.

¹⁸⁸ For the entire text of this article, see Supplement A.

¹⁸⁹ *Tadic Jurisdiction case (appeal)*, para. 30.

threat to the peace, since this had been established in several other cases prior to the conflict in this area. As the appeals chamber points out, there exists a common understanding among the members of the UN that internal conflicts do in fact constitute a threat to the international peace. Thus, the SC made the decision under article 39 that there existed a breach of the peace.

When the SC has taken the step to decide a threat to the peace, the discretion on what sort of measures that needs to be taken is even wider than the discretion it possesses when it comes to the determination. In the following articles, 41 and 42, there are a few recommended measures. These are not exhaustive though, and can be extended at the will of the SC.

The appeals chamber concluded that the establishment of the international tribunal was a measure under article 41 of the Charter. The arguments made in favour of this view are the fact that the measures under article 42 include the use of armed force – which is not the case here – and that the measures under article 40 are by their very nature provisional and intended as a sort of “holding operation”. However, the match to article 41 is only a *prima facie* match. There have been doubts raised since– as the examples in the article show – the measures are mainly economic and political, not judicial, and that they are measures to be undertaken by member States of the UN. This is not the fact in the case of the international tribunal.¹⁹⁰

The first argument – that the measures should be economic or political – does not hold up according to the appeals chamber. The mere wording of article 41 gives it away that the measures exemplified are just that – examples. Therefore, they cannot exclude other measures. The only real requirement is that the measures not “involve the use of force”.¹⁹¹

4.5.3.2 Legal Establishment?

Another argument dismissed by the appeals chamber was that of the Security Council not being endowed with judicial powers meaning that it therefore could not establish a subsidiary organ with such powers. This argument was also used when we discussed the Boundary Demarcation Commission above. The chamber states:

The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.¹⁹²

Under this task of the SC, the discretion is wide, as I have stated several times in this thesis. The chamber continued their statement by saying that:

The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own

¹⁹⁰ *Tadic Jurisdiction case (appeal)*, para. 34.

¹⁹¹ UN Charter, article 41.

¹⁹² *Tadic Jurisdiction case (appeal)*, para. 37.

functions of the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.¹⁹³

In this, the appeals chamber sets out its view that the SC has powers under the Charter, not specifically expressed, yet a large part of the maintenance of peace and security. It has been established under the *implied* powers, as discussed above. Since the establishment of an international tribunal did, in the view of the appeals chamber, fall under the implied powers, there needed not be any question as to the legality of the decision.

4.6 The decision to establish ICTY

Just to sum up, the ICTY was established in 1993 by a Resolution – number 827 – of the SC under Chapter VII of the Charter. It has a humanitarian function and a criminal law function. The Statute is binding to all members of the UN, since it was a Chapter VII resolution.¹⁹⁴ The tribunal's main purpose is to ease the conflict in the area of Former Yugoslavia and to make sure that the individual responsibility, which emerges when breaches of the Geneva Conventions occur, is upheld. The determination in resolution 808 that the situation constituted a grave breach of the Geneva Conventions was the key the SC needed to establish the tribunal.¹⁹⁵

Before the tribunal had been properly established and started working on specific cases, a few writers came up with views on how they felt it should work. O'Brien in *AJIL* 1993 meant that the establishment of the international tribunal was the least the SC could do to cease the hostilities in former Yugoslavia. His view is that the step to establish the tribunal was in fact less harsh than that of the use of force.¹⁹⁶ In the article, he states:

The Council's careful, incremental approach has been reasonable. A less active response to the atrocities would have been callous; a more aggressive approach might have sparked resistance from those concerned about sovereignty.¹⁹⁷

This is – in my opinion – a rather controversial view, seeing that the tribunal had not yet started its work, and it was the first time that the SC had established a subsidiary organ of this character. The main reason for his views is that the violations of humanitarian law had, to date, not been the object of any proceedings in a judicial organ of any kind. O'Brien argued

¹⁹³ *Tadic Jurisdiction case (appeal)*, para 37-38.

¹⁹⁴ UN Charter art 103.

¹⁹⁵ S/RES/808, para. 7.

¹⁹⁶ O'Brien, J. C., in *AJIL*, p. 643.

¹⁹⁷ *Ibid.*

that the atrocities themselves constituted a threat to the peace, and therefore the question whether the conflict was international or national was not important. However, there would have to be a condition – that the SC had exhausted all other alternatives for remedies in the case at hand.¹⁹⁸

In the Commentary to the UN Charter, it is stated that the creation of the International Tribunal is the most far-reaching use of article 29 to date, and the lawfulness of the two tribunals governing Yugoslavia and Rwanda has been much debated.¹⁹⁹ Today we can say that the establishment of the tribunal is universally accepted, but this has a lot to do with the limited timeframe set out in the Statute, and the fact that it has a large degree of legal independence from its creator. The conclusion that the Appeals Chamber in the *Tadic Jurisdiction Case (Appeal)* came to, that they also possess the same so called *compétence de la compétence* to determine the scope of their own powers as the SC does, showed that they firmly asserted their independence from the SC.²⁰⁰

In Resolution 827 the SC emphasises that the establishment of a tribunal is an *ad hoc* measure, which will enable the aims of the SC to be achieved; *i.e.* the restoration of peace and security. There does not exist a procedure in order to establish whether the actions of the SC or the GA are legal nor have any bearing. Every organ of the UN has to interpret the Charter and decide on what its competence is under the Charter. The competences of the organs change in different directions with the practice of the UN at large.²⁰¹ Some authors go even further and mean that article 29 gives the SC the power to establish judicial tribunals, unquestionable. An example of this view is the following:

...the Council has the option of forming a subsidiary tribunal under Article 29 to adjudicate legal issues. Thus, instead of deciding questions of law and fact for itself, which raises concerns about institutional competence, the Council can establish a tribunal that properly adjudicates the issues. An Article 29 tribunal would provide both a distance from the Council necessary to preserve institutional legitimacy, and only limited autonomy if the Council desires to have more control than it would have over the I.C.J.²⁰²

Paulus argues that the creation of the ICC and the two mixed international-national tribunals in Sierra Leone and Cambodia makes the creation of similar tribunals in the future rather questionable.²⁰³ These mixed courts are also questionable in character, but it must be said that they are in some ways better since they offer a choice for the governments involved to use their own domestic legal system in combination with the international legal system, which in times of war is wider. When it comes to the ICC, this is a permanent court, and makes the need for establishment of *ad hoc*-tribunals

¹⁹⁸ O'Brien, J.C., p. 658.

¹⁹⁹ Paulus in Simma, p. 555.

²⁰⁰ Patel King and La Rosa in *EJIL*, p. 177.

²⁰¹ Bring, O., p. 249.

²⁰² Harper, K., p. 143.

²⁰³ Paulus in Simma, p. 562.

not as great in the future. But, against this stands the fact that two of the permanent members of the SC – China and the USA – are actively opposing the jurisdiction of the ICC, and this could in some ways make way for the SC sometime in the future to establish another tribunal in the same manner as the two now established. One thing that has not been said is that the establishment of the ICTY made the judicial mechanism a part of the work of the SC, since it was connected to peace-building and peace-making. With this fact comes that the judicial mechanism becomes a part of collective security.²⁰⁴

The establishment of the tribunals in Yugoslavia and Rwanda was in accordance with article 29 of the UN Charter, if we agree with the abovementioned authors and the appeals chamber in the *Tadic* case. In the Commentary to the UN Charter the only thing that is said about these decisions is that:

... subsidiary organs such as the International Criminal Tribunals for the former Yugoslavia and Rwanda or the UN Compensation Commission ... can perform tasks which the SC could not perform itself, namely the adjudication of claims and the prosecution of alleged offenders of international criminal law.²⁰⁵

Apart from this statement, the Commentary gives no further explanation to the issue. If we read this without prejudice, it seems like there is a consensus that it is valid to establish subsidiary organs to perform functions that the principal does not itself possess. Paulus argues that the SC must possess the substantive competence in the area concerned, and that is all that is needed in order for the decision to be legal.²⁰⁶ In this case, they do possess the competence to take measures relating to peace and security. The measure to create an international tribunal may be such a measure. Therefore, the question whether or not the SC can itself act as a tribunal is not of importance to the analysis since it has already been established that the SC does have power to adopt measures in the area concerned. To draw a parallel to another situation like this one; D.W. Bowett states in his publication on UN Forces (about the Korean situation) that the Korean action was within the powers of the SC, since its purpose was the restoration of international peace and security. When he comes to this conclusion, he uses a quote from the *Certain Expenses Case*, saying that:

...when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.²⁰⁷

In the Korean situation there were also arguments made that since the province where the war took place was at the beginning one State, there did not exist a breach to *international* peace and security. It was a civil war, and as such not a threat to the international community. This was an argument

²⁰⁴ Bring, O., p. 18.

²⁰⁵ Paulus in Simma, p. 540.

²⁰⁶ *Ibid*, p. 543.

²⁰⁷ *Certain Expenses* case, p. 168.

against the constitutionality of the resolutions passed to take action in the area.²⁰⁸ This was rejected since there is no way of saying that the fact that it was a civil war was a guarantee that the international peace and security would not be threatened. Neither could Korea at the time be considered one State, since the legal government had no control over a large part of the State, the part north of the 38th parallel (North Korea).²⁰⁹

Bring argues that the Charter of the UN is a flexible document, or as he puts it, a document of its time. If the Charter were interpreted in a way that is clearly deeply rooted among the members of the Organisation, this would not give rise to any legal or judicial problems. The same goes for the fact that the interpretation would be generally accepted afterwards.²¹⁰ This is based on the rule that the members of a treaty-based organisation can – through practice and consent – further develop the treaty, as long as the treaty is the base for the developments. The Charter of the UN has a dynamic role in a dynamic time.

4.6.1 Enforcement under the UN Charter

4.6.1.1 Chapter VI

In the Charter of the United Nations there are a number of rules, which can be of use to us in this matter. The first chapter we need to look at is Chapter VI, on pacific settlement of disputes. In the resolutions passed on the matter, in particular Resolution 827, the SC acts under Chapter VII of the Charter, where it of course has a lot wider powers than the ones under Chapter VI. But, since the court is not an armed force in the sense of article 42, or another type of measure not involving the use of force spelled out in article 41, we have to look to the previous Chapter in order to find answers to the question whether or not the decision to establish the ICTY is in accordance with the Charter. So, why did the SC decide to take action under Chapter VII and not under Chapter VI, obviously the more logical choice?

Looking at article 36, under which the SC can make recommendations in order to settle a dispute – as referred to in article 33 – or a situation of like nature, we find that the UN Charter makes a distinction between a ‘dispute’ and a ‘situation’. In the commentary to the UN Charter, this distinction has the practical meaning that a dispute has to include two or more States, while a situation can occur in a single State.²¹¹ In article 34 is spelled out another distinction between the two, saying that a situation can lead to a dispute. A dispute must be – by this definition – of a more grave character. Decisions under this article, i.e. article 34, may be taken *ex officio*. The article, under which the SC would act, had they chosen to act under Chapter VI, is article

²⁰⁸ This was at first a Polish note to the SG, and the Soviet Republic also stood behind it. The official number of the document is UN Doc. S/1545.

²⁰⁹ Bowett, D.W., p. 35.

²¹⁰ Bring, O., p. 308.

²¹¹ Stein in Simma, p. 618

33. In this article, there are examples of different ways to settle a dispute. There is not in this article anywhere mentioned the word 'situation'. Neither is there mentioned anything other than an 'international' dispute. If we consider that the literary meaning of the words is the same in all the articles in the Chapter, this would mean that the SC can only call upon the parties to settle a dispute by peaceful means if there indeed is more than one State involved. This was also the argumentation used by the defence in the *Tadic Jurisdiction Case*, that the conflict in Former Yugoslavia was not an international one, and therefore the SC had no authority to act.

The recommendations made under Chapter VI are not binding, as we know, to the States involved in the dispute. This fact is another reason why the SC could not in this situation have used Chapter VI to establish the International Tribunal, since it would then have no judicial competence. If the Tribunal's decisions could not be enforced in a way binding to the parties, then there would have been no incentive to establish it in the first place.

4.6.1.2 Chapter VII

As opposed to decisions taken under Chapter VI, the decisions and actions under Chapter VII are binding to the Member States of the UN. Not only are they binding, but they also override sovereignty of the Member States.²¹² This is another aspect of the SC's powers under article 24 of the UN Charter. To apply Chapter VII to a situation, the SC has to determine a threat to the peace and this takes place under article 39. Nowhere in that article can we find any sort of criteria for this determination. The determination of a threat to the peace is political but its consequences are legal, as we have seen in the discussions on the legality of the ICTY.²¹³ The determination under article 39 is as we have seen above, non-delegable. Once the SC has made such a determination there are many different possibilities that can be used.

Under this Chapter, the SC has a very broad discretion on what they can do. Since the SC has the primary responsibility for international peace and security, the choice to act under this Chapter was not a surprising one. The binding nature of the decisions is probably what made the SC use Chapter VII in order to achieve its goal.

The list afforded in article 41 of measures not involving the use of force is in no way exhaustive.²¹⁴ There are a number of subsidiary organs established under this article, such as the Compensation commission for Iraq, the UN Administrations in East Timor and Kosovo and the ICTY, and these are atypical if compared to the measures mentioned in the article. The broad discretion of the SC to determine its powers is the main reason for this. Most of the measures mentioned in the article are either political or

²¹² See, apart from the Charter itself, for example Kerr, R., p. 13.

²¹³ Kerr, R., p 14.

²¹⁴ Frowein/Krisch in Simma, p. 740.

economical, and therefore there have been raised questions regarding the lawfulness of establishment of a judicial tribunal, and – in my opinion – rightly so.

4.6.2 Some views concerning the establishment

There are some critical voices raised on the subject also. Koskenniemi argues that the fact that each of the principal organs of the UN are the judge of their own competence, makes procedural constraint all the more significant. “For better or for worse”, he says, “what the Council says *is* the law.”²¹⁵ To another point, the decision by the Appellate Chamber in the *Tadic Jurisdiction* case is the first one where a judicial body actually does take into consideration the actions of the SC. A judicial review has suddenly become a reality to the SC and to the Members of the UN. This means that the veto – which has before the decision in the *Tadic* case been the only way to “check” SC actions – is no longer the only way of reviewing the actions of the SC.²¹⁶

Only four years earlier, the judges in the *Lockerbie* case²¹⁷ came to the conclusion that the ICJ was not of the belief that the Court is in any way entitled to review the decisions of the SC, since their respective powers are set out in the UN Charter. This conclusion was also reached in the *Namibia* decision in 1971. Judge Weeramantry argues that the principle of separation of powers, which is essential to most municipal systems, is not interpreted in the same strict sense when it comes to the UN. Together with the fact that the organs of the UN have no hierarchical arrangement, he argues that it will be the court’s duty to examine and determine – from a strictly legal point of view – the same matters as are dealt with in a political sense in any of the other organs of the UN.²¹⁸ The fact that the consequences of the legal decision made by the court are sometimes political can have no bearing to the decision as such. The Court has to act under the Charter and the Statute of the Court, and according to Weeramantry:

The interpretation of Charter provisions is primarily a matter of law, and such questions of law may in appropriate circumstances come before the Court for judicial determination. When this does occur, the Court acts as guardian of the Charter and of international law for, in the international arena, there is no higher body charged with judicial functions and with the determination of questions of interpretation and application of international law.²¹⁹

²¹⁵ Koskenniemi, M. in *EJIL*, 1995, p. 327.

²¹⁶ Alvarez, Jose E. in *EJIL*, 1996, p. 249

²¹⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3.*, (hereinafter *Lockerbie* case). See especially the Dissenting Opinion of Judge Weeramantry.

²¹⁸ *Lockerbie* case, diss. op. Judge Weeramantry, p. 55.

²¹⁹ *Ibid.* p. 56.

Hans Kelsen has said that the Security Council is a quasi-judicial organ. It cannot be a judicial organ since the members of the Council are not independent.²²⁰ If we use only the bibliographical meaning of the words “quasi-judicial organ” then the conclusion must be that the SC as such cannot establish a judicial organ. The requirement that a judicial organ must be “established by law” will in this case not be met.

The SC in the case of the ICTY decided to employ an instrument that has gradually become known as international judicial intervention, as Bergsmo labelled the phenomenon. He puts the question out there whether this was going to be at the expense of the established SC’s instruments such as mediation, peacekeeping and peace-enforcement. He also questions the independence and impartiality of the tribunal by asking if it would unfairly target one of the sides to the conflict in the former Yugoslavia.²²¹ This is a legitimate concern, if we look at the outcome of the Nuremberg Tribunal as the only example of a war-crimes tribunal before the ICTY was established.

4.6.2.1 Establishment of the ICC as a future obstacle?

Some States did not recognise the legal basis of the Security Council to establish the ICTY and ICTR, this is a well known fact. Then again, few, if any, could be in doubt of the fact that the permanent members of the SC has shown no intention to give up the newly asserted power and instrument of judicial intervention, at least not in the near future. The two *ad hoc* tribunals, both subsidiary organs of the UN created by the SC, were successful, and this was increasingly being recognised by States at the same time as the process to establish the ICC progressed.²²²

Now that a permanent international criminal tribunal, the ICC, has been established, one has to wonder whether establishment of subsidiary judicial organs will still be an issue since the use of such tribunals would be within the same competence as the ICC. Bergsmo argues that the SC retains its power to establish new *ad hoc* Tribunals pursuant to Chapter VII of the UN Charter after the adoption and entry into force of the Rome Statute, something that is already a reality today. A new multilateral treaty such as the ICC Statute does not have an effect on the powers of the Council under the Charter in his view. This is of course true to a certain extent. That means that the SC could, legally, decide to establish new *ad hoc* Tribunals after the ICC has been set up. Bergsmo even labels this power, international judicial intervention, and he argues that this is a newly asserted power of the SC, which it is not likely to give up after the establishment of the ICC.²²³ Therefore, we may, hypothetically, still see the emergence of similar tribunals in the future, even with the ICC as a part of international law today, although I find it highly unlikely to occur.

²²⁰ Kelsen, H., p. 157.

²²¹ Bergsmo, M., p. 88.

²²² *Ibid*, pp. 92-93.

²²³ *Ibid*, p. 110.

4.7 Conclusions

If we look at the reasoning by Bowett²²⁴ taken from the Korean situation, there are many arguments that can be used to analyse the establishment of the ICTY. In fact, the similarities are, in my opinion, rather obvious. The conflicts were both, at least from the beginning, civil wars. The action taken by the SC in the creation of ICTY most certainly had as a purpose to restore international peace and security. Therefore, if we apply the same arguments to the ICTY – that the acts of an organ of the UN aimed to uphold one of the main purposes of the organisation as a whole could never be considered *ultra vires* – then there would be no question as to whether or not the Resolution was within the powers of the SC. If the Polish view, expressed above, that the UN had no business to interfere with a civil strife would have been heard; that would mean that the situation in former Yugoslavia could have been exposed to the same arguments. Now that the ICJ has in a ruling concluded that there is no special distinction between civil and international wars when it comes to the determination of threats to international peace and security this argument cannot be used in this situation. So also with the discussion whether the action would be classified as enforcement action.

If we would also look at the establishment of the ICTY by using the facts we have learned from Bring, we conclude that the SC has to determine its own competence in this matter, as in any other matter concerning the implied powers. A prolongation of the analysis – that the SC has the competence to determine its own powers – is the fact that there have been no complaints made by any of the members of the UN; the members have generally accepted the decision. Maybe the decision was clearly rooted in the members' interpretation of the Charter even before Resolution 827 was passed. This is not an impossible viewpoint. Therefore, we must – by taking these views into consideration – come to the conclusion that the SC has the discretion to determine their own competence and that the decision to establish the ICTY was legal. This rests on the fact that there exists no way in which we can determine the legality of decisions taken by the organs of the UN.

I believe the key, in order to justify the establishment of the ICTY by the SC, is to not be stuck on the fact that the ICTY is an international tribunal with judicial assignments. If we only look at the *purpose* of the tribunal, we find that the sole purpose is to restore peace and security in the area of former Yugoslavia. As I have pointed out above, and as the UN Charter is perfectly clear in this area, the SC has the primary responsibility for the maintenance of international peace and security. It is clear in article 24 of the Charter, and we can even go back to the very first article to find the same to be the purpose of the organisation as such. If we are to justify the decision taken in Resolution 827, we have to consider this side of the coin. Then we have to step aside from the composition and assignments of the

²²⁴ *Supra* note 177.

subsidiary organ as such, and concentrate on the purpose behind it. If this is done, then the question whether or not the SC has delegated powers it does not possess becomes irrelevant. The delegation of powers becomes secondary to the main purpose of the tribunal. I have to state that this is the only logical way to argue in favour of the decision, since it is clear that the SC cannot render criminal judgments over individuals. Ergo, it has to be impossible for the Council to delegate such a power. I find it hard to place the power of enforcing individual criminal responsibility in the implied powers of the SC. The Charter of the UN is formed in such a way that the only judicial organ does not possess that power. The SC is in full a political organ, and cannot enforce any type of responsibility unless it is done in the form of a binding resolution. Even that can only affect States, not individuals, the same as the judgments by the ICJ.

5 Concluding Remarks

The delegation of powers to subsidiary organs of the UN is an area of public international law that is a lot less questioned than I first thought when I started working on this thesis. The authors I have studied all have a view that the principal organs of the UN have a very large degree of discretion when it comes to the establishment of subsidiary organs. This circumstance makes it difficult to come to any conclusion other than that it is so, the principal organs of the UN have very wide powers under the UN Charter. This in turn gives the organs a lot of flexibility in their work. Effectiveness in the work of the organs was obviously a key phrase when the articles concerning establishment of subsidiary organs were produced. Therefore, we hear no objections most of the time when the principal organs establish subsidiaries.

Nevertheless, there are still frames that cannot be bent. The principal organs have to act under the UN Charter; otherwise, the decisions are *ultra vires*. Decisions made *ultra vires* have, as we know, no effect. Therefore, it is essential that we know what powers the organs have under the UN Charter in order to be able to decide the legality of the decisions. Here, we can divide the powers into the express and the implied powers. I have been much undecided when it comes to the discussions around the implied powers, and I believe that you could write an entire essay on that subject alone. The *implied powers doctrine* used by the ICJ in the *Reparation for Injuries* case is widely considered to be valid. In the case of the Boundary Demarcation Commission and the ICTY, we have to use this doctrine in order to validate the decisions to establish these subsidiary organs. Although the decision did in fact lead to the establishment and the ongoing work of the tribunal, I still think it to be important that there is a reason to look at the establishment with scrutinizing eyes.

In both cases I have chosen to look into in this thesis, the SC took the decision to establish a subsidiary organ, pursuant to the powers it possesses under article 29 of the UN Charter, and the powers delegated to the newly established organs were powers under Chapter VII of the Charter. In Chapter VII, there is no mention of judicial enforcement or of any type of judicial measures that can be taken in order to come to a standstill in a conflict. The measures included in article 41, interruption of economic relations, rail, sea, air, postal, telegraphic and radio communication, and the severance of diplomatic relations are certainly not judicial measures, but mainly economical ways of stalling the conflict. The list is not exhaustive, this we know, yet can we still imply that the measures under this article can include judicial measures. The thought is far-fetched. It is even more far-fetched to imply that there may be judicial measures taken when it comes to the following article, 42, in which the measures involving the use of force are spelled out. This list is not exhaustive, nor are the measures very light on the State under attack. Instead, we have to look at the bigger picture. The

implication of the powers has to be under the main objective, and that is the *maintenance of international peace and security*, the very core of the powers of the SC – article 24. If we can say that a measure is appropriate under that area, then we can interpret the UN Charter as to include it in the powers of the SC. We can go even further and say that if it is an appropriate measure for the fulfilment of the *purposes* of the organisation as a whole, it can be implied that the SC possesses such a power. The ways to justify decisions, which would otherwise be considered *ultra vires* are numerous.

In several of the decisions and advisory opinions of the ICJ that I have studied, we can notice a negative attitude when it comes to judicial review of the decisions of the SC especially. This is not a power that the ICJ possesses under the UN Charter, nor under the Statute of the ICJ. The competence of the SC is under the scrutiny of the SC and the SC alone. I find this suspicious, but then again, the member States have conferred power to the organisation, and it is the member States who in the first place established the organisation. If we look at the issues with this in mind, then the question whether the decisions of the SC are legal is certainly not that complicated, as long as the States affected by the decisions agree with the outcome. What I am trying to say is that; if there exists a consensus between the member States concerning the legality of a decision of the SC, then that decision must be considered legal. Now, is this the case in the two examples I have chosen to analyse in this thesis? I will now try to give an answer to this question.

5.1 The Demarcation Commission

In the case of the Boundary Demarcation Commission, the acts by the State of Iraq preceding the decision to demarcate the boundary are without a doubt a breach of the peace. The SC was hence working with the aim of restoration of the peace. However, in this case it is not appropriate to just end the discussion there. The measure – demarcation of a boundary – is clearly not within the express powers of the SC. It was a boundary, which was disputed by one of the parties to the conflict, and as such it should, in my opinion, have been decided by either the ICJ or an international arbitrator. The question is also if the work of the commission was actually only demarcation or if it included on some level the delimitation of the said boundary. This is not clear. Therefore, I find it hard to comprehend that the demarcation of a boundary could ever be a power of the SC. The fact that there were two States who voted against Resolution 687 only because of the decision to include the demarcation of the boundary in the resolution confirm my views. The aim of restoration of peace could in my opinion have been reached even if the boundary had not been demarcated by the SC. Had the SC instead referred the question to an arbitrator, this aim would have been achieved. Still, I find it hard to state that the decision was *ultra vires*, since I do not think that is the case. I just think that the establishment of the Demarcation Commission was not a necessary measure under the field of the maintenance of peace. Nor can it be said to be appropriate for

the fulfilment of the purposes of the organisation, one of which is the respect for the principle of sovereign equality of the members and the principle of non-intervention in matters within the domestic jurisdiction of States. A dispute concerning a boundary must be settled by judicial measures, in order for the decision to be final and binding. In this case, my conclusion is that the SC delegated powers to a subsidiary organ, which they did not possess, impliedly or expressly. Yet, it has been done, and the Boundary Demarcation Commission completed its work in accordance with the directives given. All that can be done about it is the issuance of a statement saying that it was wrong. I agree with Klabbers when he says that he thinks that the demarcation of the boundary between Iraq and Kuwait was a one-time measure, and that the SC was working under the “no precedent”-claim in that case.

5.2 The ICTY

International judicial intervention is according to some a newly asserted power of the SC. The ICTY was the first of two tribunals to be established by the SC as subsidiary organs in the meaning of article 29. The aim of restoration of peace is evident in this case too, since the establishment was preceded by an armed conflict. Therefore, we can conclude that the establishment is under the field of the maintenance of peace, but we cannot end the discussion there in this case either. Under the UN Charter, the SC does not have any judicial powers; in fact, these powers are already conferred to the ICJ, an organ which has no power to establish subsidiary organs of its own. This fact alone does not give the SC the power to establish judicial organs under article 29. Nor does it confer the SC with any judicial powers. In the *Tadic* case the appeals chamber discusses the implied powers doctrine and concludes that it is in fact applicable to the establishment of the tribunal. Here again we have to look at the bigger picture in my opinion. The Geneva Conventions clearly puts the crimes against humanity under individual responsibility and universal jurisdiction, but this is not enough when there is no obvious forum in which the individuals can be tried. In the report of the SG the different ways of establishment are evaluated, and the conclusion is that the SC, in fact, has the power to establish such a tribunal. In the *Effect of Awards* case, the ICJ concludes that the GA has this kind of power, and this may be analogically used to include the SC. If the GA possesses the power to establish a tribunal able to issue final and binding decisions, then certainly the SC does the same, especially since the discretion under Chapter VII is so wide. The work of the international tribunal is indeed intended for the fulfilment of the purposes of the UN, especially the work for fundamental human rights. Another aspect is that in the discussions around the ICTY, there is a clear *opinio juris* among States that the establishment of the tribunal was within the powers of the SC. There are but a few States that have opposed the establishment, and they are mainly the Republics of former Yugoslavia. This is a strong incitement for the legality of the establishment.

5.3 Final comments

I feel that there is a need, at the end of this thesis, to sum up the answer to my main question with just a few final comments. I have by using two of the SC decisions tried to establish that there is in fact a way for the SC to delegate certain powers, which it does not itself possess, to subsidiary organs established according to the UN Charter. The fact is that this is not entirely true, since the powers that are delegated are so-called implied powers, and I believe that they are actually a part of the SC:s powers under the UN Charter. If this is not the case, then the device of *nemo dat quod non habet* is still valid, what you do not possess you cannot give away.

Of course, the SC cannot itself as it is composed demarcate a boundary, nor can it render binding criminal judgments over individuals. Nevertheless, as long as these measures are means to an end, the maintenance of international peace and security, the establishment of subsidiary organs with these competences is not *ultra vires*. The reason why I mean that the decision is in my opinion wrong, but not *ultra vires*, is that I understand the meaning of *ultra vires* to be that a State, member of the UN, or many such States have to consider the decision to be *ultra vires* and treat it thereafter. Therefore, I also argue that as long as there exists a common understanding, or consent, between the Member States of the UN, then the actions of the SC are hard to reject. Ultimately, the Member States have the final word regarding the decisions of the SC. By this, I mean that if the Member States disagree with the decisions of the SC or refuse to take the actions needed to implement the decisions, then the decisions have no effect in practice. Therefore, the decisions to establish the subsidiary organs in question were valid, because of the fact that the implied powers doctrine can be used by the SC, according to scholars and the ICJ. The implication of powers other than those expressed in the UN Charter does expand the powers of the SC to a certain extent, but I believe that the way for the UN to survive over time is to keep the purposes and principles alive. This can only be done if the SC has power to act against threats to international peace and security.

Supplement A

Relevant articles of the UN Charter

Article 7

1. There are established as the principal organs of the United Nations:
 - a General Assembly
 - a Security Council
 - an Economic and Social Council
 - a Trusteeship Council
 - an International Court of Justice
 - and a Secretariat
2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41

The Security Council may decide what measures not involving the use of force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Relevant articles of the Statute of ICTY

Article 1 – Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2 – Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3 – Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Article 4 – Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Article 5 – Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

Article 6 – Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7 – Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8 – Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9 – Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10 – *Non-bis-in-idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Bibliography

- Akande, Dapo The International Court of Justice and the Security Council: Is there room for judicial control of Decisions of the Political Organs of the United Nations? *The International and Comparative Law Quarterly*, Vol. 46, 1997
- Alvarez, Jose E. Nuremberg Revisited: The Tadic Case, Vol. 7 *European Journal of International Law*, No. 2, 1996 pp. 245-264. Oxford University Press
- Arangio-Ruiz, Gaetano The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue, *European Journal of International Law*, No. 1, Vol. 8, 1997, pp 1-28. Oxford University Press
- Bergsmo, Morten Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council, *Nordic Journal of International Law*, 69, 2000
- Bowett, D. W. *United Nations Forces. A Legal Study of United Nations Practice*, The David Davies Memorial Institute, Stevens & Sons, London, 1964
- Bring, Ove *FN-Stadgan och Världspolitiken, Om folkrättens roll i en föränderlig värld*, 2nd ed. Nordstedts Juridik, Stockholm, 1997
- Dupuy, René-Jean (editor) *Manuel sur les organisations internationales / A Handbook on International Organizations*, Hague Academy of International Law, 2nd ed. Hague, 1998
- Ely, Robert B. III Subsidiary Judicial Organs of the United Nations, *Temple Law Quarterly*, 1950-1951 pp. 420-427
- Gray, Christine After the Ceasefire: Iraq, the Security Council and the Use of Force, *British Year Book of International Law*, vol. 63, pp. 135-174, Oxford University Press 1994

- Harper, Keith Does the United Nations Security Council have the competence to act as court and legislature? *New York University Journal of International Law and Politics*, Vol. 27:103, 1994-1995
- Kelsen, Hans *The Law of the United Nations, A Critical Analysis of Its Fundamental Problems*, 1st ed. The London Institute of World Affairs, London 1951
- Kerr, Rachel *The International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford 2004
- Klabbers, Jan No more shifting lines? The report of the Iraq-Kuwait Boundary Demarcation Commission, *The International and Comparative Law Quarterly*, Vol. 43, 1994
- Klepacki, Zbigniew M. *The Organs of International Organizations*, Warszawa, 1978
- Koskenniemi, Martti The Police in the Temple Order, Justice and the UN: A Dialectical View, Vol. 6 *European Journal of International Law*, No. 1, Vol. 6, 1995 pp. 325-348. Oxford University Press
- Mendelson, M. H. and Hulton, S. C. The Iraq-Kuwait Boundary, *British Year Book of International Law*, vol 64, pp. 135-195, Oxford University Press 1993
- Merrills, J. G. *International Dispute Settlement*, Third edition, Cambridge University Press, Cambridge 2002
- Moskowitz, Moses *The Roots and Reaches of United Nations Actions and Decisions*, Sijthoff & Noordhoff, Alphen aan den Rijn, The Netherlands 1980
- O'Brien, James C. The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, No 87 *American Journal of International Law* 1993 pp. 639-659
- Patel King, Faiza and La Rosa, Anne-Marie The Jurisprudence of the Yugoslavia Tribunal: 1994-1996, Vol. 8 *European Journal of International Law*, No. 1, Vol. 8, 1997, pp. 123-179. Oxford University Press

- Sarooshi, Danesh *The Legal Framework Governing United Nations Subsidiary Organs, The British Year Book of International Law 1996*, Oxford University Press, 1997
- Sarooshi, Danesh *The United Nations and the Development of Collective Security – The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford University Press, 1999
- Simma, Bruno (editor) *The Charter of the United Nations: A Commentary*, München, 1995
- The United Nations Blue Books Series, Volume IX *The United Nations and the Iraq-Kuwait Conflict, 1990-1996*, United Nations Publication, New York 1996
- United Nations Conference on International Organization Documents, Vol 3
Dumbarton Oaks Proposals, Comments and Proposed Amendments, (English Text) San Francisco, 1945
- United Nations *Repertory of Practice of United Nations Organs*, Vol I Articles 1-22 of the Charter, New York, 1955
- United Nations *Repertory of Practice of United Nations Organs*, Vol II Articles 23-54 of the Charter, New York, 1955

UN Documents

UN Doc. S/1545 *Letter dated 30 June 1950 from the acting Chief of the Polish delegation to the United Nations Secretary-General transmitting a statement of the Government of Poland concerning the Security Council Resolution of 27 June 1950 (S/1511)*

UN General Assembly Resolutions

Available at (When no other source is mentioned):

<http://www.un.org/documents/resga.htm>

377 (V) *Uniting for Peace* of 3 November 1950, 302nd Plenary Meeting.

687 (VII) of 5 December 1952 on International Criminal Jurisdiction.

1000 (ES-I) available at:

1001 (ES-I) available at:

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/037/45/IMG/NR003745.pdf?OpenElement>

3351 (XXIX) *Pattern of Conferences* of 18 December 1974

UN Secretary General Reports

S/22558 Report of the Secretary-General on establishing an Iraq-Kuwait Boundary Demarcation Commission, 2 May 1991

S/25704 Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993) Presented 3 May 1993

S/25811 Final report of the demarcation of the international boundary between the Republic of Iraq and the State of Kuwait by the United Nations Iraq-Kuwait Boundary Demarcation Commission

Report of Secretary General Kofi Annan 2005, *In larger freedom – Towards Development, Security and Human Rights for all*. Available at the UN Homepage, <http://www.un.org>

UN Security Council Resolutions

Available at: http://www.un.org/Docs/sc/unsc_resolutions.html

660 (1990) of 2 August 1990

661 (1990) of 6 August 1990

678 (1990) of 29 November 1990

686 (1991) of 2 March 1991

687 (1991) of 3 April 1991

713 (1991) of 25 September 1991

764 (1992) of 13 July 1992

771 (1992) of 13 August 1992

808 (1993) of 22 February 1993

827 (1993) of 25 May 1993

Internet-sources

Background concerning the United Nations Emergency Force, 1956
http://www.un.org/Depts/dpko/dpko/co_mission/unef1backgr2.html

Background information concerning United Nations Administrative Tribunal
<http://untreaty.un.org/ola-internet/unat.htm>

Information concerning the implied powers doctrine
<http://www.mhhe.com/socscience/history/usa/brink/solc/glos06.htm>

Statute of the ICJ
<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>

The UN Charter
<http://www.un.org/aboutun/charter/index.html>

Other sources
<http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>

<http://deoxy.org/wc/wc-nurem.htm>

Table of Cases

ICJ

- Administrative Tribunal of ILO *Advisory Opinion on Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against the UNESCO*, 1956 ICJ Rep. 77, 163, (23 October 1956)
- Application for Review case *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p.166. (12 July 1973)
- Certain Expenses case *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, p. 151. (20 July 1962)
- Effect of Awards case *Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13th, 1954: I.C.J. Reports 1954*, p. 47. (13 July 1954)
- Lockerbie case *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3. (14 April 1992)
- Namibia case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16. (21 June 1971)
- Nicaragua case *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Order of 26 November 1984, I.C.J. Reports 1984*, p. 392. (26 November 1984)
- Reparation for Injuries case *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174.(11 April 1949)

Tehran Hostages case *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Order of 24 May 1980, I.C.J. Reports 1980, p. 4. (24 May 1980)*

ICTY

Tadic case Prosecutor v. Dusko Tadic a/k/a “Dule”,
Decision on the Defence Motion on Jurisdiction,
Decision of 10 August 1995. Case No. IT-94-1-T
<http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm>

Tadic case (appeal) Prosecutor v. Dusko Tadic a/k/a “Dule”,
Decision on the Defence Motion for
Interlocutory Appeal on Jurisdiction, Decision of
2 October 1995. Case No. IT-94-AR72
<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>

Permanent Court of Arbitration

Island of Palmas case Netherlands v. United States
Sole Arbitrator: Max Huber
2 U.N. Rep. Int'l Arbitral Awards 829