

The International Criminal Tribunal for the Former Yugoslavia

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I. Introduction

The key to an understanding of the Statute of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia (hereinafter International Tribunal or Tribunal) is the context within which the Security Council took its decision of principle to establish it.¹

By the end of February 1993 the conflict in the former Yugoslavia had been underway for more than 18 months, the principal focus of the conflict shifting from Slovenia to Croatia and then to Bosnia. United Nations involvement, through UNPROFOR, which at its inception had been conceived of as a protection force to shield pockets of Serbs in a newly independent Croatia (the United Nations Protected Areas) had gradually evolved into a multi-dimensional peace-keeping force whose main activities then centred on Bosnia. The character of the conflict had also evolved. While from the very beginning great brutality had marked the conduct of the parties, it was in Bosnia that the first signs of international crimes began to emerge: mass executions, mass sexual assaults and rapes, the existence of concentration camps and the implementation of a policy of so-called 'ethnic cleansing'. The Security Council repeatedly enjoined the parties to observe and comply with their obligations under international humanitarian law but the parties systematically ignored such injunctions. In October 1992 the Security Council, unable to control the wilful disregard by the parties for international norms, sought to create a dissuasive effect by asking the Secretary-General to establish a

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The views expressed in this Article are exclusively those of the authors and do not necessarily reflect any opinion of the Office of Legal Affairs or of the United Nations.

¹ SC Res. 808, 22 February 1993, UN Doc. S/RES/808 (1993).

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Commission of Experts to report on the evidence of grave breaches of international humanitarian law in the former Yugoslavia.² The unspoken understanding was that this Commission would be a step towards the establishment of an international tribunal to prosecute individuals if the parties did not conform to Security Council resolutions. The establishment of the Commission served to illuminate the crimes which were being committed but did nothing to arrest them. Public opinion, particularly in the Western permanent members of the Security Council, demanded accountability and action. Among European countries, in particular, the events in the former Yugoslavia bore uncomfortable reminders of fascism and nazism. By February 1993 the pressure of public opinion compelled these countries to call for the establishment of the tribunal.

If such a step was taken reluctantly by some or indifferently by others, it was because of the perceived political and legal factors which made the effective establishment of such a tribunal difficult if not improbable.

To begin with, the conflict was still underway. This meant that, unlike Nuremberg, the tribunal would have to function without having effective control over the territories in which the perpetrators of the crimes were to be found. Furthermore, since the conflict was still being waged, the negotiations to end the conflict were still being conducted and representatives of the United Nations, the European Union and the United States and the Russian Federation would be required to meet and negotiate with the very leaders of the parties who, at the same time, might bear responsibility for the crimes being committed. Indeed, in December 1992 the United States Secretary of State had declared a number of such individuals to be war criminals.

If the political factors were daunting, the legal factors seemed insuperable. No international criminal code existed, although the ILC had sporadically examined such a code for a quarter of a century. Neither, needless to say, was there an international criminal tribunal, although once again various proposals for such a tribunal had been made in the years following the Nuremberg and Tokyo Tribunals. The adoption of a code and the establishment of a tribunal through a treaty-making process were, of course, technically possible but the consideration, negotiation, signature and ratification of an international instrument to bring this about would take years. The Security Council, however, was not interested in an academic exercise but required immediate action which would have a preventive and deterrent effect on the conflict. The Secretary-General was, therefore, asked to prepare a report within 60 days on the establishment of a tribunal which would be effective and expeditious.³ If the use of Chapter VII of the Charter as the legal basis for the establishment of the Tribunal is perhaps the most visible and innovative aspect of the Secretary-General's report from an international law perspective, many other

2 SC Res. 780, 6 October 1992, UN Doc. S/RES/780 (1992).

3 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UNSC, UN Doc. S/25704 (1993) (hereinafter *Secretary-General's Report*), reprinted in 32 ILM (1993) 1163.

aspects of the report are equally innovative. In the present article, an attempt is made to provide some insight into and an explanation of the underlying concepts and philosophy of the Secretary-General's report with regard to the jurisdiction, structure and procedure of the Tribunal.⁴

The report was very much the Secretary-General's report. It was the Secretary-General's decision to provide the Security Council with a Statute which could be approved and which indeed was approved without change.⁵ This is not to say that in drawing up the report the Secretary-General did not have the benefit of the suggestions and drafts proposed by States, intergovernmental and non-governmental organizations and individuals. However, while these voluminous suggestions provided the raw material for the Secretary-General, the final product was a result of the choices he made. In doing so, he endeavoured to meet the requirements laid down by the Security Council while remaining within the legal and political mainstream of the international community. Like all human endeavours, the work is far from perfect but its unanimous approval by the Security Council is an indication that the Secretary-General at least met the expectations of the Organization's principal political organ.

II. The Scope of Jurisdiction of the International Tribunal

A. Territorial and Temporal Jurisdiction

In establishing the International Tribunal under Chapter VII of the United Nations Charter for the purpose, *inter alia*, of restoring peace and security in the territory of the former Yugoslavia, the Security Council has created an organ of limited duration and scope of jurisdiction. As a form of Chapter VII enforcement measure, the Tribunal's jurisdiction could not have extended beyond the territorial bounds of the former Yugoslavia,⁶ nor could it extend in time, beyond the restoration of peace and security as eventually to be determined by the Security Council.

The temporal jurisdiction of the Tribunal extends, pursuant to Security Council Resolution 808 (1993), to the period beginning in 1991, and is fixed, by Article 8 of the Statute, to begin on 1 January of that year. In the search for a specific date within the general reference to 1991, three dates were considered, each referring to a specific event to which the beginning of the dissolution process of the former Yugoslavia could have been attributed: 25 June 1991 – the proclamation of independence by Croatia and Slovenia; 27 June 1991 – the intervention of the

4 See generally, Merón, 'The Case for War Crimes Trials in Yugoslavia', 72 *Foreign Affairs* (1993) 122; Meron, 'War Crimes in Yugoslavia and the Development of International Law', 88 *AJIL* (1994) 78; O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia', 87 *AJIL* (1993) 639; Szasz, 'The Proposed War Crimes Tribunal for Yugoslavia', 25 *New York University Journal of International Law and Politics* (1993) 405.

5 SC Res. 827, 25 May 1993, UN Doc. S/RES/827 (1993), reprinted in 32 *ILM* (1993) 1203.

6 Article 8 of the Statute.

Federal Army in Slovenia, and 3 July 1991 – the outbreak of clashes between Serbian and Croatian militia.⁷ The Secretary-General opted, however, for a neutral date which would not carry with it any political connotation as to the international or internal character of the conflict, with the legal implications that such a determination would have entailed for the choice of the applicable law. In addition, information made available by the Federal Republic of Yugoslavia to the Secretary-General pursuant to paragraph 1 of Security Council Resolution 780 (1992), suggested that crimes falling within the jurisdiction of the Tribunal might have been committed against Serbian populations before June 1991.⁸ The choice of 1 January 1991 was, therefore, intended to embrace all crimes by whomsoever committed in the territory of the former Yugoslavia in 1991, and to convey an image of complete neutrality and impartiality in the Yugoslav conflict.

B. Subject-matter Jurisdiction

The establishment of the Tribunal under Chapter VII of the United Nations Charter delimited not only its territorial and temporal jurisdiction, but also circumscribed the scope of its subject-matter jurisdiction and imposed strict criteria on the choice of the applicable law. The fact that the Security Council is not a legislative body mandated that the subsidiary organ it created would not be endowed with competence the parent body did not have. Likewise it could not be seen as creating a new international law binding upon the parties to the conflict.

The Tribunal was, accordingly, empowered to apply only those provisions of international humanitarian law which are beyond any doubt part of customary international law, irrespective of their codification in any international instrument, and regardless of whether the State or States in question had adhered to them and duly incorporated their provisions into their national legislation. The list of international humanitarian law violations that are of an undoubtedly customary international law nature, was further limited to those which have customarily entailed the criminal liability of the individual, and includes, according to Articles 2 to 5 of the Statute: grave breaches of the Geneva Conventions, violations of the laws or customs of war, the crime of genocide and crimes against humanity.

1. Grave breaches of the Geneva Conventions

The 'grave breaches' of the four Geneva Conventions⁹ are set out in common Articles 50/51/130/147, and are reproduced in Article 2 of the Statute. They include

7 *Letter from the Permanent Representative of France to the Secretary-General*, 10 February 1993, UN Doc. S/25266 (1993), paras. 77-81 (hereinafter *French Letter*).

8 *Letter from the chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the Secretary-General*, 15 March 1993, UN Doc. S/25421 (1993) 16, 17, 30, 34.

9 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (hereinafter *First Geneva Convention*); Geneva

any of the following acts, when committed against persons or property protected under the Conventions:¹⁰ wilful killing, torture and inhuman treatment, wilfully causing great suffering or serious injury to body or health, extensive destruction or appropriation of property not justified by military necessity, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deprivation or transfer or unlawful confinement of a civilian, and the taking of civilians as hostages.

Unlike breaches of the Geneva Conventions, in respect of which the High Contracting Parties undertake an obligation to suppress them, grave breaches entail an additional obligation to prosecute and try persons alleged to have committed or to have ordered the commission of the crimes, regardless of their nationality, before their courts or the courts of other States. 'Grave breaches' thus entail for the perpetrator of the crime an individual criminal liability irrespective of the responsibility of the State of which he is a national.

Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, 1977 (hereinafter Protocol I), supplements the list of 'grave breaches' established in the Conventions, and extends the application of the repression system i.e., the establishment of universal criminal jurisdiction, to new categories of persons and objects protected under the Protocol.¹¹ Given, however, the undisputed customary international law nature of the Geneva Conventions, recourse has been had to the list of 'grave breaches' enumerated therein, and not to the one established in Protocol I. The latter, notwithstanding the customary law nature of most of its provisions, was, as a whole, not yet qualified as indubitably part of customary international law.¹²

Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

10 Namely, wounded, sick and members of medical personnel, prisoners of war and civilians in the hands of the adverse power, hospitals, medical equipment and ships, and civilian movable and immovable property in occupied territory.

11 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Protocol I), 1125 UNTS 3, 11-12 and 41-42 (Arts. 11 and 85).

12 For this reason, the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs, which is a newly-added 'grave breach' under Protocol I (Article 85, paragraph 3(f)), was not included in the list of 'grave breaches' contained in Article 2 of the Statute. This, notwithstanding the fact that Article 53 of the First Geneva Convention recognized the unauthorized use of the 'Red Cross' or the 'Geneva Cross' or any designation thereof, as a breach of the Convention. On the legal status of the two Additional Protocols, see Abi-Saab, 'The 1977 Additional Protocols and General International Law. Some Preliminary Reflections', in A.J.M. Delissen and G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead* (1991) 115.

2. Violations of the Laws or Customs of War

The catalogue of war crimes established in Article 3 of the Statute draws upon the Regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land,¹³ as re-affirmed in the Nuremberg Charter¹⁴ and the Judgment of the Nuremberg Tribunal.¹⁵ It includes the use of poisonous weapons or other weapons calculated to cause unnecessary suffering (Regulation 23(a) and (e)); the wanton destruction and devastation of cities not justified by military necessity (Regulation 23(g) and Article 6(b) of the Nuremberg Charter); attack, or bombardment of undefended towns (Regulation 25) the seizure of or destruction and damage to institutions dedicated to religion, charity, education, historic monuments or works of art and science (Regulation 56) and the plunder of public or private property (Article 6(b) of the Nuremberg Charter).

The customary international law nature of the Hague Regulations, and the characterization of violations thereof as war crimes entailing the individual criminal liability of the perpetrator, were firmly established by the Nuremberg Tribunal. In rejecting the argument that the Hague Convention applied in the relationship between its Contracting Parties only,¹⁶ the Tribunal held that although the rules of land warfare represented an advance over existing international law at the time of their adoption, by 1939, these rules were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.¹⁷

As for the individual criminal liability they entail, the Tribunal added that methods of land warfare prohibited under the Hague Convention, such as the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters, 'had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war'.¹⁸ In an oft-quoted passage, the Tribunal held:

With respect to war crimes, however ... the crimes defined by Article 6, section (b), of the Charter were already recognized as war crimes under international law. They were

13 Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, in Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (1915) 100; 1 Ch. I. Bevens, *Treaties and Other International Agreements of the United States of America 1776-1949*, 643 (hereinafter *Bevens*).

14 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 280 (hereinafter *Nuremberg Charter*).

15 Judgment of the International Military Tribunal at Nuremberg, in *Nazi Conspiracy and Aggression, Opinion and Judgment* (1947) (hereinafter *Nuremberg Judgment*).

16 Article 2 of the Hague Convention (IV) provides as follows:
'The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.'

17 *Nuremberg Judgment*, 83.

18 *Ibid.*, 50.

covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907... That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.¹⁹

Although the list of war crimes contained in Article 3 of the Statute is limited, it is, as clearly indicated in the chapeau to the Article, by no means exhaustive. Other violations of the laws and customs of war, which under customary international law have been recognized as war crimes entailing the criminal liability of the individual, may equally be determined by the Tribunal to fall within its subject-matter jurisdiction.²⁰

3. Crimes against Humanity

Article 5 of the Statute reproduces Article 6(c) of the Nuremberg Charter and Article II of Control Council Law No. 10 for Germany.²¹ As part of the Nuremberg Charter, recognized as 'the expression of international law existing at the time of its creation',²² Article 6(c) still represents the only authoritative definition of crimes against humanity. Article 5 of the Statute, accordingly, includes the crimes of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds and other inhumane acts, when committed in an armed conflict, whether international or national in character, and directed against any civilian population.²³

19 Ibid., 83.

20 In its interpretative statement upon the adoption of Security Council Resolution 827(1993), the US delegate declared that the 'laws and customs of war' in Article 3 of the Statute refer to 'all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including Article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions' (emphasis added). (UNSC, Provisional Verbatim Record, 3217 mtg. UN Doc. S/PV.3217 (1993) 15) (hereinafter *Verbatim Record*). Article 3 of the Statute contains, however, provisions which meet the cumulative criteria of undisputed customary international law nature, and of individual criminal liability, and although common Article 3 of the four Geneva Conventions represents a customary international law standard of minimum human conduct applicable in internal armed conflict, it does not entail, under the Geneva Conventions, the individual criminal liability of the perpetrator of the crime. The Article prohibits violence to life and person, in particular, murder of all kinds, cruel treatment and torture, taking of hostages, outrages upon personal dignity, humiliating and degrading treatment, and the passing of sentences and the carrying out of execution without previous judgment, pronounced by a regularly constituted court affording all the judicial guarantees. Note, however, that the crimes of murder, torture and the taking of hostages are also crimes against humanity, which under Article 5 of the Statute, may be committed in an armed conflict whether international or internal in character.

21 Control Council Law No. 10, Dec. 20, 1945, *Official Gazette of the Control Council for Germany*, No. 3, 22; reprinted in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1946-1949)* 23, 24-25.

22 *Nuremberg Judgment*, 48.

23 Upon the adoption of Security Council Resolution 827 (1993), representatives of France, the US and Russia expressed their understanding that Article 5 applies to all acts listed therein when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds (*Verbatim Record*, 11, 16, 45, respectively). Although not expressly provided for in Article 5 of the Statute, the mass scale and widespread nature of the crimes is implicit in the notion of 'attack against civilian population' which envisages a plurality

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One of the most notorious crimes committed in the Yugoslav conflict, the practice of so-called 'ethnic cleansing', is not referred to, as such, in the Statute. 'Ethnic cleansing', a new name for an old crime, is embraced by the grave breach of 'unlawful deportation or transfer ... of a civilian', or the crime of 'deportation' of civilian population under Article 5 of the Statute.²⁴ To the extent that 'ethnic cleansing' also comprises murder, extermination, rape etc. it is covered under the respective crimes, characterized as either war crimes or crimes against humanity.

Article 5 of the Statute deviates from Article 6(c) of the Nuremberg Charter²⁵ in that it breaks the nexus – established in the Charter and subsequently abandoned in Control Council Law No. 10²⁶ – between the commission of crimes against humanity and the execution of war crimes and crimes against peace. It preserves, however, the link between crimes against humanity and the existence of 'an armed conflict whether international or national in character'. Unlike Article 6(c) of the Nuremberg Charter, Article 5 of the Statute does not extend to the period 'before the war'.²⁷ In the Yugoslav context, it was considered unnecessary to refer to the period 'before the war' as the entire period falling within the temporal jurisdiction of the Tribunal, namely, since 1 January 1991, is one which may either be characterized as an international or an internal conflict. The Statute did not decide, however, the

of authors and victims of crimes, and is explicitly referred to in paragraph 48 of the *Secretary-General's Report*.

- 24 In its Interim Report, the Commission of Experts established by the Secretary-General pursuant to Security Council Resolution 780(1992) to analyse and examine information relating to evidence of war crimes in the territory of the former Yugoslavia, defined the expression 'ethnic cleansing' to mean 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area'. The Commission furthermore noted that:
'Based on the many reports received describing the policy and practices conducted in the former Yugoslavia ... "ethnic cleansing" has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property... These practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore ... such acts could also fall within the meaning of the Genocide Convention.'
- 25 *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780(1992)*, UNSC, UN Doc. S/25274 (1993), Annex I, para. 56.
- 26 See also Article 5(c) of the Charter of the International Military Tribunal for the Far East, 19 January 1946, 4 *Bevans* 20, 22 (hereinafter Tokyo Charter).
- 27 Article II(1)(c) of Control Council Law No. 10.
- 27 Under Article 6(c) of the Nuremberg Charter, crimes against humanity could be committed before or during the war, provided they were committed in execution of or in connection with war crimes or crimes against peace. The difficulty of proving that crimes against humanity committed *before* the war, and therefore in time of peace, were committed in execution of or in connection with war crimes or crimes against peace is well illustrated in the Nuremberg Judgment, where the Tribunal found that the murder of political opponents, the policy of vast-scale, systematic and organized terror, persecution, repression and murder of civilians, and the persecution of Jews before 1 September 1939, did not constitute crimes against humanity within the meaning of the Charter, as '[T]he Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with any such crime' (*Nuremberg Judgment*, 84).

question, still debated, of whether crimes against humanity can be committed in times of peace.

4. *The Crime of Genocide*

Genocide, as a specific case of crimes against humanity ('extermination'), may be committed both in times of peace and of war. However, unlike the crime of 'extermination' of civilian populations committed in time of war, genocide targets a specifically designated group within the civilian population, distinguished on national, ethnic, racial or religious grounds, with an intent to destroy that group as such, and 'because of its existence and character as a coherent community'.²⁸ Genocide embraces acts which, although in themselves are short of physical or biological destruction, lead to the liquidation of the group, as a whole. According to Article 4 of the Statute, which replicates Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948²⁹ (hereinafter Genocide Convention), genocide consists of any of the following acts, when committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group.

The International Court of Justice affirmed in the case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, that the principles underlying the Convention 'are principles which are recognized by civilized nations and binding on States, even without any conventional obligation'.³⁰ This affirmation applies both to the definition of the crime and to the individual criminal liability it entails.³¹ The individual criminal liability for the crime of genocide does not, however, exclude the responsibility which may, independently thereof, be imputed to the State.³² In the Yugoslav context, the crime of genocide could conceivably be the subject of parallel and simultaneous legal proceedings before the International Tribunal and the International Court of Justice, entailing, respectively, the individual criminal liability of the perpetrator, and the responsibility of the State of which he is the agent or the organ. Indeed, the

28 Shaw, 'Genocide and International Law', in Y. Dinstein (ed.), *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne* (1989) 805.

29 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 278.

30 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951) 23 (Advisory Opinion of May 28).

31 Article IV of the Genocide Convention stipulates that: 'Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'

32 Shaw, *supra* note 28, at 813-814.

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International Court of Justice has already been seized with an Application of the Republic of Bosnia and Herzegovina instituting proceedings against the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations by Yugoslavia of the Convention on the Prevention and Punishment of the Crime of Genocide.³³

C. Personal Jurisdiction and the Principles of Criminal Liability

Article 6 of the Statute provides that the International Tribunal shall have jurisdiction over natural persons. All persons are, therefore, subject to the personal jurisdiction of the Tribunal, with the exclusion of legal persons, organizations and States. The possibility of extending the personal jurisdiction of the Tribunal to organizations for the purpose of establishing membership thereof as an offence, was discarded. The Nuremberg precedent, whereby a declaration of criminality of an organization by the Military Tribunal fixed the criminality of its members in Subsequent Proceedings before national courts of the signatory Parties,³⁴ could not have been followed in the Yugoslav context. This was not only because a similar hierarchical structure between the International Tribunal and national courts could not have been envisaged, but mainly because the notion of guilt by association, implicit in the crime of membership, does not comport with the underlying principle of the Statute that criminal liability is personal.³⁵

Individual criminal responsibility is attributed, under Article 7 of the Statute, to any person accused of planning, instigating, ordering or committing a crime falling within the jurisdiction of the Tribunal, whether as a principal or as an accomplice.³⁶

33 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, (Order of 8 April 1993), ICJ Reports (1993) 3; (Order of 13 September 1993), *ibid.* 325.

34 Articles 9 and 10 of the Nuremberg Charter, and Article 5 of the Tokyo Charter.

35 For these reasons, both New Zealand and Belgium in their submissions to the Secretary-General expressed opposition to including membership in criminal organization as an offence under the Statute (*Letter from the Permanent Representative of New Zealand to the Secretary-General*, 25 March 1993 (on file with authors) (hereinafter *New Zealand Letter*), and *Observations du Gouvernement Belge au sujet de la creation d'un Tribunal International ad hoc pour juger les violations graves du droit humanitaire international commises dans l'ex-Yougoslavie*, 23 March 1993 (on file with authors). The *French Letter* provided, however, that membership in a *de jure* or *de facto* group whose primary or subordinate goal is to commit crimes coming within the jurisdiction of the Tribunal would constitute a specific offence (*French Letter*, para. 92, and Article VII, para 2, of the 'Possible provisions for the Statute of the Tribunal', 63).

36 The Statute does not retain the notion of 'conspiracy' which was recognized by the Nuremberg Tribunal as a specific offence only in relation to crimes against peace (*Nuremberg Judgment*, 56). Conspiracy, or the participation in a common plan to commit a crime, entails the criminal responsibility of any individual who participated in the common plan for any acts done by other members of that group in carrying out the collective decision. Premised on the principle of individual criminal liability, the Statute retains the notion of complicity which entails the individual criminal responsibility of the accused for acts done by him to the extent of his contribution to the execution of the crime. See, Principle VII of the Nuremberg Principles (*Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the*

It is designed to embrace all perpetrators along the chain of command, from the level of policy decision-makers to the rank-and-file level of soldiers, paramilitary, or civilians. Article 7 of the Statute thus entails the liability of those who ordered the commission of the crime, of those who only knew or could have known of it but failed to prevent or repress it, when in a position and under a duty to do so, and of those who physically committed the crime. Pleas of 'Head-of-State' immunity or obedience to superior orders are excluded as a defence, although the latter is permitted as mitigating punishment.³⁷

In attributing individual criminal liability to the head of State and to the perpetrator of the crime in carrying out superior orders, the Statute follows almost literally the Nuremberg Charter. However, in attributing criminal responsibility to a superior for acts of his subordinates,³⁸ the Statute reflects the customary international law rule of 'command responsibility', as it has developed since post World-War II trials, and most notably the *Yamashita* trial. Its conceptual basis is attributed to Article 1 of the Regulations annexed to the 1907 Fourth Hague Convention, which provides that a condition for the applicability of the laws and customs of war to militia or volunteer corps is that the latter are 'commanded by a person responsible for his subordinates'. Since the landmark case of *General Yamashita*³⁹ – the Japanese commander in the Philippines who was sentenced to death by the United States Military Commission for failing to prevent troops under his overall command from committing widespread crimes – the principle of 'command responsibility' has been incorporated in the national military legislation of States and reaffirmed in a series of international and national judicial decisions – the *My Lai*⁴⁰ and the *Sabra and Shatila*⁴¹ cases are but a few of the most notable examples.⁴²

Judgment of the Tribunal, II Yearbook of the ILC (1950) 374, 377; Wright, 'The Law of the Nuremberg Trial', 41 *AJIL* (1947) 38, 67-70.

37 Article 7, paragraph 4, of the Statute reproduces Article 8 of the Nuremberg Charter and allows for a plea of 'obedience to superior orders' as mitigating punishment only. It thus reflects the restrictive approach adopted by the Nuremberg Tribunal which held that: 'The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible' (*Nuremberg Judgment*, 53-54).

'Obedience to superior orders' is therefore excluded as defence, regardless of the state of knowledge of the perpetrator of the crime as to the legality of the order. See, however, the interpretative statement of the US delegate recognizing lack of knowledge of the illegality of an order, as defence (UNSC, *Verbatim Record*, 16); see generally, Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (1965) 21-37, 147-156, 160-214.

38 Article 7, paragraph 3, of the Statute.

39 *Trial of General Tomoyuki Yamashita*, United Nations War Crimes Commission, 4 Law Reports of Trials of War Criminals (1948) 1; affirmed, *In Re Yamashita*, 327 US 1 (1945).

40 *US v. Medina*, 20 USCMA 403, 43 CMR 243 (1971).

41 *Final Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut*, 7 February 1983, 22 *ILM* (1983) 473.

42 See generally M. Ch. Bassiouni, *Crimes Against Humanity in International Criminal Law* (1992) 372-392; Green, 'Superior Orders and Command Responsibility', 27 *Can. Y.B. Int'l L.* (1989) 167; Green, 'War Crimes, Extradition and Command Responsibility', 14 *Israel Yearbook on Human Rights* (1984) 17, 33-53; Paust, 'My Lai and Vietnam: Norms, Myths and Leader Responsibility',

D. Concurrent Jurisdiction, the Primacy of the International Tribunal and the Principle of Non-bis-in-Idem

The power of the International Tribunal and that of national courts to prosecute persons responsible for serious violations of international humanitarian law, under the Statute and national legislation, respectively, created a potential conflict of jurisdictions. In the choice between exclusive jurisdiction of the International Tribunal and concurrent jurisdiction of the Tribunal and national courts, including, in particular, those of the former Yugoslavia, considerations of law and practicality militated in favour of the latter. As a matter of law, it was a recognition of the judicial sovereignty of States and their universal jurisdiction in respect of grave breaches of the Geneva Conventions, war crimes, crimes against humanity and the crime of genocide. As a matter of practicality, concurrent jurisdiction was a necessity, given the magnitude of crimes committed and the large number of potential war criminals.⁴³

Concurrent jurisdiction of the International Tribunal and national courts in matters falling within the jurisdiction of the Tribunal, does not, however, imply equality of jurisdictions. Rather, given that the objectivity and impartiality of the judicial systems of the parties to the conflict are seriously in doubt, the concurrent jurisdiction of the national courts is subject to the primacy of the International Tribunal. In exercising its primacy over national courts, the International Tribunal is empowered to intervene at any stage of the proceedings, including the investigation stage, and request that national authorities or courts defer to the competence of the Tribunal.⁴⁴ The grounds for intervention and the procedure by which deferral may be requested were left to be elaborated in the Rules of Procedure and Evidence of the Tribunal. However, Members of the Security Council indicated upon the adoption of Resolution 827 that intervention in legal proceedings before national courts would only be appropriate in situations covered under Article 10(2) of the Statute, namely, to guarantee the objectivity and impartiality of national courts when trying persons responsible for crimes under the Statute, and to ensure that

57 Military Law Review (1972) 99; Parks, 'Command Responsibility for War Crimes', *62 Military Law Review* (1973) 1. In their submissions to the Secretary-General, Canada, Italy, the Netherlands and the United States proposed the inclusion of 'command responsibility' in the principles of criminal liability. (*Letter from the Permanent Representative of Canada to the Secretary-General*, 13 April 1993, UN Doc. S/25594 (1993) para. 12 (hereinafter *Canadian Letter*); *Letter from the Permanent Representative of Italy to the Secretary-General*, 16 February 1993, UN Doc. S/25300 (1993) Art. 5(3) of the proposed Statute (hereinafter *Italian Letter*); *Note Verbale from the Permanent Representative of the Netherlands to the Secretary-General*, 30 April 1993, UN Doc. S/25716 (1993) 4 (hereinafter *Netherlands Note*); *Letter from the Permanent Representative of the United States to the Secretary-General*, 5 April 1993, UN Doc. S/25575 (1993) Annex II, Art. 11(b) (hereinafter *US Letter*).

43 Paragraph 64 of the *Secretary-General's Report* provides:

'... [I]t was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures.'

44 Article 9 of the Statute.

judicial proceedings in national courts are not instituted with the sole purpose of obstructing the jurisdiction of the Tribunal or otherwise shielding the accused from international criminal responsibility.⁴⁵

The procedure for requesting a deferral of legal proceedings is set out in Rules 8 to 11 of the Rules of Procedure and Evidence (hereinafter sometimes Rules of Procedure).⁴⁶ The grounds for the request, stipulated in Rule 9, include the characterization of the act for which a person is tried before the national court as an ordinary crime, the partiality of the court and its lack of independence, and situations where the case investigated or tried before a national court is closely related to, or might otherwise have significant implications for the investigation or prosecution of other persons before the Tribunal. Upon receipt of information regarding any investigation or proceedings instituted in a national court for a crime falling within the jurisdiction of the Tribunal, and which may suggest that any or all of the grounds stipulated in Rule 9 exist, the Prosecutor may ask the President to formally request a deferral for the competence of the Tribunal; a request which shall be assigned by the President to a Trial Chamber for decision. If convinced of the existence of such grounds, the Trial Chamber shall issue an order for a deferral along with a request that the results of the investigation and a copy of the court's records and the judgment, if delivered, be forwarded to the Tribunal.⁴⁷

The concept of concurrent jurisdiction raises the issue of double jeopardy of an accused, and the risk of being tried twice for the same offence before two different jurisdictions. Given the primacy of the International Tribunal, the principle of *non-bis-in-idem* (no one shall be tried or punished twice) does not apply equally to both jurisdictions in a manner which would bar subsequent prosecution by any one jurisdiction following a conviction or acquittal by the other. Rather, under Article 10 of the Statute, the principle of *non-bis-in-idem* only bars subsequent prosecution before national courts, following a conviction or acquittal by the International Tribunal. It does not bar a subsequent prosecution before the Tribunal, if the act for which the person was accused before the national court was characterized as an ordinary crime, or where the national court proceedings were not impartial, independent, or were otherwise designed to shield the accused from international criminal responsibility.

E. Cooperation of States, Judicial Assistance and National Legislation

The obligation to cooperate with the International Tribunal and give effect to its requests for judicial assistance, including, where necessary, the adoption of implementing legislation, is implicit in the general obligation of States to give effect

45 Statements by France, United States and the United Kingdom, UNSC, *Verbatim Record*, 11, 16, 18-19, respectively.

46 *Rules of Procedure and Evidence* (Adopted on 11 February 1994), UN Doc. IT/32 (1994), reprinted in 33 ILM (1994) 493 (hereinafter Rules of Procedure).

47 Rule 10 of the Rules of Procedure.

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to Security Council resolutions adopted under Chapter VII of the United Nations Charter.⁴⁸ It is explicitly provided for in paragraph 4 of Security Council Resolution 827 (1993), and is further specified in Article 29 of the Statute.⁴⁹

Compliance with the Tribunal's requests for the identification or location of persons, the taking of testimony, the service of documents, the carrying out of on-site investigation and the arrest of suspects and accused would be effectuated in the territories of the cooperating States in accordance with their national legislation. It is, indeed, the underlying assumption of Rules 55 and 56 of the Rules of Procedure which provide that a warrant for the arrest of the accused and his transfer to the Tribunal shall be transmitted to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, and that a State to which such warrant has been transmitted shall ensure execution in accordance with Article 29 of the Statute.

The obligation to give effect to the Tribunal's orders, summons and warrants of arrest would, however, necessitate in most countries implementing legislation to authorize, within their national territories, enforcement measures which would otherwise not be permitted.⁵⁰ Thus, a request of the Tribunal for the surrender of the

48 Paragraph 126 of the *Secretary-General's Report* provides as follows:

'... an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations'.

49 On 2 June 1993, shortly after Resolution 827 (1993) was adopted, the Secretary-General addressed a note to all member States, drawing their particular attention to their obligations under paragraph 4 of Security Council Resolution 827, to cooperate fully with the International Tribunal and its organs, and to 'take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute' (Note SCA/8/93(7), 2 June 1993 (on file with authors)); Rule 58 of the Rules of Procedure provides: 'The obligations laid down in Article 29 of the Statute prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the State concerned.'

50 Italy was the first to enact implementing legislation. Article 11 of the Italian Decree-Law No. 544 of 28 December 1993 on Provisions in the matter of cooperation with the International Tribunal for the prosecution of serious violations of international humanitarian law committed in the territory of the former Yugoslavia, as modified by Law No. 120 of 14 February 1994, establishes the procedure for complying with requests of the Tribunal for surrender of accused. Accordingly, a request emanating from the Tribunal should be submitted by the *procuratore generale* to the Court of Appeal, whose decision may be appealed to the Supreme Court of *Cassation*. The final decision on the surrender rests with the Minister of Justice. Surrender to the Tribunal may be refused on any of the following grounds: (a) the Tribunal has not issued a warrant of arrest; (b) the identity of the accused has not been established; (c) the fact for which the surrender is requested does not fall within the temporal and territorial jurisdiction of the International Tribunal; (d) the facts for which surrender is requested do not constitute a crime under Italian law, and (e) a final judgment was entered against the person for the same facts (*Gazzetta Ufficiale della Repubblica Italiana, serie generale*, No. 43, 22 February 1994, at 48). Whereas the first two conditions state the obvious, the third raises the question of the competence of a national court to pass judgment or otherwise determine the jurisdiction of the Tribunal, and the last two conditions are inconsistent with the Statute and the principle of the primacy of the Tribunal. Article 6 of the Spanish Organization Act 15/1994 of 1 June on Cooperation with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory

accused would be considered in most national legislation, unless modified, a request for extradition, which, as such, may be refused on grounds of nationality of the accused.⁵¹

Similarly, requests for stay or deferral of proceedings to the Tribunal's competence, or recognition that the Tribunal's judgment is a bar to subsequent prosecution or retrial before national courts, impose serious limitations on States' judicial sovereignty and likewise require implementing legislation.⁵² In the case of the host country or of countries through which territories suspects or accused transit on their way to the Tribunal, the obligation to give effect to surrender orders, would entail for these countries a limitation on the exercise of their universal jurisdiction. A provision, similar to that introduced in the draft Headquarters Agreement between the United Nations and the Netherlands, granting 'safe conduct' or 'immunity from prosecution' to suspects or accused, while 'en route' to the Tribunal, would in many transit countries be necessary.⁵³ And finally, introduction or modification of

of the Former Yugoslavia, foresees a simplified procedure for complying with requests of the Tribunal for surrender of accused without the need for formal extradition proceedings. *Letter from the Permanent Representative of Spain to the Secretary-General*, 25 July 1994, UN Doc. A/49/278, S/1994/876 (1994), Annex.

51 This, indeed, has been the position of the Federal Republic of Yugoslavia which announced its refusal to extradite its own citizens without modification of its constitution (Declaration of M. Mitic, Representative of the Federal Republic of Yugoslavia to the Committee on the Elimination of Racial Discrimination (CERD) on 14 August 1993, CERD/C/SR 1004, paragraph 57). National legislation cannot, however, be relied upon for refusal to surrender, not only because requests for surrender emanating from the Tribunal are binding on the State under Chapter VII of the Charter and thus override any national legislation, but mainly because surrender of an accused to the Tribunal cannot be equated with extradition to a State pursuant to an extradition treaty and in the context of judicial inter-State cooperation.

52 Article 3 of the Italian Decree-Law provides that proceedings be deferred to the Tribunal's competence if the following two conditions are met:

- 'a. [that] the International Tribunal is proceeding for the same fact for which the Italian judge is proceeding;
- b. [that] the International Tribunal has territorial and temporal jurisdiction over said fact, under Article 8 of the Statute.'

Similarly, see Article 4, paragraph 2 of the Spanish Law.

53 Article XXI, paragraph 1, of the draft Headquarters Agreement between the United Nations and the Netherlands Concerning the International Tribunal provides as follows:

'The host country shall not exercise its criminal jurisdiction over persons present in its territory, who are to be or have been transferred as a suspect or an accused to the premises of the Tribunal pursuant to a request or an order of the Tribunal, in respect of acts, omissions or convictions prior to their entry into the territory of the host country (on file with authors).' Article 7, paragraph 4 of the Spanish Law provides that:

'Spain shall guarantee the immunity of persons in transit for the purpose of appearing before the International Tribunal.'

See also Article 10 of the Dutch draft bill containing provisions relating to the establishment of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, in *Council of Europe*, European Committee on Crimes Problems (CDPC), *Exchange of views of experts on the repercussions on international legal co-operation and domestic law of the creation of the 'International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia'* (CDPC Doc./Exch.Inf.Int.Trib(93)1), and the informal views expressed by delegations from Switzerland, France, Hungary, Austria, Portugal, Spain, UK and Germany in the Council of Europe, European

legislation would be necessary in order to give effect to enforcement of prison sentences – once the State concerned has indicated to the Security Council its willingness to accept convicted persons.⁵⁴

III. The Principles of Criminal Procedure

The principles of criminal procedure and the stages of the legal process from the investigation and pre-trial to the trial and post-trial phase, are set out in Articles 18 to 28 of the Statute. Unlike the conservative approach which characterized the choice of the applicable law, a more liberal approach was adopted in procedural matters, where internationally recognized standards of criminal procedure were relied upon, whether they represented customary international law or the most progressive legal systems. The principles of due process of law, the rights of suspects and accused, the protection of victims and witnesses, the right of appeal and the exclusion of the death penalty are indicative of the progressive approach adopted by the Secretary-General in matters of criminal procedure.

A. Due Process of Law and the Rights of Suspects and Accused

Article 21 of the Statute provides for the minimum judicial guarantees to which all defendants are entitled in the determination of their guilt, and reflects the internationally recognized standard of due process set forth in Article 14 of the International Covenant on Civil and Political Rights, 1966 (hereinafter Covenant).⁵⁵ It thus includes the principle of equality before the Tribunal, the right to a fair and public hearing, the presumption of innocence, the right to be informed of the charges made against him, to have adequate time to prepare his defence and to communicate with a counsel, to be tried without undue delay and in his presence, the right to a counsel, and if necessary, to legal assistance at no cost, the right to examine evidence against him and have the assistance of an interpreter, and the right not to be compelled to testify against himself or to confess guilt.

Unlike the Covenant, the Statute extends some of the most elementary judicial guarantees to the pre-trial stage of the investigation, when criminal charges are not yet formulated against the suspect. Under Article 18, paragraph 3, of the Statute, the suspect is entitled to a counsel of his own choosing and, if necessary, to legal assistance assigned to him at no cost. If questioned in a language that he does not speak or understand, he is also entitled to the necessary interpretation and translation services.

Committee on Crimes Problems, 42nd. plenary session, 7-11 June 1993, see CDPC Doc. Exch.Inf.Int.Trib.(93) 2-9.

⁵⁴ Paragraph 122 of the *Secretary-General's Report*, Article 27 of the Statute.

⁵⁵ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 176-177.

The right of the accused to be tried in his presence was considered in conjunction with the possibility of conducting trials *in absentia*, a proposal put forward by France.⁵⁶ The idea of trials *in absentia* was particularly appealing in the context of the Yugoslav conflict, given the high probability that the parties most directly concerned would refuse compliance with the requests for transfer of suspects and accused, and the need in these cases of some public condemnation. The possibility of trials *in absentia* was, however, discarded on both legal and political grounds. As a matter of law, the conduct of trials *in absentia* was judged incompatible with the right of the accused, under Article 14 of the Covenant, to be present in his trial,⁵⁷ and too cumbersome a process, in that it requires the re-opening of trial proceedings, once the accused is present in the seat of the Tribunal. Given, however, that the right of the accused to be present in his trial may be waived expressly or by implication, and that the conduct of *in absentia* proceedings in these cases and in strict observance of the right of the defence, is not entirely excluded by the language of Article 14(3)(d) of the Covenant,⁵⁸ the decision to preclude trials *in absentia* in the present context was mandated by political rather than legal considerations.

Politically it was considered that the conduct of trials *in absentia* as a response to States' refusal to surrender accused to the Tribunal – a refusal which in the present context is the official policy of at least one party to the conflict – would result in the conduct of show trials. Trials of this kind, if conducted by a Tribunal which was established to prosecute, try and effectively punish persons responsible for gross violations of international humanitarian law, would adversely impact on its credibility, reliability and authority as a UN judicial body.⁵⁹ If, on the other hand,

56 *French Letter*, 30, 67 (Article XV, paragraph 2 of the 'Possible Provisions for the Statute of the Tribunal').

57 Paragraph 101 of the *Secretary-General's Report* provides:

'A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials *in absentia* should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence.'

58 In communication No. 16/1977, the Human Rights Committee expressed its view on the legality of conducting trials *in absentia*, as follows:

'According to article 14(3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariable rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice.'

International Covenant on Civil and Political Rights, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol, Seventeenth to Thirty-second Sessions (October 1982-April 1988), 76, 78.

59 The following States expressed in their submissions to the Secretary-General opposition to the conduct of trials *in absentia*: Denmark (*Note presented by the Permanent Representative of Denmark to the UN Office of Legal Affairs*, 26 March 1993 (on file with authors) (hereinafter *Danish Letter*)); Germany (*Letter from the Permanent Representative of Germany to the UN Legal Counsel*, 29 March 1993, 5-6 (on file with authors) (hereinafter *German Letter*)); Ireland (*Letter*

trials *in absentia* were intended to be a declaration of guilt or a moral sanction against the accused or the State refusing his surrender, it was considered that a public reading of the indictment in the manner laid down by the Rules of Procedure and Evidence, would achieve the same effect.⁶⁰

B. Protection of Victims and Witnesses

Measures for the protection of the privacy and safety of victims and witnesses were considered necessary, given the nature of the crimes of rape and sexual assault, the sensitivities of victims and witnesses and the fear of intimidation and reprisals. The details of such measures were left to be elaborated in the Rules of Procedure and Evidence, which were to include, however, as a minimum, the conduct of *in camera* proceedings and the protection of the victims' identity.⁶¹ Rule 75 of the Rules of Procedure accordingly provides for a series of protection measures including: the non-disclosure to the public or the media of the identity or location of a victim or a witness or of persons related to or associated with them; the giving of testimony through image or voice altering devices or closed circuit television, and the conduct of *in camera* proceedings. Protection of victims and witnesses by restricting or altogether excluding personal confrontation or cross-examination would have to be accommodated with and weighed against the rights of the accused to due process of law, including his right to have examined witnesses against him.

In addition to protection measures which may be ordered by a Trial or an Appeals Chamber, a Victims and Witnesses Unit was established in the Registry to provide counselling and support for victims and witnesses, in particular in cases of rape and sexual assault, and to recommend appropriate protective measures in accordance with Article 22 of the Statute.⁶²

from the Permanent Representative of Ireland to the UN Legal Counsel, 19 March 1993, para. 8 (on file with authors) (hereinafter Irish Letter); the Netherlands (Netherlands Note, 5); New Zealand (New Zealand Letter, 3); Letter from the Chef du Département Fédéral Suisse des affaires étrangères to the Secretary-General, 30 March 1993, 1 (on file with authors); United States (US Letter, Art. 13).

60 Rule 61 establishes the procedure in case of failure to execute a warrant of arrest. Accordingly, when a Trial Judge is informed of a State's inability or unwillingness to execute a warrant of arrest, and is satisfied that the Prosecutor has taken all reasonable steps to effect personal service through national authorities or advertisement in the local press, he shall order that the indictment be submitted by the Prosecutor to the Trial Chamber and be read in open Court. An international arrest warrant would then be issued and transmitted to all States, and if the Trial Chamber is satisfied that the failure to execute a warrant of arrest is due to the State's refusal to cooperate with the Tribunal, the President shall so inform the Security Council.

61 Article 22, paragraph 1, of the Statute.

62 Rule 34 of the Rules of Procedure.

C. The Right of Appeal

The right of appeal was expressly excluded from the Nuremberg Charter. Article 26 provides that the judgment of the Tribunal as to the guilt or innocence of any defendant shall be final and not subject to review. Recognizing that the right of appeal before a higher tribunal, as reflected in Article 14, paragraph 5, of the Covenant has become a 'fundamental element of individual civil and political rights', the Statute of the International Tribunal provides that both the defendant and the Prosecutor be entitled to appeal a judgment of the Tribunal on grounds of law or fact.⁶³

The right of appeal was thus transposed from the national context envisaged in Article 14 of the Covenant⁶⁴ to the international judicial system, and created within that system the necessity of establishing a hierarchy of judicial instances. Mindful of the fact that Article 14, paragraph 5 requires a review by a higher tribunal, but that the constitution of yet another international tribunal as a court of appeal composed of an entirely different body of judges was practically impossible, the Secretary-General proposed to establish, within the same International Tribunal, an Appeals Chamber, distinguished from the two Trial Chambers in the number and composition of its judges.⁶⁵

Aside from appellate proceedings, the Statute provides for review proceedings which may be initiated before a Trial Chamber or an Appeals Chamber where a new fact has been discovered, which if known at the time of the original proceedings, would have had a decisive effect on the final decision.⁶⁶ An application for review of the judgment may be submitted by the convicted person at any time, and theoretically even after the dissolution of the Tribunal to the body then designated. When submitted by the Prosecutor, an application for review shall be filed within one year of the entry of the final judgment.⁶⁷

D. Penalties, and the Exclusion of Capital Punishment

The power of the International Tribunal to impose penalties is limited, under Article 24 of the Statute, to imprisonment for terms to be determined in accordance with the general practice regarding prison sentences in the courts of the former Yugoslavia. The Tribunal may also order the restitution of property and the proceeds thereof,

63 Article 25 of the Statute.

64 It is, however, noteworthy that even in the national context the right of appeal may be subject to an exception when the person is tried in the first instance by the highest tribunal. See Article 2, paragraph 2, of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, Council of Europe, *European Treaty Series*, No. 117.

65 Article 12 and Article 14, paragraph 3, of the Statute. The principle of clear separation between the Trials Chambers and the Appeals Chamber seems, however, to have been eroded by the system of regular rotation of judges between the Chambers, laid down in Rule 27 of the Rules of Procedure.

66 Article 26 of the Statute.

67 Rule 120 of the Rules of Procedure.

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acquired by criminal conduct including by means of duress. An order of restitution will, however, be issued only after a special hearing is held to determine rightful ownership in the property, and to which third parties, whose *bona-fide* rights may be affected by that determination, are summoned.⁶⁸

The death penalty, which in the Nuremberg trial constituted the principal punishment,⁶⁹ is not provided for in the Statute; it is specifically excluded in paragraph 112 of the Secretary-General's Report. In this, perhaps more than in any other respect, recourse is not allowed to the national law of the former Yugoslavia, nor to that of any of its splinter republics which, with the exception of Slovenia,⁷⁰ may still recognize capital punishment in their national legislation.

Article 24 of the Statute is thus a reflection of the widely accepted interpretation of Article 6, paragraph 2, of the Covenant, that where the death penalty does not exist it should not be introduced. It is also a reaffirmation of the general tendency of States favouring the abolition of the death penalty in general,⁷¹ and their almost unanimous opposition to its introduction in the context of the Yugoslav conflict.⁷²

The Tribunal was not empowered to order compensation as a form of penalty on the convicted person or on the State of which he is a national. Resolution 827, however, provides that the Tribunal's work shall be carried out without prejudice to the right of victims to seek 'through appropriate means', compensation for damages incurred from violations of international humanitarian law.⁷³ In the absence of a

68 Rule 105 of the Rules of Procedure.

69 Article 27 of the Nuremberg Charter.

70 Article 17 of the Constitution of the Republic of Slovenia adopted on 23 December 1991, provides:

'Human life is inviolable. There is no death penalty in Slovenia.'

A.P. Blaustein & G.H. Flanz (eds), *Constitutions of the Countries of the World, Slovenia*, (October 1992) Release 92-6, 3.

71 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, 28 April 1983, Council of Europe, *European Treaty Series*, No. 114, Art. 1, reprinted in 22 ILM (1983) 539; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 15 December 1989, adopted by General Assembly resolution 44/128 of 15 December 1989, reprinted in 29 ILM (1990) 1465; American Convention on Human Rights, 22 November 1969, 9 ILM (1970) 673, 676, Art. 4; African Charter on Human and Peoples' Rights, 27 June 1981, 21 ILM (1982) 59, 60, Art. 4.

72 The following States expressed opposition to the introduction of the death penalty in the Statute of the International Tribunal: Canada (*Canadian Letter*, 3, para. 15); Conference on Security and Cooperation in Europe (CSCE) (Proposal for an International War Crimes Tribunal for the Former Yugoslavia, 9 February 1993 by Rapporteurs (Corell-Turk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia, 179-180, submitted on behalf of the Chairman-in-Office of the Conference on Security and Cooperation in Europe (CSCE), *Letter from the Permanent Representative of Sweden to the Secretary-General*, 18 February 1993) UN Doc. S/25307 (1993); Denmark (*Danish Letter*); France (*French Letter*, 35); Germany (*German Letter*, 4, para. 9); Ireland (*Irish Letter*, para. 9); Italy (*Italian Letter*, 4, Art. 7(3)); New Zealand (*New Zealand Letter*, 3); *Letter from the Permanent Representative of the Russian Federation to the Secretary-General*, 5 April 1993, UN Doc. S/25537 (1993) 10, Art. 22(3)).

73 The Organization of Islamic Conference proposed the establishment of a victims' compensation scheme to be funded by Governments found responsible for crimes committed by individuals (*Letter from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi*

legislative authority to order compensation, Rule 106 of the Rules of Procedure defers to the competent national authorities from which – if national legislation so permits – the victim may obtain compensation from the convicted person. In the proceedings before the national court, the judgment of the International Tribunal as to the criminal responsibility of the convicted person, shall be final and binding.

E. Pardon and Commutation

Pardon or commutation of sentences may be granted by the Tribunal upon notification by a State, in which prison sentence is served, that a convicted person is eligible under its laws for pardon or commutation.⁷⁴ In deciding upon the matter the President of the Tribunal, in consultation with the judges, shall take into consideration the gravity of the crime, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation and any substantial cooperation he might have had with the Prosecutor.⁷⁵ The criteria for pardon and commutation established in the Rules of Procedure thus add a second layer of eligibility conditions to the national criteria and ensure that, within a process initiated by any one particular State, a uniform policy of pardon and commutation is applied by the Tribunal.

IV. Conclusions

Much has already been written about the Tribunal and no doubt the literature of international law will continue to be enlarged by doctrinal studies of this new international organ for some time to come. The Secretary-General's report and the Tribunal's Rules of Procedure and Evidence constitute a rich vein for exploration by scholars and practitioners alike.

In this article, we have endeavoured to provide insights into the underlying thinking and philosophy of the Secretary-General's report drawing upon our unique knowledge from the vantage point of the Office of the Legal Counsel. In particular, we have tried to demonstrate that by deliberately and prudently circumscribing the territorial, temporal and subject matter jurisdiction of the Tribunal, the Security Council has acted within its powers and competences under the Charter while at the same time engaging in a constructive interpretation of the measures open to it, for the restoration of international peace and security.

Arabia, Senegal and Turkey to the Secretary-General, 31 March 1993, UN Doc. A/47/920 and S/25512 (1993) 3.

74 Article 28 of the Statute.

75 Rule 125 of the Rules of Procedure.