Violations of international humanitarian law and measures of repression: the International Tribunal for the former Yugoslavia

by Juan José Quintana*

1. Introduction

The International Conference for the Protection of War Victims, held in Geneva from 31 August to 1 September 1993, urged all States to make every effort to

> *"ensure that war crimes are duly prosecuted and do not go unpunished, and accordingly implement the provisions on the punishment of grave breaches of international humanitarian law and encourage the timely establishment of appropriate international legal machinery ...".*[1]

This refers to the establishment of an international criminal court, a widely discussed matter which has received new impetus in recent years within the framework of the United Nations. Recent prominent international instruments, such as the Final Declaration of the Geneva Conference and the Vienna Declaration adopted by the World Conference on Human Rights in June 1993[2], have noted with satisfaction the progress

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[1] Final Declaration of the Conference, Part II, para. 7. The text is to be found in the *International Review of the Red Cross*, No. 296, September-October 1993, p. 379. For consideration of the topic by the participants in the Conference, see *ibid.*, p. 375, pp. 436 *ff.*

[2] Vienna Declaration and Programme of Action, Part II, para. 92 (Doc. A/CONF. 157/23 of 12 July 1993).

achieved on this subject within the International Law Commission and called on this subsidiary organ of the General Assembly to continue examining the matter.[3]

However, until the said "appropriate legal machinery" is established, the international community will have to resort to *ad hoc* procedures in order to provide effective mechanisms for punishment of serious violations of international humanitarian law. This is precisely what has taken place in relation to the events in the territory of the former Yugoslavia. The Security Council has recently set up an international tribunal to try those responsible for serious violations of international humanitarian law[4] in the said territory. This is the first court of its kind to be established since the international military tribunals of Nuremberg and Tokyo in 1945 and 1946. The object of the present paper is to describe the main features of this tribunal, as laid down in the Statute approved by the Security Council.

2. The process of establishing the Tribunal

One of the cornerstones of the Vance-Owen peace plan for the former Yugoslavia was human rights and humanitarian considerations. Thus, given the scale of the violations of IHL which have taken place in the territory of the former Yugoslavia, the setting-up of a body such as the one under discussion was only a matter of time, once the situation in the area was put on the agenda of the United Nations Security Council.

Although the Security Council had been concerned with the issue of the former Yugoslavia since September 1991, it was not until the middle of 1992 that it adopted the first of the resolutions which were the immediate antecedent for the creation of the International Tribunal. In resolution 764 (1992) of 13 July 1992, the Security Council reaffirmed the obligation of all parties to the conflict with regard to the application of IHL and laid down the important principle of individual responsibility for grave breaches of its rules. According to the Council, anyone who commits or orders the commission of grave breaches of the Geneva Conven-

[3] For the background to this question, see "The work of the International Law Commission", 4th ed., United Nations, New York, 1988, pp. 28, 34 and 121. For current treatment of the subject, see the reports of the Commission on its proceedings during the 44th and 45th sessions (Doc. A/47/10, 1992; and A/48/10, 1993).

[4] Referred to hereinafter as "IHL".

tions of 1949 will be held personally responsible for such breaches. In resolution 771 (1992) of 1 August 1992, the Security Council went one step further, taking a decision in application of Chapter VII of the Charter of the United Nations by virtue of which it demanded that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia-Herzegovina, desist from all breaches of IHL. Should they fail to do so, the Security Council would have to take new measures in conformity with the Charter.

In resolution 780 (1992) of 6 October 1992, the Council requested the Secretary-General to establish an impartial Commission of Experts to examine and analyse corroborated information relating to IHL violations, including grave breaches of the Geneva Conventions committed in the territory of the former Yugoslavia. The interim report of the Commission of Experts was sent to the Security Council by the Secretary-General on 9 February 1993. The report concluded that, in the territory in question, there had been grave breaches and other violations of IHL, including "ethnic cleansing", mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary detention. The report clearly advocated the establishment of an *ad hoc* international tribunal.[5]

On 22 February 1993, the Security Council formally stated in resolution 808 (1993) that the situation in the former Yugoslavia constituted a threat to peace and international security and declared that it was determined to put an end to the above-mentioned crimes and to take effective measures to bring those responsible to justice. To this end, it decided to establish an 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 the same resolution, the Council requested the Secretary-General to prepare a report on how to establish such a tribunal, a task which the Secretary-General carried out promptly.[6]

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[5] Document S/25274 of 9 February 1993. At the same time, the French government sent a letter to the President of the Security Council, attaching an important document on this topic, namely the report of the Committee of Jurists set up by the French Minister for Foreign Affairs to study the establishment of an international criminal tribunal for the former Yugoslavia. The Committee, consisting of eight distinguished French jurists, had been established on 16 January. The *rapporteur* was Professor Alain Pellet (Doc. S/25266, 10 February 1993; referred to hereinafter as "Committee of Jurists, Report").

[6] Report presented by the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), 3 May 1993, Doc. S/25704 and Annex (referred to hereinafter as "Report of the Secretary-General").

On 27 May 1993, the Security Council unanimously adopted resolution 827 (1993), in which, "acting under Chapter VII of the Charter", it approved the Secretary-General's report and the Statute of the International Tribunal. As we have already said, this Tribunal is the first of its kind since the Nuremberg and Tokyo Tribunals set up after the Second World War.

3. Basis and judicial nature

The decision of the Security Council to establish the Tribunal appears in paragraph 1 of resolution 808 (1993) of 22 February 1993. With regard to the form in which this decision could be executed, the Secretary-General noted in his report to the Security Council that, in the normal course of events, a tribunal of this kind would be established by means of a treaty concluded and adopted by an appropriate international body, such as the General Assembly or a conference of plenipotentiaries, as had been the case with the Nuremberg Tribunal.[7] This method, however, would have the enormous disadvantage of requiring considerable time, both to prepare and conclude the treaty and to ensure that it was subsequently put into effect. Such a delay would not be compatible with the criterion of urgency laid down in resolution 808.[8]

The Secretary-General, therefore, proposed that the Tribunal should be established by means of a decision taken on the basis of Chapter VII of the Charter, i.e. in the form of a measure to maintain or restore international peace and security. As well as being expeditious and immediately effective, this method would have the major advantage that all States would be under a binding obligation to take whatever action is required to apply the decision of the Security Council, since it was a measure approved under Chapter VII.[9] The Council accepted this recommendation and, accordingly, the preamble of the Statute expressly states

[7] London agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (*UN Treaty Series*, Vol. 82, No. 251). However, it should be noted that the Charter of the International Military Tribunal for the Far East was approved directly on 19 January 1946 by the then Supreme Allied Commander.

[8] The Committee of French Jurists gave three reasons why it would not be appropriate to establish the Tribunal by means of a treaty (Committee of Jurists, Report, p. 10, para. 28).

[9] Report of the Secretary-General, p. 7, paras. 19-23.

that the Tribunal was established by the Security Council "acting under Chapter VII of the Charter of the United Nations".[10]

The Security Council's acceptance of this latter recommendation of the Secretary-General means that the International Tribunal is in fact a subsidiary organ as provided for in Article 29 of the Charter, in the present case an international judicial organ.[11]

The Tribunal has the following distinctive features:

i) It is an **independent** organ, which, given its judicial character, is not subject to any kind of authority or control by the Security Council. Although there is no express provision to this effect in the Statute, this is the understanding of the members of the Security Council, as reflected in the statements recorded upon approval of the Statute.[12]

ii) It is a **temporary** organ, the existence or maintenance of which depends on the restoration or maintenance of peace and international security in the territory of the former Yugoslavia and the future decisions of the Security Council in this regard.[13]

iii) It is an ***ad hoc*** jurisdictional mechanism, the establishment of which is not directly related to the establishment of an international criminal jurisdiction of a permanent nature, this being an issue which remains under examination by the International Law Commission and the General Assembly.[14] At most, it may be said that the example

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[10] In the debate which followed the approval of resolution 827 (1993), two members of the Security Council (China and Brazil) expressed serious reservations with regard to the suitability of the method adopted to establish the Tribunal. They clearly favoured the alternative of negotiating and concluding an international treaty (provisional verbatim record of the 3217th session, Doc. S/M.3217 of 25 May 1993, pp. 32 and 36).

[11] As examples of decisions of the Security Council taken within the framework of Chapter VII and involving the establishment of subsidiary organs, reference may be made to resolution 687 (1991) and subsequent resolutions relating to the situation between Iraq and Kuwait (Report of the Secretary-General, p. 8, para. 27).

[12] See, for example, the statement by the delegate of Spain, *supra*, note 9, p. 38.

[13] Report of the Secretary-General, p. 8, para. 28. According to the Committee of Jurists, " ... it would be for the Security Council to terminate the Tribunal if it determined that the latter was no longer serving the purposes for which it had been created" (Committee of Jurists, Report, p. 13, para. 40).

[14] Various members of the Security Council stressed the *ad hoc* nature of the Tribunal and the fact that its establishment by means of a decision of the Council should not be taken as a precedent (*supra*, note 9, *passim*). The report of the Committee of Jurists also made it clear that, if it were a question of establishing an international criminal tribunal of universal competence, then neither the Security Council nor the General Assembly seemed to have the necessary powers (Committee of Jurists, Report, pp. 11-12, paras. 29-37).

of the creation of this organ by the Security Council has served to speed up the process of examination of the said questions by the above-mentioned bodies.[15]

iv) The Tribunal will confine itself to applying the rules of existing IHL; it will not develop or create new rules. As the Secretary-General noted in his report, by establishing the Tribunal and assigning it the task of prosecuting persons responsible for serious violations of IHL, the Security Council is not creating rules of international law nor seeking to assume a sort of "legislative" function within the framework of international criminal law.[16]

4. Organization and composition of the Tribunal

The Tribunal is not a single entity but consists of a number of components: a judicial component, a prosecutory component and an administrative component.

The judicial component consists of three chambers: two Trial Chambers, each with a bench of three judges, responsible for hearing cases submitted to them by the prosecutory component, and an Appeals Chamber, with a bench of five judges, for appellate proceedings in respect of the decisions of the Trial Chambers. In total, the judicial component will comprise 11 judges.[17]

The prosecutory component, comprising a Prosecutor and other staff, has the function of investigating cases, preparing charges and indicting persons responsible for violations of IHL.

The administrative component consists of a Registry or secretariat which provides services for the three chambers and the Prosecutor's office.

Thus, in accordance with Articles 11 and 12 of the Statute, the structure of the Tribunal is as follows:

a) two Trial Chambers, each with a bench of three judges

[15] The Report on the Protection of War Victims, drawn up by the ICRC in June 1993 and presented to the Geneva Conference, was very clear on this point: *supra*, note 1, p. 437.

[16] Report of the Secretary-General, p. 8, para. 29.

[17] The Committee of Jurists favoured a total of 15 judges, plus the members of the so-called "Commission for Investigation and Prosecution", which, in this plan, would carry out the prosecutory role (Committee of Jurists, Report, p. 44, paras. 164-169).

b) an Appeals Chamber, with a bench of five judges

c) the Prosecutor's office

d) a Registry which provides services to the Chambers and the Prosecutor.

Paragraph 8 of resolution 827 (1993) requests the Secretary-General to make practical arrangements for the effective functioning of the International Tribunal at the earliest time. This implies, in the first place, initiation of the procedure laid down in Articles 13 and 16 of the Statute for the election of the Tribunal's 11 judges and the Prosecutor.

The qualifications required of candidates for judges of the Tribunal are stated in paragraph 1 of Article 13 of the Statute:

> *"The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law, and human rights law".*

When drawing up the final list of candidates, moreover, the Security Council must "take due account of the adequate representation of the principal legal systems of the world". This means that there should be an equitable geographical distribution of the 11 vacancies, as is the case with the International Court of Justice.

With regard to the judges, the Secretary-General invited the Member States to propose up to two candidates, no two of whom could be of the same nationality. The resulting list of candidates was submitted to the Security Council, which reduced it to 22 names. In accordance with Article 13, para. 2, the General Assembly then elected the 11 members of the Tribunal from this short list on 15 September 1993.[18] Should a vacancy arise in any of the chambers, the Secretary-General will appoint

[18] The list of judges elected, according to geographical distribution, is as follows (for the relevant biographical profiles, see Document A/47/1006 of 1 September 1993): **Western Europe and other States**: Antonio Cassese (Italy), Jules Deschênes (Canada), Germain Le Foyer de Costil (France), Gabrielle Kirk McDonald (United States of America), Ninian Stephen (Australia); **Africa**: Georges Michel Abi-Saab (Egypt), Adolphus Godwin Karibi-Whyte (Nigeria); **Asia**: Li Haopei (China), Lal Chand Vohrah (Malaysia), Rustam S. Sidhwa (Pakistan); **Latin America and Caribbean**: Elizabeth Odio Benito (Costa Rica).

a replacement after consultation with the presidents of the Security Council and the General Assembly.[19]

The 11 judges making up the Tribunal elect one of their number to act as President; he or she will be a member of the Appeals Chamber and will preside over its proceedings. The main function of the President is to assign judges to the three chambers, after consultations with the members of the Tribunal. The three members of each Trial Chamber so assigned elect their own Presiding Judge (Article 14).

The Prosecutor (with the rank of Under-Secretary-General of the United Nations) is appointed by the Security Council on nomination by the Secretary-General.[20] In accordance with Article 16, para. 4, of the Statute, the candidate for Prosecutor

> *"shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases".*

The Prosecutor's office consists of an investigation unit and a prosecution unit. The other staff are appointed by the Secretary-General on the recommendation of the Prosecutor (Article 16).[21]

The Registry is headed by a Registrar with the rank of Assistant Secretary-General of the United Nations, appointed by the Secretary-General after consultation with the President of the Tribunal. Registry staff are also appointed by the Secretary-General, on the recommendation of the Registrar. As the organ responsible for the administration and

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[19] The Committee of Jurists favoured a considerably more complex solution, in which the judges would be elected by four existing jurisdictions, namely the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights. If this system encountered resistance, the Committee proposed that the Security Council could elect the members from lists of candidates submitted by these four bodies (Committee of Jurists, Report, pp. 45-46, paras. 170-175).

[20] The last paragraph of the preamble to resolution 827 (1993) stipulates that, pending the appointment of the Prosecutor, the Commission of Experts established pursuant to resolution 780 (1992) "should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report". On this point, see Committee of Jurists, Report, pp. 27-28, paras. 102-103. The person finally appointed as Prosecutor was the jurist Ramón Escobar Salom.

[21] As mentioned above, in the plan proposed by the Committee of Jurists, the Prosecutor would be replaced by a Commission for Investigation and Prosecution, consisting of five members of the Tribunal appointed in the same way as other Tribunal members, i.e. the judges (Committee of Jurists, Report, pp. 46-47, paras. 177-180).

servicing of the Tribunal, the Registry will deal, *inter alia*, with the following matters:

a) public information and external relations;

b) preparation of minutes of meetings;

c) conference-service facilities;

d) printing and publication of all documents;

e) all administrative work and budgetary and personnel matters.[22]

The judges, the Prosecutor and the Registrar are appointed for a four-year term and are eligible for reappointment.

5. Jurisdiction and competence

a) General scope

Article 1 of the Statute sets out the general scope of the competence attributed to the 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".*

b) Competence *ratione materiae* (subject-matter jurisdiction)

With regard to material or subject-matter jurisdiction, the Tribunal shall prosecute persons responsible for **serious violations of international humanitarian law**, which includes both conventional and customary law. According to the Secretary-General, conventional IHL which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in seven international instruments:

— the four Geneva Conventions of 12 August 1949 for the protection of victims of war;

— Hague Convention IV respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907;

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[22] Report of the Secretary-General, p. 23, para. 90.

— the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;

— the Charter of the Nuremberg International Military Tribunal of 8 August 1945.

Recognizing the customary nature of the rules contained in these instruments, Articles 2 to 5 of the Statute specify the following acts, which fall within the scope of the subject-matter competence of the Tribunal, and systematically set forth the relevant provisions of each of the instruments referred to above.

- ***Grave breaches of the Geneva Conventions of 1949 (Article 2)***

This provision enumerates only the acts which the Conventions consider to be "grave breaches" or war crimes. They include the following:

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 or 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 a fair and regular trial;

g) unlawful deportation or transfer or unlawful confinement of a civilian;

h) taking civilians as hostages.

On the basis of the argument that the Conventions adequately reflect the state of international customary law in this area, it is clear that, for the Security Council, a grave breach of the Conventions is a grave breach of IHL which gives rise to individual responsibility.[23]

[23] The statement of the delegate of the United States, approving the Statute, also refers to the two Additional Protocols of 1977 but in the context of another category of acts: violations of "the laws or customs of war" (*supra*, note 10, pp. 14-15).

- ***Violation of the laws or customs of war (Article 3)***

This provision gives various examples of violations of the laws and customs of war, noting that the list is not an exhaustive one:

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.

The drafting of the article is inspired by Hague Convention IV of 1907 and the Regulations annexed thereto, which, according to the Secretary-General,

> *" ... comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law".*[24]

In support of this conclusion, he cites a ruling of the Nuremberg Tribunal to the effect that many of the provisions of the Hague Regulations had been recognized by all civilized nations by 1939 and were regarded as being declaratory of the laws and customs of war. The same can be said of the war crimes defined in Article 6 of the Charter of the said Tribunal.

- ***Genocide (Article 4)***

Article 4 is a word-for-word recapitulation of the provisions of Articles 2 and 3 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which is held to form part of international customary law, as stated by the International Court of Justice in an Advisory Opinion of 1951.[25]

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[24] Report of the Secretary-General, p. 11, para. 41.

[25] Opinion on *Reservations to the Genocide Convention, ICJ Reports* 1951, p. 23.

For the purposes of the Statute, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as:

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.

The following acts are 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.

In this regard, it is worth mentioning that, at the present time, there is an action between Bosnia-Herzegovina and Yugoslavia (Serbia and Montenegro) before the International Court of the Hague, relating specifically to the application of the 1948 Convention. The case was submitted through an application filed by Bosnia-Herzegovina on 20 March 1993 and is now in the phase of written proceedings, the Court having taken steps to order provisional protection measures.[26]

According to the application, Yugoslavia has violated and remains in breach of its legal obligations under various provisions of the Convention in relation to the State and people of Bosnia-Herzegovina. It must be stressed that, as the dispute submitted to the Court refers to the interpretation of a multilateral treaty, the other States which are party to the instrument in question have the right to intervene in the proceedings under the terms and conditions stipulated in Article 63 of the Charter of the Court. In accordance with the said article, the Registrar of the Court sent the governments concerned formal notification.[27]

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[26] *Case concerning Application of the Convention on the Prevention and Repression of the Crime of Genocide*, Order of 8 April 1993, *ICJ Reports* 1993, p. 3. On 27 July 1993, Bosnia-Herzegovina presented a new request for provisional measures, which was under consideration by the Court when this article was being prepared.

[27] According to available information, no State has yet invoked Article 63 of the Statute of the Court in this case.

- ***Crimes against humanity (Article 5)***

This is probably the category of offences whose inclusion in the Statute gives rise to the most problems, owing to the absence of an international instrument which states clearly what is understood by "crimes against humanity". At the same time, however, it is one of the most important categories in relation to the subject-matter competence of the Tribunal, given that the atrocities committed in the former Yugoslavia (such as "ethnic cleansing" and rape and other general and systematic forms of sexual abuse) do not technically belong to any of the three categories previously described. Among the international legal precedents cited in relation to this type of conduct are the Charter and Judgment of the Nuremberg Tribunal, Law No. 10 of the Control Council for Germany and a ruling of the International Court of Justice in the matter of *Military and Paramilitary Activities in and against Nicaragua*, pronounced in 1986.[28]

The Secretary-General's report contains an eminently explanatory definition of crimes against humanity, that is:

> " ... *inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds*".[29]

In accordance with Article 5, the Tribunal will 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;

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[28] Report of the Secretary-General, p. 13, para. 47 and note 9.

[29] Report of the Secretary-General, p. 13, para. 48.

h) persecution on political, racial and religious grounds;

i) other inhumane acts.

c) Competence *ratio personae* (personal jurisdiction)

With regard to competence *ratio personae* or personal jurisdiction, the wording of the Security Council's resolutions is vague, referring to the trial of "persons responsible for serious violations of international humanitarian law". In the Secretary-General's report, the expression is interpreted as referring to individuals and, for this reason, Article 6 of the Statute states that the Tribunal will try only natural persons.

Closely related to this aspect is the principle of individual criminal responsibility, which is based on the fact that the various resolutions of the Security Council clearly state that persons who have committed serious violations of humanitarian international law are individually responsible for them. This principle is endorsed in Article 7 of the Statute which, more particularly, settles a number of complex questions such as the irrelevance of the official position of the accused (including a head of State or government), the responsibility of superiors for certain acts of their subordinates and the consequences where the accused acted pursuant to an order of a superior.[30]

d) Competence *ratione loci* (territorial jurisdiction) and competence *ratione temporis* (temporal jurisdiction)

Article 8 of the Statute states as follows:

i) "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".

This is a neutral date which, according to the Secretary-General,

"is not tied to any specific event and is clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised".[31]

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[30] On this aspect, see Committee of Jurists, Report, pp. 23-25, paras. 82-96.

[31] Report of the Secretary-General, p. 16, para. 62. After lengthy reflection, the Committee declared itself in favour of a later date, namely 25 June 1991, which it considered to be "more neutral" (Committee of Jurists, Report, pp. 22-23, paras. 74-81).

e) Concurrent jurisdiction and the principle of *non bis in idem*

Finally, Article 9 upholds the principle of **concurrent jurisdiction**. This means that in deciding on the establishment of the International Tribunal, it was not the intention of the Security Council to preclude the exercise of jurisdiction by national courts with respect to acts characterized as serious violations of international humanitarian law. However, while it is stipulated that the International Tribunal and the national courts have concurrent jurisdiction, the primacy of the former over the latter is clearly stated. At any stage of the procedure, the International Tribunal may formally request the national courts to defer to the competence of the International Tribunal in the manner set out in the rules of procedure and evidence.

In addition, Article 10 lays down the principle of *non bis in idem*, whereby a person may not be tried twice for the same crime.[32]

6. Functioning: prosecutorial system

As laid down in the Statute, the International Tribunal will function in accordance with the prosecutory system of Anglo-Saxon law. This provides for an organ separate and independent from the Tribunal which will be responsible for the investigation stage and the inquiries needed in each case. Thus, provision is made for a Prosecutor who, after carrying out the necessary investigation, decides whether or not there are grounds for bringing an indictment for examination by a judge of the Trial Chamber.

As already stated, the International Tribunal will consist of three Chambers, the Prosecutor's office and the Registry. With regard to procedure, the Statute contains very general rules on the following basic aspects:

— investigation and preparation of the indictment (Article 18);

— review of the indictment (Article 19);

— commencement and conduct of the trial proceedings (Article 20);

— rights of the accused (Article 21);

— protection of victims and witnesses (Article 22).

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[32] For a discussion of this point, see Committee of Jurists, Report, pp. 36-37, paras. 132-137.

However, it is left to the judges to adopt the rules of procedure and evidence which will be applicable at every stage of the trial. It is to be hoped that this task will advance as the judges take up their duties and the Tribunal is formally constituted, the cooperation of all States having been requested to this end.[33]

Provision has been made for two types of further proceedings: appellate proceedings (Article 25) and review proceedings (Article 26). [34] It is further stipulated that the Tribunal will impose only imprisonment as a penalty (Article 24), the sentence being served in the territory of a State designated by the Tribunal from a list of States having indicated to the Security Council their willingness to accept convicted persons (Article 27).

7. Duty of cooperation and judicial assistance

Article 29 of the Statute creates important obligations for all States with regard to cooperation with the Tribunal. Given the significance of this, it is worth recalling the relevant section of the Secretary-General's report which describes the nature of these obligations:

> *"125. (...) the establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision. In practical terms, this means that all States would be under an obligation to cooperate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and the service of documents. Effect shall also be given to orders issued by the Trial Chambers, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial.*

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[33] One of the main paragraphs of resolution 827 (1993) requested the Secretary-General to submit to the judges of the Tribunal any suggestions received from States for the rules of procedure and evidence. The judges are empowered to adopt such rules under Article 15 of the Statute.

[34] The Report of the Committee of Jurists provided only for "revision" by the International Court of Justice or a special Court of Revision composed of the Presidents of the four specialized jurisdictions referred to above (*supra*, note 19), in relation to the appointment of candidates for membership of the Tribunal (Committee of Jurists, Report, pp. 38-40, paras. 141-153.

126. In this connection, 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".[35]

8. Final remarks

The specific obligations for States arising from resolution 827 (1993) include the presentation of suggestions for the rules of procedure of the Tribunal, with a view to facilitating the implementation of the Statute, and consideration of the possibility of contributing funds, equipment and services to the Tribunal, including the offer of expert personnel. Moreover, the general duty of States to cooperate fully with the Tribunal and its organs, in accordance with the resolution and the Statute, includes the obligation to take any measures necessary under their domestic law to implement the relevant instruments.

It may be said that the functioning of the Tribunal will depend in large measure on the readiness of States to comply with these obligations and the promptness with which they act in this regard.[36] Once the Tribunal has been established, great care will be required in the process of adopting rules of procedure and in the first steps taken by the Prosecutor's office, including, of course, the submission of the first cases.

Juan José Quintana is a First Secretary in the Colombian Foreign Service. A graduate in International Relations and Diplomacy, he has followed courses in public international law at the Hague Academy of International Law. He is the author of various articles on the International Court of Justice, including "The Latin American contribution to international adjudication: the case of the ICJ", published in a special issue of the *Netherlands International Law Review* entitled "Five hundred years since the rediscovery of the Americas" (Vol. XXXIX/1992-1). Mr. Quintana is Assistant Professor of International Law at the Diplomatic Academy of San Carlos, Bogotá, Colombia.

[35] Report of the Secretary-General, p. 31.

[36] Pursuant to Article 32 of the Statute, the expenses of the Tribunal will be borne by the regular budget of the United Nations. For the immediate period, one of the items on the agenda for the 48th session of the General Assembly was to be the financing of the Tribunal. The Advisory Committee on Administrative and Budgetary Questions requested the Secretary-General to prepare a report on this subject for presentation to the Assembly (Doc. A/47/980, 22 July 1993).