

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

By Fausto Pocar

President of the International Criminal Tribunal for the former Yugoslavia

On 6 October 1992, amid accounts of widespread violations of international humanitarian law and fundamental human rights in the conflicts engulfing the former Yugoslavia, the Security Council passed resolution 780 (1992), calling on the Secretary-General to establish an impartial Commission of Experts to provide conclusions on these accounts. A number of Security Council resolutions adopted in the course of 1992 had already affirmed the principle of individual responsibility for crimes under international law. Notable in this respect were resolutions 764 (1992) of 13 July 1992 and 771 (1992) of 13 August 1992.

The Commission of Experts' first interim report of 9 February 1993 concluded that the establishment of an *ad hoc* international tribunal to try the perpetrators of atrocities in the former Yugoslavia "would be consistent with the direction of its work". A report by the Secretary-General also conveyed the support of the Co-Chairmen of the International Conference on the former Yugoslavia for the establishment of just such an international tribunal to deal with grave breaches of humanitarian law.

Draft proposals for a statute for the prospective *ad hoc* tribunal were subsequently forwarded by Rapporteurs appointed by the Conference on Security and Cooperation in Europe, as well as by commissions of jurists from France and Italy. Using these drafts as a resource, on 22 February 1993, the Secretary-General presented a report to the Security Council. Having determined pursuant to Article 39 of Chapter VII of the Charter of the United Nations that the situation in the former Yugoslavia constituted a threat to international peace and security, the Security Council decided to establish an international tribunal as an effective measure to deter the commission of crimes, bring those responsible to justice, and contribute to the restoration and maintenance of peace. In resolution 827 (1993) of 25 May 1993, the Security Council unanimously approved under Chapter VII both the report of the Secretary-General and the appended Statute of the International Tribunal (Statute).

The drafters of the Statute had explicitly declined to make it a self-contained criminal code. They instead granted the Tribunal jurisdiction over a set of very broadly defined crimes, the specific content of which was to be found in customary international law. Though the Tribunal recognizes that binding conventional law could also provide basis for its jurisdiction, it has in practice always determined that the treaty provisions in question are also declaratory of custom. As a consequence of this approach, articles 2, 3, 4 and 5 of the Statute list the crimes within the Tribunal's jurisdiction in very general terms.

Article 2 grants the Tribunal jurisdiction to try persons for "grave breaches" of the Geneva Conventions of 12 August 1949 in international armed conflicts. Article 3 confers jurisdiction over other serious violations of the laws and customs of war, both in international and non-international armed conflicts, including violations of the Hague law on international conflicts, infringements of the Geneva Conventions other than those

classified as “grave breaches” by those Conventions and violations of certain rules applicable to internal conflicts.

Article 4 of the Statute is derived directly from the Genocide Convention of 1948 and requires the unique mental element of specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

Article 5 confers on the Tribunal jurisdiction over crimes against humanity. It requires that perpetrators of crimes against humanity committed one or more of the offences enumerated in the article’s provisions with the knowledge that their acts formed part of a widespread or systematic attack against a civilian population. The Statute grants jurisdiction over only those crimes against humanity committed in armed conflict, whether international or internal, signalling a departure from customary international law. (The existence of an armed conflict is a prerequisite to triggering the Tribunal’s jurisdiction.)

The International Criminal Tribunal for the former Yugoslavia (ICTY) has, through its jurisprudence, extensively elaborated the elements of crimes under its Statute, such as the concept of grave breaches, the objective and subjective elements of crimes against humanity, the protected group within the definition of genocide, and the definitions of specific offences, including that of torture, extermination, enslavement and deportation.

The Tribunal’s personal, territorial and temporal jurisdiction to try individuals for the aforementioned crimes are provided in articles 6 and 8, which grant jurisdiction over natural persons allegedly responsible for crimes committed after 1 January 1991 in the territory of the former Yugoslavia. While the ICTY and national courts have concurrent jurisdiction over these crimes, the ICTY has primacy and may thus formally request national courts to defer to its competence. Furthermore, article 29 places a binding obligation on States to cooperate with the ICTY in its investigations and prosecutions.

Among the most important contributions to international criminal law of the Statute and the jurisprudence through which it has been elaborated is the specification of the elements of individual criminal responsibility. By virtue of article 7 of the Statute, individual criminal responsibility may be engaged if a person planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime, irrespective of the official position of the accused person, whether as Head of State or Government or as a responsible Government official. The fact that the crime was committed by a subordinate does not relieve his superior of criminal responsibility if the superior: (i) had effective control over the subordinate; (ii) knew or had reason to know that the subordinate was either about to commit the crime or had already done so; and (iii) failed to take the necessary and reasonable measures to prevent the crime or to punish the subordinate perpetrator after the event. Among the Tribunal’s elaborations of the modes of liability enshrined in article 7 is also the joint criminal enterprise theory of individual criminal responsibility, according to which persons are individually responsible for the commission of a crime as part of “a plurality of co-perpetrators who act pursuant to a common purpose involving the commission of a crime in the Statute” (*Prosecutor v. Kvočka, Radić, Žigić and Prcać*, IT-98-30/1-A, para. 81).

The Statute has also proved important in setting the basic procedural requirements of criminal proceedings before the Tribunal. Though the Statute does not include a full body of procedural rules, it does articulate the basic principles of a fair trial, entrusting to

the permanent judges the task of adopting a detailed set of rules of procedure and evidence (article 15). For example, article 21 embodies the internationally recognised standard of due process set forth in article 14 of the International Covenant on Civil and Political Rights, but other provisions of the Statute and of the rules have gone far beyond these minimal requirements.

Upon completion of proceedings, judgment is to be rendered by a majority of the Judges of the Trial Chamber and must be accompanied or followed by a reasoned opinion in writing, to which separate or dissenting opinions may be appended (article 23). The Statute does not, however, define a coherent scheme of sentencing, pardon and commutation of sentence. Instead, article 24 provides only that the penalty shall be limited to imprisonment and that, in determining sentence, the Tribunal shall consider the general practice in the courts of the former Yugoslavia.

As a check on the improper application of law at trial, the Statute and the Rules of Procedure and Evidence established an Appeals Chamber with jurisdiction to hear appeals from judgments filed by the convicted person or the Prosecution on grounds of error on a question of law invalidating the decision or an error of fact which has occasioned a miscarriage of justice (article 25, paragraph 1(a)), as well as interlocutory appeals during trial. The Appeals Chamber may also hear appeals where a party has raised a legal issue that would not invalidate the judgment but is considered to be of general significance.

The Security Council has the exclusive authority to amend the Statute via resolution. Moreover, the Security Council can also address individual administrative matters before the Tribunal by adopting a resolution without formally amending the Statute. Since its adoption in May 1993, the Statute has been amended on six occasions in matters related to the composition of Chambers and the number and functions of judges. Additionally, the Security Council has issued resolutions relating to extension of the mandate of individual judges.

Since its inception, the Statute has stood out as a seminal document, providing as it has the first comprehensive codification of international criminal law. As a result, it has provided inspiration for the drafters of the Statute of the International Criminal Tribunal for Rwanda, the Rome Statute of the International Criminal Court, and the foundational documents of the growing collection of so-called “hybrid tribunals”, such as the Special Court for Sierra Leone.

Related Materials

A. Legal Instruments

Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, United Nations, *Treaty Series*, vol. 78, p. 277.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, p. 31.

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, p. 85.

Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, p. 135.

Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, p. 287.

International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, p. 171.

Statute of the International Criminal Tribunal for Rwanda. Security Council resolution 955 (1994) of 8 November 1994.

Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, p. 3.

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations, *Treaty Series*, vol. 2178, p. 137.

B. Jurisprudence

International Criminal Tribunal for the former Yugoslavia, (*Prosecutor v. Kvočka, Radić, Žigić and Prcać*, IT-98-30/1-A), Judgement of the Appeals Chamber of 28 February 2005.

C. Documents

Report of the Secretary-General on the activities of the International Conference on the former Yugoslavia, 2 February 1993 (S/25221).

Interim report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), transmitted to the Security Council by a letter from the Secretary-General dated 9 February 1993 (S/25274).

Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, forwarding a report of the Committee of French Jurists to study the establishment of an international criminal tribunal to judge the crimes committed in the former Yugoslavia (S/25266).

Letter dated 16 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, forwarding a draft statute of a tribunal for war crimes and crimes against humanity committed in the territory of the former Yugoslavia, prepared by the Commission of Italian Jurists (S/25300).

Letter dated 18 February 1993 from the Permanent Representative of Sweden to the United Nations addressed to the Secretary-General, forwarding the decision by the Conference on

Security and Cooperation in Europe on the proposal for an international war crimes tribunal for the former Yugoslavia (S/25307).

Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), 3 May 1993 (S/25704).

Final Report of the Commission of Experts Established Pursuant to Security Council resolution 780 (1992), 27 May 1994 (S/1994/674).

Rules of Procedure and Evidence (adopted on 11 February 1994), 28 February 2008 (IT/32/Rev.41).

D. Doctrine

G. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia", *American Journal of International Law*, vol. 90 (1996), p. 64.

L. Condorelli, "Le Tribunal Pénal International pour l'ex-Yougoslavie et sa jurisprudence" in: *Cursos euromediterráneos bancaja de derecho internacional*, 1. 1997 (1998), (1. 1997. Castellón de La Plana), p. 241.

C. Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia", in *Max Planck Yearbook of United Nations Law*, vol. 2 (1998), Heidelberg, Max Planck Institute for Comparative Public Law and International Law, p. 97.

L. D. Johnson "Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity", *American Journal of International Law*, vol. 99 (2005), p. 158.

T. Meron, "Reflections on the Prosecution of War Crimes by International Tribunals", *American Journal of International Law*, vol. 100 (2006), p. 551.

J. C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the former Yugoslavia", *American Journal of International Law*, vol. 87 (1993), p. 639.

A. Pellet, "Le tribunal criminel international pour l'ex-Yougoslavie: poudre aux yeux ou avancée décisive?", *Revue général de droit international public*, vol. 98 (1994), p. 7.

F. Pocar, "Current Issues in International Criminal Jurisdiction" in: *Cursos euromediterráneos bancaja de derecho internacional*, 7. 2003 (2005), (7. 2003. Castellón de La Plana), p. 457.

F. Pocar, "Criminal Proceedings before the International Criminal Tribunals for the former Yugoslavia and Rwanda", *The Law and Practice of International Courts and Tribunals*, vol. 5, No. 1 (2006), p. 89.

F. Pocar, "International Criminal Tribunal for the former Yugoslavia", *Max Planck Encyclopedia of Public International Law* (2008, forthcoming), Heidelberg, Max Planck Institute for Comparative Public Law and International Law.

C. J. M. Safferling, "International Criminal Procedure and its Participants: An Examination of the Interaction of Judges, Prosecutor and Defence at the Yugoslav Tribunal", in *Yearbook of International Humanitarian Law*, vol. 5 (2002), The Hague, T. M. C. Asser Institute, p. 219.

"Symposium: The ICTY 10 Years On: The View from Inside", *Journal of International Criminal Justice*, vol. 2:2 (2004), p. 353.