

## A. Security Council Resolution 827 (1993)

[Source: UN Doc. S/RES/827 (May 25, 1993), available at :  
[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/827\(1993\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/827(1993))]

**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

*The Security Council,*

[...]

*Having considered* the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

*Expressing once again* its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of “ethnic cleansing”, including for the acquisition and the holding of territory,

*Determining* that this situation continues to constitute a threat to international peace and security,

*Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

*Convinced* that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc

measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

*Believing* that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed, [...]

*Reaffirming* in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, [...]

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Approves* the report of the Secretary-General;
2. *Decides* hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between January 1, 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;
3. *Requests* the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;
4. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall 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; [...]
5. *Decides* also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law; [...]

## **B. Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)**

[Source: UN Doc. S/25704 (May 3, 1993), available at : [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_re808\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf) ; footnotes omitted.]

[...]

### **A. Competence *ratione materiae* (subject-matter jurisdiction)**

1. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.
2. In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.
3. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945. [...]

### **Grave breaches of the 1949 Geneva Conventions**

1. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war.
2. Each Convention contains a provision listing the particularly serious violations that qualify as “grave breaches” or war crimes. Persons committing or ordering grave breaches are subject to trial and punishment. The lists of grave breaches contained in the Geneva Conventions are reproduced in the article which follows.
3. The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law. [...]

### **Violations of the laws or customs of war**

1. The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.
2. The Nüremberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war. The Nüremberg Tribunal also recognized that war crimes defined in article 6(b) of the Nüremberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.

3. The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the Hague Regulations also recognize that the right of belligerents to conduct warfare is not unlimited and that resort to certain methods of waging war is prohibited under the rules of land warfare.
4. These rules of customary law, as interpreted and applied by the Nüremberg Tribunal, provide the basis for the corresponding article of the statute [Article 3] [...]

## **C. 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 since 1991, May 25, 1993**

[Source: Originally published as Annex to the *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, (S/25704), approved by the Security Council by Resolution 827 (1993), May 25, 1993; available at :

[http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_re808\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf)

### **UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

[...]

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, 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 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

#### **Article 1 Competence of the International Tribunal**

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

#### **Article 2 Grave breaches of the Geneva Conventions of 1949**

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

- a. wilful killing;
- b. torture or inhuman treatment, including biological experiments;

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

### **Article 3 Violations of the laws or customs of war**

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

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

### **Article 4 Genocide**

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
  2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
    - a. killing members of the group;
    - b. causing serious bodily or mental harm to members of the group;
    - c. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
    - d. imposing measures intended to prevent births within the group;
    - e. forcibly transferring children of the group to another group.
- The following acts shall be punishable:
    - a. genocide;
    - b. conspiracy to commit genocide;
    - c. direct and public incitement to commit genocide;
    - d. attempt to commit genocide;
    - e. complicity in genocide.

### **Article 5 Crimes against humanity**

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

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

#### **Article 6 Personal jurisdiction**

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

#### **Article 7 Individual criminal responsibility**

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

#### **Article 8 Territorial and temporal jurisdiction**

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

#### **Article 9 Concurrent jurisdiction**

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

#### **Article 10 Non-bis-in-idem**

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
  - a. the act for which he or she was tried was characterized as an ordinary crime; or
  - b. the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

#### **Article 11 Organization of the International Tribunal**

The International Tribunal shall consist of the following organs:

- a. the Chambers, comprising three Trial Chambers and an Appeals Chamber;
- b. the Prosecutor; and
- c. a Registry, servicing both the Chambers and the Prosecutor.

#### **Article 12 Composition of the Chambers**

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.
5. The Secretary-General may, at the request of the President of the International Tribunal appoint, from among the *ad litem* judges elected in accordance with Article 13 *ter*, reserve judges to be present at each stage of a trial to which they have been appointed and to replace a judge if that judge is unable to continue sitting.
6. Without prejudice to paragraph 2 above, in the event that exceptional circumstances require for a permanent judge in a section of a Trial Chamber to be replaced resulting in a section solely comprised of *ad litem* judges, that section may continue to hear the case, notwithstanding that its composition no longer includes a permanent judge.

#### **Article 13 Qualifications of judges**



The permanent and *ad litem* 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 and sections of the Trial 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.

### **Article 13 bis Election of permanent judges**

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
  - a. The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
  - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") in accordance with article 12 bis of the Statute of that Tribunal;
  - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world;
  - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.
2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.
3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

### **Article 13 ter Election and appointment of *ad litem* judges**



1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
  - a. The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.
  - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.
  - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.
  - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.
  - e. The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.
2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

#### **Article 13 quater** Status of *ad litem* judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:
  - a. Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
  - b. Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;
  - c. Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal.
  - d. Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.
2. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall not:
  - a. be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;
  - b. have power:

- i. to adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
  - ii. to review an indictment pursuant to article 19 of the Statute;
  - iii. to consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute;
3. Notwithstanding, paragraphs 1 and 2 above, an ad litem judge who is serving as a reserve judge shall, during such time as he or she so serves:
  - a. Benefit from the same terms and conditions of service mutatis mutandis as the permanent judges of the International Tribunal;
  - b. Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
  - c. Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to and for that purpose to enjoy subject to paragraph 2 above, the same powers as permanent judges.
4. In the event that a reserve judge replaces a judge who is unable to continue sitting, he or she will, as of that time, benefit from the provisions of paragraph 1 above.

#### **Article 14 Officers and members of the Chambers**

1. The permanent judges of the International Tribunal shall elect a President from amongst their number.
2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.
3. After consultation with the permanent judges of the International Tribunal, the President shall assign four of the permanent judges elected or appointed in accordance with Article 13 bis of the Statute to the Appeals Chamber and nine to the Trial Chambers.
4. Two of the judges elected or appointed in accordance with article 12 of the Statute of the International Tribunal for Rwanda shall be assigned by the President of that Tribunal, in consultation with the President of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal.
5. After consultation with the permanent judges of the International Tribunal, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.
7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.

#### **Article 15 Rules of procedure and evidence**

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

#### **Article 16 The Prosecutor**

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for

serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she 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 shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

#### **Article 17**The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

#### **Article 18**Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.
4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

#### **Article 19**Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so

satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

#### **Article 20 Commencement and conduct of trial proceedings**

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

#### **Article 21 Rights of the accused**

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
  - a. to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - b. to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - c. to be tried without undue delay;
  - d. to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - e. to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - f. to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
  - g. not to be compelled to testify against himself or to confess guilt.

#### **Article 22 Protection of victims and witnesses**

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera

proceedings and the protection of the victim's identity.

### **Article 23 Judgement**

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

### **Article 24 Penalties**

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

### **Article 25 Appellate proceedings**

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
  - a. an error on a question of law invalidating the decision; or
  - b. an error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

### **Article 26 Review proceedings**

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

### **Article 27 Enforcement of sentences**

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

### **Article 28 Pardon or commutation of sentences**

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the

matter on the basis of the interests of justice and the general principles of law.

#### **Article 29 Co-operation and judicial assistance**

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
  - a. the identification and location of persons;
  - b. the taking of testimony and the production of evidence;
  - c. the service of documents;
  - d. the arrest or detention of persons;
  - e. the surrender or the transfer of the accused to the International Tribunal.

#### **Article 30 The status, privileges and immunities of the International Tribunal**

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

#### **Article 31 Seat of the International Tribunal**

The International Tribunal shall have its seat at The Hague.

#### **Article 32 Expenses of the International Tribunal**

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

#### **Article 33 Working languages**

The working languages of the International Tribunal shall be English and French.

#### **Article 34 Annual report**

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

## **D. Security Council Resolution 1534 (2004)**

[Source: Resolution 1534 (2004) Adopted by the Security Council at its 4935<sup>th</sup> meeting, on 26 March 2004; available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1534\(2004\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1534(2004))]

*The Security Council,*

[...]

*Recalling and reaffirming* in the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21) endorsing the ICTY's completion strategy and its resolution 1503 (2003) of 28 August 2003,

*Recalling* that resolution 1503 (2003) called on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies), and requested the Presidents and Prosecutors of the ICTY and ICTR, in their annual reports to the Council, to explain their plans to implement the Completion Strategies, [...]

*Acting* under Chapter VII of the Charter of the United Nations, [...]

1. *Calls* on the ICTY and ICTR Prosecutors to review the case load of the ICTY and ICTR respectively in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions, as well as the measures which will need to be taken to meet the Completion Strategies referred to in resolution 1503 (2003) and urges them to carry out this review as soon as possible and to include a progress report in the assessments to be provided to the Council under paragraph 6 of this resolution;
2. *Calls* on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003); [...]
3. *Recalls* that the strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular;
4. *Welcomes* in particular the efforts of the Office of the High Representative, ICTY, and the donor community to create a war crimes chamber in Sarajevo; encourages all parties to continue efforts to establish the chamber expeditiously; and encourages the donor community to provide sufficient financial support to ensure the success of domestic prosecutions in Bosnia and Herzegovina and in the region; [...]

## Discussion

1.
  - a. Were the various armed conflicts in the former Yugoslavia, even those of a purely internal character, a threat to peace (justifying measures under Chapter VII of the UN Charter)? Is the



establishment of a tribunal to prosecute violations of IHL an appropriate measure to stop that threat? Can we today say whether it contributed to the restoration of peace in the former Yugoslavia? Does that (the end result) actually matter? Doesn't the prosecution of (former) leaders make peace and reconciliation more difficult?

- b. Or are violations of IHL themselves threats to peace (justifying measures under Chapter VII of the UN Charter)? Even in non-international armed conflicts? Could the same be said of gross violations of human rights outside armed conflicts?

2.

- a. May the UN Security Council establish a tribunal? Is such a tribunal independent? Is it a "court established by law"? Does the creation of a tribunal competent to try acts committed before it was established itself violate the prohibition (in IHL and international human rights law) of retroactive penal legislation?
- b. How else than by a resolution of the Security Council could the ICTY have been established? What are the advantages and disadvantages of those other methods?

3.

- a. Does IHL provide for the possibility of prosecuting war criminals before an international tribunal? Is the prosecution of war criminals before an international tribunal and its concurrent jurisdiction as described in Art. 9 of the Statute compatible with the obligation of States under IHL to search for and prosecute war criminals? (GC I-IV, Arts 49/50/129/146 respectively)
- b. Under IHL and the Statute, does the ICTY relieve States of their obligation to search for and prosecute war criminals?

4.

- a. Are Arts 2-5 and 7 penal legislation or simply rules determining the ICTY's competence?
- b. Is Art. 3 retroactive penal legislation, at least when applied to non-international armed conflicts?

5. Is the UN Secretary-General right in stating that the principle of *nullum crimen sine lege* requires that the ICTY apply rules of IHL which are beyond any doubt part of customary law? (*Doc B., para. 34*)

Would an application of rules (such as those of Protocol I) accepted by all parties to a conflict violate that principle? From the point of view of the principle *nullum crimen sine lege*, is a prosecution for a violation of a rule of customary law more or less problematic than a prosecution for a violation of clearly applicable treaty law? Do you see a divergence here between civil law and common law traditions? Would an application of treaty law make the transfer of accused persons from third States not party to the respective treaty impossible?

6.

- a. Does Art. 2 cover all grave breaches of the Conventions? (GC I-IV, Arts 50/51/130/147 respectively)
- b. Can you imagine why Art. 2 does not refer to grave breaches of Protocol I? Is there any possible justification for this omission, taking into account that the former Yugoslavia and all its successor States are parties to Protocol I and that the parties to the conflicts have undertaken to respect large parts of it, regardless of the qualification of the conflict? [See Former Yugoslavia, Special Agreements Between the Parties to the Conflicts, and ICTY, *The Prosecutor v. Tadic* [Part A., para. 143]] How could the ICTY nevertheless try grave breaches of Protocol I?

7.

- a. Which elements in Art. 3 go beyond the grave breaches mentioned in Protocol I? Are any grave

- breaches of Protocol I not covered by Art. 3? (P I, Arts 11(4) and 85)
- b. Is an attack on an undefended building a grave breach of contemporary IHL? Is it always prohibited by IHL? Even if the building is uninhabited? Can an undefended building become a military objective? How would you formulate Art. 3(c) under contemporary IHL? (HR, Art. 25; GC IV, Arts 53 and 147; P I, Arts 52, 59 and 85(3)(d))
  - c. Is plunder of private property a grave breach of IHL? How would you formulate Art. 3(e) under contemporary IHL? (GC IV, Arts 33 and 147)
- 8.
- a. Can Art. 7(1) be inferred from the pertinent provisions of the Conventions and Protocol I? Does it correspond to a rule of customary IHL? Could it conceivably be a rule newly introduced by the ICTY Statute? (GC I-IV, Arts 49/50/129/146 respectively; P I, Arts 85(1) and 86(2))
  - b. Do you see any substantive difference between Art. 7(3) of the Statute and Art. 86(2) of Protocol I?
9. Is Article 10 compatible with IHL?
- 10.
- a. Which rights granted to the accused under Art. 21 go beyond those granted by IHL to suspected war criminals? Which guarantees of IHL go further? (GC I-IV, Arts 49/50/129/146 respectively; GC III, Arts 105-107; P I, Art. 75)
  - b. Has the ICRC a right to visit an accused? Must it be notified of sentences as a de facto substitute for the Protecting Power? (GC I and II, Arts 10(3); GC III, Arts 10(3), 107 and 126; GC IV, Arts 11(3), 30, 74 and 143; P I, Art. 5(4))
11. Do persons held under the authority of the ICTY (pending trial or after being sentenced) lose their status under IHL as protected civilians or prisoners of war if they had such status before being arrested in the former Yugoslavia? Are any of the Statute's provisions incompatible with such status and the treatment prescribed by IHL for holders of it? Is it lawful to deport a civilian arrested in the former Yugoslavia to The Hague to stand trial? (GC III, Art. 85; GC IV, Art. 49; P I, Art. 44(2))