

inalienable right and an integral part of fundamental human rights, which must be realized through international cooperation, respect for fundamental human rights, the establishment of a monitoring mechanism and the creation of essential international conditions for the realization of such right;

18. *Recognize* that the main obstacles to the realization of the right to development lie at the international macroeconomic level, as reflected in the widening gap between the North and the South, the rich and the poor;

19. *Affirm* that poverty is one of the major obstacles hindering the full enjoyment of human rights;

20. *Affirm also* the need to develop the right of humankind regarding a clean, safe and healthy environment;

21. *Note* that terrorism, in all its forms and manifestations, as distinguished from the legitimate struggle of peoples under colonial or alien domination and foreign occupation, has emerged as one of the most dangerous threats to the enjoyment of human rights and democracy, threatening the territorial integrity and security of States and destabilizing legitimately constituted governments, and that it must be unequivocally condemned by the international community;

22. *Reaffirm* their strong commitment to the promotion and protection of the rights of women through the guarantee of equal participation in the political, social, economic and cultural concerns of society, and the eradication of all forms of discrimination and of gender-based violence against women;

23. *Recognize* the rights of the child to enjoy special protection and to be afforded the opportunities and facilities to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity;

24. *Welcome* the important role played by national institutions in the genuine and constructive promotion of human rights, and believe that the conceptualization and

eventual establishment of such institutions are best left for the States to decide;

25. *Acknowledge* the importance of cooperation and dialogue between governments and non-governmental organizations on the basis of shared values as well as mutual respect and understanding in the promotion of human rights, and encourage the non-governmental organizations in consultative status with the Economic and Social Council to contribute positively to this process in accordance with Council resolution 1296 (XLIV);

26. *Reiterate* the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia;

27. *Reiterate further* the need to explore ways to generate international cooperation and financial support for education and training in the field of human rights at the national level and for the establishment of national infrastructures to promote and protect human rights if requested by States;

28. *Emphasize* the necessity to rationalize the United Nations human rights mechanism in order to enhance its effectiveness and efficiency and the need to ensure avoidance of the duplication of work that exists between the treaty bodies, the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Commission on Human Rights, as well as the need to avoid the multiplicity of parallel mechanisms;

29. *Stress* the importance of strengthening the United Nations Centre for Human Rights with the necessary resources to enable it to provide a wide range of advisory services and technical assistance programmes in the promotion of human rights to requesting States in a timely and effective manner, as well as to enable it to finance adequately other activities in the field of human rights authorized by competent bodies;

30. *Call for* increased representation of the developing countries in the Centre for Human Rights.»

## The Establishment of the International Tribunal on War Crimes

by Morten Bergsmo, Oslo

### Background

The establishment of the International Tribunal has been described as an "exceptional step needed to deal with exceptional circumstances".<sup>1</sup> The Tribunal has come into existence through two Security Council resolutions [Nos 808 and 827 (1993), full text in 14 HRLJ 197 f. (1993)] based on Chapter VII of the United Nations Charter as a measure for the restoration and maintenance of international peace and security. The legal foundation of the Tribunal is thus the United Nations Charter as interpreted by the Security Council.

The first of the two Security Council resolutions is 808 (1993) of 22 February 1993, which decided in principle "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".<sup>2</sup> The resolution asked the Secretary-General to submit within sixty days a report on all aspects of the establishment of the Tribunal, including specific proposals and options for "the effective and expeditious implementation" of the resolution.

Resolution 808 (1993) was adopted unanimously, with China supporting "the thrust" of the resolution.<sup>3</sup> It was described by ambassadors as "a momentous decision".<sup>4</sup> "For the first time in history, the United Nations will be setting up an international criminal jurisdiction".<sup>5</sup> In fact,

resolution 808 (1993) represents a natural continuation of the work of the Security Council to curb serious violations of international humanitarian law in the former Yugoslavia as expressed in resolutions 764 (1992), 771 (1992) and 780 (1992).

When resolution 808 (1993) was passed, three studies on the international adjudication of violations of international humanitarian law in the former Yugoslavia had already been submitted to the Secretary-General, by France,<sup>6</sup> Italy<sup>7</sup> and Sweden,<sup>8</sup> the last on behalf of the Chairman-in-Office of the Conference on Security and Co-operation in Europe. Further to these comprehensive studies, the Secretary-General received formal and informal suggestions and comments from twenty eight Member States of the United

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<sup>1</sup> Sir David Hannay, Permanent Representative of the United Kingdom to the United Nations, during the Security Council debate on resolution 827, 25 May 1993, cf. S/PV.3217, p. 18.

<sup>2</sup> Cf. operative paragraph 1 = 14 HRLJ 197 (1993).

<sup>3</sup> Cf. S/PV.3175, p. 7.

<sup>4</sup> Mr. Terence Christopher O'Brien, Permanent Representative of New Zealand to the United Nations, *ibid.*, p. 26.

<sup>5</sup> Mr. Jean-Bernard Mérimée, Permanent Representative of France to the United Nations, *ibid.*, p. 9.

<sup>6</sup> UN document S/25266, 10 February 1993.

<sup>7</sup> UN document S/25300, 17 February 1993.

<sup>8</sup> UN document S/25307, 18 February 1993.

Nations, from Switzerland, from the International Committee of the Red Cross, and from nine non-governmental organizations, as well as from "international meetings and individual experts in relevant fields".<sup>9</sup> Thus, although resolution 808 (1993) did not provide explicitly for formal hearings as part of the process to establish the *ad hoc* Tribunal, many governments and interested non-governmental organizations contributed to the setting-up of the Tribunal.

On 3 May 1993, the Secretary-General submitted the report requested in resolution 808 (1993) to the Security Council, with the draft statute of the Tribunal annexed thereto.<sup>10</sup> In the preparation of his report, the Secretary-General had drawn on a Secretariat team headed by the Legal Counsel, Mr. Carl-August Fleischhauer. The report examines, *inter alia*: the legal basis for the establishment of the Tribunal; the Tribunal's competence *ratione materiae*, *personae*, *loci* and *temporis*; its structure and conduct of work; and organizational matters concerning, e.g., working languages, finances and the Tribunal's seat. The formulations of the draft statute are taken from provisions of existing international instruments, the submissions from States and non-governmental organizations, and texts previously prepared by the United Nations Committee on International Criminal Jurisdiction, the International Law Commission and the International Law Association.

#### *Unanimous, but ad hoc*

The Security Council, "acting under Chapter VII of the Charter of the United Nations",<sup>11</sup> unanimously approved the Secretary-General's report in resolution 827 (1993) of 25 May 1993, and decided to "establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 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".<sup>12</sup> The resolution 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".<sup>13</sup>

Although resolution 827 (1993) was adopted unanimously, it is interesting to note some of the statements made during the Security Council consultation that followed the vote on the resolution. Notably, the Chinese representative stated that China's vote in favour of the resolution "should not be construed as our endorsement of the legal approach involved", that "an international tribunal should be established by concluding a treaty so as to provide a solid legal foundation for it and ensure its effective functioning", and that to adopt the statute by resolution "is not in compliance with the principle of State judicial sovereignty".<sup>14</sup> For his part, the Brazilian representative observed, concerning this report of the Secretary-General, that it "posed intricate and not unimportant legal difficulties, many of which were not resolved to our satisfaction", and that its vote in favour "should not be construed as an overall endorsement of legal formulas involved in the foundation or in the Statute of the International Tribunal".<sup>15</sup>

#### *Budget*

Further to the report of 3 May 1993, the Secretary-General submitted an addendum on the draft budget of the Tribunal, dated 19 May 1993,<sup>16</sup> in which it is preliminarily estimated that the costs of the Tribunal for the first full year of operation would be around US\$ 31.2 million. This

estimate covers, *inter alia*, a staff of 373 persons. On 26 May 1993, the Secretary-General requested that the financing of the Tribunal and the election of judges be included in the agenda of the 47th session of the General Assembly (15 Sept. 1992 - 20 Sept. 1993),<sup>17</sup> as Article 32 of the Statute of the Tribunal says that its expenses "shall be borne by the regular budget of the United Nations in accordance with Article 17<sup>18</sup> of the Charter of the United Nations". On 14 September 1993, in resolution A/RES/47/235,<sup>19</sup> the General Assembly requested the Secretary-General, based on a report from the Advisory Committee on Administrative and Budgetary Questions of 22 July 1993,<sup>20</sup> to submit "detailed cost estimates for the International Tribunal, separate from the proposed programme budget for the biennium 1994-1995"<sup>21</sup> to the General Assembly during the present 48th session (21 Sept. 1993 - ), which will have to finally decide on the budget.

#### *Judges and Prosecutor*

On 20 August 1993, the Security Council unanimously adopted resolution 857 (1993) which selected twenty three candidates to serve as judges to the Tribunal from the nominations submitted by the Secretary-General to the Council. By 17 September 1993, the Assembly had managed, in decision A/DEC/47/328, to elect<sup>22</sup> the eleven

<sup>9</sup> The Secretary-General, in UN document S/25704, p. 5.

<sup>10</sup> UN document S/25704, full text in 14 HRLJ 198-214 (1993).

<sup>11</sup> Cf. final preambular paragraph of resolution 827 (1993) = 14 HRLJ 198 (1993).

<sup>12</sup> *Ibid.*, operative paragraph 2 = 14 HRLJ 198 (1993).

<sup>13</sup> *Ibid.*, operative paragraph 4 = 14 HRLJ 198 (1993).

<sup>14</sup> Cf. UN document S/PV.3217, p. 33.

<sup>15</sup> *Ibid.*, pp. 35-36.

<sup>16</sup> UN document S/25704/Add.1.

<sup>17</sup> UN document A/47/955.

<sup>18</sup> Article 17 states in paragraph (1) that the General Assembly shall consider and approve the budget of the Organization, and in paragraph (2) that the General Assembly apportions the expenses of the Organization among its Members, *see* 14 HRLJ 214 (1993).

<sup>19</sup> Resolution A/RES/47/235 deals in part with the powers of the General Assembly under Article 17 of the Charter; cf. operative paragraph 3 of the resolution, wherein the Assembly "expresses concern that advice given to the Security Council by the Secretariat on the nature of the financing of the International Tribunal did not respect the role of the General Assembly as set out in Article 17 of the Charter". The statement should be read in light of a note from the Secretariat to the General Assembly dated 20 August 1993 (A/47/1002), which, in paragraph 12, states that "[i]n the view of the Secretary-General, within the context of preparing a comprehensive Statute of the International Tribunal to be implemented effectively and expeditiously, there was no legal bar to the Security Council reaching its own conclusions as to the appropriate financing of the International Tribunal and including a provision on the matter in the Statute which it adopted", and that "such conclusions are without prejudice to the authority of the General Assembly". Resolution A/RES/47/235 could be seen against the background of the Security Council's establishment of the legal foundation of the Tribunal through two resolutions, with no direct participation by the General Assembly.

<sup>20</sup> Cf. UN document A/47/980.

<sup>21</sup> Cf. General Assembly resolution G/RES/47/235, operative paragraph 6.

<sup>22</sup> The list of candidates was submitted to the General Assembly by the Secretary-General on 26 August 1993, cf. UN document A/47/1005. One candidate, Mr. Hans Corell from Sweden, withdrew his candidacy for judge before the vote in the General Assembly. The curriculum vitae of the candidates were submitted to the General Assembly on 1 September 1993, cf. UN document A/47/1006.

judges from among the candidates identified by resolution 857 (1993).

The judges are:

Mr. Georges Michel Abi-Saab (Egypt),  
Mr. Antonio Cassese (Italy),  
Mr. Jules Deschenes (Canada),  
Mr. Adolphus Godwin Karibi-Whyte (Nigeria),  
Mr. Germain Le Foyer de Costil (France),  
Mr. Haopei Li (China),  
Ms. Gabrielle Kirk McDonald (USA),  
Ms. Elizabeth Odio Benito (Costa Rica),  
Mr. Rustam Sidhwa (Pakistan),  
Sir Ninian Stephen (Australia) and  
Mr. Lal Chand Vohrah (Malaysia).

It proved difficult for the Security Council to appoint the Prosecutor. On 21 October 1993, in resolution 877 (1993), the Council agreed on the third candidate nominated by the Secretary-General, Mr. Ramon Escovar-Salom of Venezuela. Neither Mr. M. Cherif Bassiouni (Egypt) nor Mr. Solijehangir Sorabjee (India) had been able to win the endorsement of all Security Council members.

#### First session

The inaugural meeting of the Tribunal was held on 17 November 1993 in the Peace Palace of The Hague in the

presence of, *inter alia*, the Prosecutor, the President of the Security Council, and the Legal Counsel, Mr. Fleischhauer. The latter, speaking on behalf of the Secretary-General, recalled that the difficulties faced by the Tribunal were not to be underestimated and said that "the States concerned whose co-operation will be essential to the gathering of evidence, the hearing of witnesses and the arrest and surrender of the accused have not so far been forthcoming in providing such co-operation. The Tribunal is, however, endowed with powers which will allow it through the enforcement mechanism available to the Security Council under Chapter VII of the Charter to enforce its decisions".<sup>23</sup> It remains to be seen how the enforcement mechanism of the Council may be used.

The first session of the Tribunal was held from 17 November through 1 December 1993. Mr. Antonio Cassese was elected President of the Tribunal. The second session is scheduled for 17 January through 11 February 1994, during which the Tribunal plans to conclude its work on rules of procedure and evidence. The third and fourth sessions are expected to take place from 25 April through 29 July and from 19 September through 4 November 1994 respectively.

<sup>23</sup> UN Press release, 17 November 1993, p. 3.

### Romania joined the Council of Europe

On 7 October 1993 Romania became the 32nd Member State of the Council of Europe. During the admission ceremony in Vienna, the day before the Council of Europe Summit, Foreign Minister Teodor Viorel Melescanu signed the European Convention on Human Rights. At a press conference the Minister declared that he expects Parliament to ratify the Convention quite soon. He expressed the view that the acceptance of the right of individual petition and of the compulsory jurisdiction of the EurCourtHR (Arts. 25 and 46 ECHR) are within the aspirations of the present Romanian society.

The nine new Member States of the Council of Europe are: Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, the Czech Republic, Slovakia and Romania, see A. Drzemczewski, "The Council of Europe's co-operation and assistance programmes with Central and Eastern European Countries in the human rights field", 14 HRLJ 229-248 (1993) at p. 247.

The Vienna Council of Europe Summit (8/9 October) decided to establish a single full-time European Court of Human Rights (see below the Vienna Declaration). The respective Additional Protocol

No. 11 to the ECHR will be signed at the next regular meeting of the Committee of Ministers (of foreign affairs) scheduled for early May 1994 in Strasbourg. The original idea was to have the Protocol signed at the Vienna Summit. Failure in this regard has been attributed to technical problems and a "lack of time". The governments which have upheld the process, effectively causing the problem of time, are those of the United Kingdom, Italy and Turkey.

The Presidents of the Court and Commission, Mr. Rolv Ryssdal (Norwegian) and Mr. Carl Aage Nørgaard (Dane) participated officially in the Vienna Council of Europe Summit, President Ryssdal, in a written statement, urged the Heads of State and Government to establish a full-time single Court: "Opinions have been divided on the question how to restructure the supervisory machinery of the Convention, but I am convinced that the present difficulties as well as foreseeable developments require the creation of a single, full-time court, which, I hope, will be set up in the reasonably near future."

The Parliamentary Assembly will discuss the matter during its next session. The issue is on the draft agenda of 24 January 1994.

### Summit Meeting of the Heads of State and Government of the 32 Member States of the Council of Europe

8/9 October 1993

#### Vienna Declaration of the Heads of State and Government of the Member States of the Council of Europe on the Reform of the Control Mechanism of the ECHR, on National Minorities, and on a Plan of Action against Racism

(full text)

«We, Heads of State and Government of the member States of the Council of Europe, meeting for the first time in our Organisation's history at this Vienna summit conference, solemnly declare the following:

The end of the division of Europe offers an historic opportunity to consolidate peace and stability on the continent. All our countries are committed to pluralist and parliamentary democracy, the indivisibility and universality of human rights, the rule of law and a common cultural heritage enriched by its diversity. Europe can thus become a vast area of democratic security.

This Europe is a source of immense hope which must in no event be destroyed by territorial ambitions, the resurgence of aggressive nationalism, the perpetuation of spheres of influence, intolerance or totalitarian ideologies.

We condemn all such aberrations. They are plunging peoples of former Yugoslavia into hatred and war and threatening other regions. We call upon the leaders of these peoples to put an end to their conflicts. We invite these peoples to join us in constructing and consolidating the new Europe.

We express our awareness that the protection of national minorities is an essential element of stability and democratic security in our continent.