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MEMORANDUM TO THE INTERNATIONAL LAW COMMISSION: ESTABLISHING A JUST, FAIR AND EFFECTIVE PERMANENT INTERNATIONAL CRIMINAL TRIBUNAL

> **"Before I discuss the particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate. . . . We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice."**
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> **Robert H. Jackson, Chief Counsel for the Prosecution in the Nuremberg Trials, opening statement, 20 November 1945.**[1]

I. INTRODUCTION AND BASIC PRINCIPLES

A. INTRODUCTION

As part of its work to end impunity for those responsible for extrajudicial executions, "disappearances", torture and other gross human rights violations within its mandate by ensuring that they are brought to justice, Amnesty International supports the establishment of a permanent international criminal court. Such a court, however, must satisfy international minimum human rights standards of fairness and be effective in preventing impunity for those responsible for gross violations of human rights. Nevertheless, it remains the primary responsibility of states to bring to justice those responsible for human rights violations and an international criminal court should be a last resort when states cannot or will not perform this responsibility themselves.

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[1] Quoted in T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992), p. 168.

Amnesty International campaigned to ensure that the ad hoc tribunal which the United Nations (UN) Security Council decided in Resolution 808 of 22 February 1993 should be established to bring to justice those responsible for serious violations of humanitarian law in the former Yugoslavia since 1991 was just, fair and effective and included human rights violations and abuses.[2] When the UN Security Council decided in Resolution 827 of 25 May 1993 to establish the ad hoc International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ad hoc Tribunal) in the form recommended by the UN Secretary-General,[3] Amnesty International supported it on the understanding that it was only the first step to establishing a permanent, international criminal court competent to try cases involving gross violations of humanitarian and human rights law.[4]

The draft Statute of the International Criminal Tribunal prepared by the Working Group of the International Law Commission at its 48th session is an important step in this direction, but it needs to be strengthened to ensure that it is a just, fair and effective institution. Although the draft Statute has a number of stronger protections than the Statute of the ad hoc Tribunal concerning the rights of defendants in pre-trial detention, at trial and on appeal, there are still major gaps which need to be addressed to ensure that the rights of defendants are adequately protected. The international community must ensure that a permanent international criminal tribunal contains stronger human rights guarantees, is effective and achieves the widest possible acceptance among the 184 member states of the UN.

Unfortunately, however, there are serious grounds for concern that the current proposal for an international criminal tribunal being considered by the UN International Law Commission will not meet these requirements. The cautious and complex system of consensual jurisdiction by states in the draft Statute is likely to limit severely the effectiveness of the International Criminal Tribunal. This is counter-balanced by the express provision that the Security Council can refer cases (and, possibly, situations) to the Tribunal - apparently even if a state has not consented to jurisdiction. It is also a matter of concern that the Statute fails to specify the defences to crimes under international law within its jurisdiction and fails to state which defences are impermissible.

The following memorandum identifies some of the positive aspects of the draft Statute which Amnesty International believes should be retained as the International Law Commission revises the draft and it suggests several ways in which it could be strengthened to make it a just, fair and effective institution more likely to satisfy the high standards set by Justice Jackson than did the International Military Tribunal.

B. BASIC PRINCIPLES

THE STRUCTURE OF THE TRIBUNAL

The Tribunal should be closely linked to the United Nations.

The Tribunal, including a legal aid program or public defender's office, must have adequate resources.

The Tribunal should have the flexibility to conduct trials in places other than the seat of the Tribunal, subject to safeguards for defendants.

The Tribunal should have jurisdiction over a broad enough range of crimes to cover all gross violations of international human rights and humanitarian law and those crimes should be defined consistently with international human rights standards.

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[2] Amnesty International issued two papers making recommendations on the essential elements of an international criminal court which would try human rights and humanitarian law violations in former Yugoslavia, *"Memorandum to the United Nations: The question of justice and fairness in the international war crimes tribunal for the former Yugoslavia"* (AI Index: EUR 48/02/93), aimed at governments and lawyers, and *"From Nuremberg to the Balkans: Seeking justice and fairness in the international war crimes tribunal for the former Yugoslavia"* (AI Index: AI EUR 48/01/93), aimed at the general public.

[3] Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704.

[4] Amnesty International issued a short report making a preliminary assessment of the Statute of the ad hoc Tribunal, *Moving forward to set up the war crimes tribunal for the former Yugoslavia* (AI Index: EUR 48/03/93).

All states submitting to the jurisdiction of the Tribunal should agree that the jurisdiction will include a common core of crimes.

The Statute of the Tribunal should permit the Security Council to submit situations involving threats to international peace and security to the Prosecutor, but not individual cases.

The Statute of the Tribunal should ensure that the independence and impartiality of its judiciary is guaranteed, should be consistent with the UN Basic Principles on the Independence of the Judiciary and should ensure that judges are selected who have experience in international humanitarian law and human rights law.

The Statute of the Tribunal should ensure that prosecutions are carried out by an independent and impartial body with adequate powers and that the prosecution body acts consistently with international human rights standards, particularly the UN Guidelines on the Role of Prosecutors.

The Prosecutor should be able to initiate investigations in any state where the Tribunal has jurisdiction over the offence.

The Statute of the Tribunal should guarantee the independence of the Prosecutor, spell out the Prosecutor's duties and ensure that the Prosecutor has adequate powers to be effective.

Review of a decision not to prosecute must not impair the independence and impartiality of the Prosecutor.

The defendant should have the right to challenge the sufficiency of the indictment and to challenge the jurisdiction of the Tribunal before trial.

THE PROTECTION OF THE RIGHTS OF DEFENDANTS

The Statute of the Tribunal should declare that all defendants are entitled to a fair and prompt trial before an independent and impartial tribunal affording all the internationally recognized safeguards at all stages of the proceedings - from the moment of arrest until exhaustion of all legal remedies - and incorporate these standards expressly or by reference.

The Statute of the Tribunal should fully protect the internationally recognized rights of suspects when they are questioned by national authorities and before indictment.

The Statute of the Tribunal should expressly include or incorporate by reference all relevant internationally recognized rights applicable to pre-trial detainees.

The Statute of the Tribunal should expressly include or incorporate by reference all relevant internationally recognized rights applicable to defendants preparing for trial or at trial.

There should be no trials *in absentia*.

The Statute of the Tribunal must exclude the death penalty and penalties must be clearly spelled out.

The full right to appeal to a higher tribunal for review of a conviction and sentence must be assured.

The Statute of the Tribunal must ensure that international minimum safeguards apply to the custody of convicted defendants.

Pardons and commutations of sentences are an international responsibility.

PROTECTION OF THE RIGHTS OF VICTIMS AND WITNESSES

The views and concerns of victims should be presented and considered at appropriate stages of the proceedings, without prejudice to defendants.

The Statute of the Tribunal should protect victims, their families and witnesses from reprisals and unnecessary anguish.

The Statute of the Tribunal should take into account the special circumstances of cases involving violence against women.

The international community should ensure that victims and their families should be able to obtain restitution, compensation and rehabilitation, either from the Tribunal or from an other body.

II. THE STRUCTURE OF THE TRIBUNAL

A. CREATION OF THE TRIBUNAL

1. Relationship to the United Nations

The Tribunal should be closely linked to the United Nations.

The draft Statute suggests that the International Criminal Tribunal could either be a judicial organ of the United Nations (UN) or could be a body established by a treaty and linked to the UN in some way. It leaves this for the General Assembly to decide (Article 2).

In the long run, it would be best if the International Criminal Tribunal were established as an independent judicial organ of the UN by amendment of the UN Charter, with the same degree of independence possessed by the International Court of Justice, rather than a subsidiary organ of the Security Council, as is the ad hoc Tribunal, or of the General Assembly. One of the advantages of establishing the International Criminal Tribunal as a judicial organ of the UN through amendment of the UN Charter would be that under Article 108 of the UN Charter any amendment is binding on all members of the UN. It would also enhance its permanence, legitimacy, authority, universality and acceptance in the same way that such status has done this for the International Court of Justice over the past half century. Nevertheless, amendment of the UN Charter, is likely to be a lengthy and difficult process. Article 108 requires approval of any amendment by two-thirds of the 184 members, including the five permanent members of the Security Council.

Close links with the UN will be essential to the success of the International Criminal Tribunal. The Security Council will have the right to submit cases, and possibly situations, to the Tribunal under Articles 25 and 29 of the draft Statute. Under Article 27 of the draft Statute no one may be charged with a crime of or directly related to aggression unless the Security Council has first determined that the state concerned has committed the act of aggression which is the subject of the charge. Much of the Tribunal's work in bringing to justice those responsible for breaches of humanitarian law will be directly related to Security Council peace-keeping and action to protect international peace and security.[5] The International Criminal Tribunal would benefit from the universal nature of the UN, especially if the judges and staff are selected from all UN member states, not just states parties. If the International Law Commission decides not to recommend amendment of the UN Charter at this time, as a first step in this direction it should consider establishing the International Criminal Tribunal by treaty, with the UN providing the Secretariat and the budget as it does for certain independent human rights treaty bodies such as the Human Rights Committee.

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[5] Indeed, in some cases, members of UN peace-keeping forces have been charged with breaches of humanitarian law or other crimes within the jurisdiction of the International Criminal Tribunal. Consideration should be given to expanding the jurisdiction over these crimes to include defendants who are UN peace-keeping personnel.

Establishment of the International Criminal Tribunal as a subsidiary organ, either of the Security Council or of the General Assembly could certainly be accomplished more quickly than by amendment of the UN Charter or by a separate treaty, even if ratification by only a small number of states were required for it to enter into force. If, like the ad hoc Tribunal, it were established by the Security Council its compulsory jurisdiction would probably be limited to situations where the Security Council was acting pursuant to Chapter VII. Both the Security Council and the General Assembly are political organs and establishment by these bodies might lead to questions about the independence of the International Criminal Tribunal. If this route were to be adopted, it should only be as a temporary first step pending establishment as a permanent independent judicial organ of the UN by amendment of the UN Charter.

2. Resources

The Tribunal, including a legal aid program or public defender's office, must have adequate resources.

The draft Statute does not indicate how the International Criminal Tribunal will be financed if it is not to be an independent judicial organ of the UN. If it is to be established by treaty and linked to the UN, then the Secretariat should be provided by the UN and the budget, like that of the Human Rights Committee, should be met by the UN as determined by the General Assembly, rather than by the states parties to the Statute of the Tribunal. This method of financing will make it more likely that the institution will be adequately funded than if financing were dependent on states parties. Indeed, the problems of relying on states parties for the funding of the Committee against Torture under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture) has led to calls to amend that treaty to provide for funding from the general budget of the UN. Resources of the International Criminal Tribunal should be adequate to provide an effective legal aid program or public defender's office (see discussion below in Section III.B.1).

3. Seat of the Tribunal and place of trial

The Tribunal should have the flexibility to conduct trials in places other than the seat of the Tribunal, subject to safeguards for defendants.

The draft Statute gives the Court, like Rule 4 of the Rules of Procedure and Evidence of the ad hoc Tribunal,[6] flexibility to conduct trials in places other than the seat of the International Criminal Tribunal (Article 36 (2)) and it has safeguards for defendants which are more explicit than those in the Rules of Procedure and Evidence of the ad hoc Tribunal. In some cases, trials should be conducted near the place where the crime occurred for ease of access by victims, their families and witnesses. Trials taking place near the location of the crime would ensure the powerful symbolic presence of the International Criminal Tribunal and publicity could help to deter crime. Nevertheless, the Court will have to balance these considerations with the right of the accused to a fair trial. The Commentary to this article, recognizing that "the proximity of the trial to the place where the type of crimes referred to in the Statute were allegedly committed may cast a political shadow over the judicial proceedings, thus raising questions concerning respect for the defendant's right to a fair and impartial trial, or may create unacceptable security risks for the defendant, the witnesses, the judges and the other staff of the Tribunal", states that trials may take place in states other than the seat of the Tribunal "only when it is both practicable and consistent with the interest of justice to do so". This provision, with the Commentary, should be retained.

B. COMPETENCE OF THE TRIBUNAL

1. Crimes within the jurisdiction of the Tribunal

The Tribunal should have jurisdiction over a broad enough range of crimes to cover all gross violations of international human rights and humanitarian law and those crimes should be defined consistently with international human rights standards.

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[6] Rules of Procedure and Evidence (Adopted on 11 February 1994), UN Doc. IT/32.

Amnesty International believes that the International Criminal Tribunal should have jurisdiction over a broad range of crimes under international law, including war crimes and other violations of the laws or customs of war during both international and internal armed conflict, as well as crimes against humanity - whether committed in time of armed conflict or peace, including genocide, and, in certain circumstances, the systematic practice of extrajudicial executions, "disappearances" and torture. Unfortunately, however, the Statute severely limits the crimes which could fall within the jurisdiction of the Tribunal. On the other hand, Amnesty International welcomes the decision by the International Law Commission to consider the draft Statute separately from the draft Code of Crimes against the Peace and Security of Mankind.[7]

The draft Statute provides for jurisdiction in Article 22 over specified crimes defined in treaties and in Article 26 for certain crimes under international customary law. Article 22 lists crimes as defined in Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide, grave breaches of the four Geneva Conventions of August 12, 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), *apartheid* and crimes defined by various treaties designed to suppress hijacking or terrorist offences. Regrettably, Article 22 does not include breaches of Common Article 3 of the Geneva Conventions or Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) or torture as defined in the UN Convention against Torture. Most of these crimes are defined with sufficient precision in the treaties, relevant jurisprudence and interpretation by treaty monitoring bodies to give rise to individual criminal responsibility, although defences and penalties will have to be spelled out in the Statute (see discussion below in Section III.B.1).

It would be unthinkable for any permanent international criminal court to omit these crimes under international law. Failure to include crimes in Common Article 3 or Protocol II would mean that perpetrators of breaches of humanitarian law occurring in internal armed conflict - the most common form of armed conflict today - might go unpunished. Common Article 3 prohibits:

> "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
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> (b) taking of hostages;
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> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
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> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Among the crimes prohibited during internal armed conflict by Protocol II, are starvation of civilians as a method of combat (Article 14); making civilians "the object of attack" (Article 13 (2)); "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population" (Article 13 (2)); "acts of terrorism" (Article 4 (2) (d)); hostage taking (Article 4 (2)(c)); and unlawful deportation or transfer of civilians (Article 17).

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[7] Although the draft Code includes exceptionally serious war crimes, systematic or mass violations of human rights and genocide, it has been criticized by states and others on a number of grounds, including defining these crimes vaguely and inconsistently with existing treaties, failing to specify the mental state necessary for the imposition of criminal liability, failing to define defences adequately and failing to specify appropriate penalties. In addition, the draft Code fails to provide adequate guarantees of the right to a fair trial. It will be essential to ensure that these weaknesses in the draft Code are remedied.

Under Article 26 (2) (a), the Tribunal would have jurisdiction over crimes under international customary law which gave rise to individual criminal responsibility.[8] Although these are not listed in the draft Statute, the Commentary suggests that this would include breaches of Hague Convention IV, genocide as defined in the Genocide Convention when involving non-parties and war crimes, crimes against peace and crimes against humanity. The Commentary fails to state whether this would include crimes against humanity in peacetime and crimes against humanity such as the systematic practice of extrajudicial executions, "disappearances" or torture.

The Statute should make clear that these crimes are included in the jurisdiction of the Tribunal. It is now generally accepted that crimes against humanity in peacetime which are not directly connected with armed conflict or preparation for armed conflict violate customary international law. Although the International Military Tribunal interpreted its jurisdiction under the Charter of the International Military Tribunal (Nuremberg Charter) of 8 August 1945, not to extend to crimes against humanity unless they were committed in execution of or in connection with a crime against peace or a war crime, nothing in the judgment of that court should be read to suggest that crimes against humanity in other circumstances were not prohibited under international law. Indeed, only months after the Nuremberg Charter was signed, Allied Control Council Law No. 10 (20 December 1945), which formed the jurisdictional basis for war crimes trials in Germany after the International Military Tribunal, defined crimes against humanity without the limitation imposed by the Nuremberg Charter:

> "Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts *committed against any civilian population* [emphasis added], or persecutions on political, racial or religious grounds. . . ."

Some of the Axis defendants reportedly were convicted under this provision for crimes against humanity committed before the Second World War which were not committed in execution of or in connection with a crime against peace or a war crime.

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[8] Under Article 26 (2)(b) the Tribunal would also have jurisdiction over certain crimes under national law, such as drug-related crimes, which give effect to provisions of multilateral treaties.

Although the UN General Assembly in 1946 retained the Nuremberg Charter formulation of crimes against humanity in Resolution of 3 (I) of 13 February 1946 and Resolution 95 (1) of 11 December 1946, the 1954 version of the International Law Commission draft Code of Offences against the Peace and Security of Mankind (which largely followed the Nuremberg definition of crimes against humanity in defining "inhuman acts by the authorities of a State or by private individuals against any civilian population") did not require that the acts had to be committed in connection with war crimes or crimes against peace.[9] In addition, the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, both of which are considered to proscribe crimes against humanity, apply to acts committed during times of peace as well as during armed conflict, and Article 1 (a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity states that the treaty applies to crimes against humanity "whether committed in time of war or in time of peace". None of these three treaties require that the crime against humanity be committed in connection with a war crime or a crime against peace. Although the jurisdiction of the ad hoc Tribunal over crimes against humanity is limited to crimes committed during the conflict in former Yugoslavia, the Commentary to the Statute of that court states that these crimes "are prohibited regardless of whether they are committed in an armed conflict". (UN Doc. S/25704, para. 47).

Under certain circumstances the systematic practice of extrajudicial executions, "disappearances" and torture constitute crimes against humanity.[10] Extrajudicial executions are unlawful and deliberate killings, carried out by order of a government or with its acquiescence. Article 6 (c) of the Nuremberg Charter defines crimes against humanity as including "murder" and "extermination . . . committed against any civilian population". The Commentary to Article 5 of the ad hoc Tribunal states that "[c]rimes against humanity refer to 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".

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[9] International Law Commission, Draft Code of Offences against the Peace and Security of Mankind, 28 July 1954, UN Doc. A/2673 (1954) (reproduced in Report of the International Law Commission on the work of its thirty-seventh session, 6 May - 26 July 1985, para. 18). Similarly, the International Law Commission's definition of "systematic or mass violations of human rights" in Article 21 of its draft Code of Crimes against the Peace and Security of Mankind does not require that these violations be committed in time of war or in connection with a war crime or crime against peace. Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991, UN Doc. A/46/10, para. 176 (page 265).

[10] Amnesty International, *"Disappearances" and Political Killings: Human Rights Crisis of the 1990s - A Manual for Action* (AI Index: ACT 33/01/94), pp. 103-104.

In a resolution adopted on 17 November 1983, the General Assembly of the Organization of American States (OAS) declared that "the practice of the forced disappearance of persons in the Americas . . . constitutes a crime against humanity".[11] On 10 June 1994 the OAS General Assembly adopted the Inter-American Convention on the Forced Disappearances of Persons. The Convention reaffirms that "the systematic practice of the forced disappearance of persons constitutes a crime against humanity". In 1984 the Parliamentary Assembly of the Council of Europe called for the adoption of a UN declaration recognizing enforced "disappearances" as a crime against humanity.[12] The Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly in Resolution 47/133 on 18 December 1992 states that "the systematic practice of such acts is of the nature of a crime against humanity".

Similarly, the systematic practice of torture, a crime under international law, falls within the definition of a crime against humanity. Article 6 (c) of the Nuremberg Charter defines crimes against humanity as including "inhumane acts committed against a civilian population" and Article 5 of the ad hoc Tribunal includes the crime of torture in its definition of crimes against humanity. In 1991 the International Law Commission stated that it "took the view that the particularly odious character of this crime, as well as the numerous examples unfortunately furnished by international realities in recent decades, fully warranted including torture among crimes against the peace and security of mankind when it was a systematic or mass practice".[13]

2. Consent by states to jurisdiction

All states submitting to the jurisdiction of the Tribunal should agree that the jurisdiction will include a common core of crimes.

Generally, states will be able to participate in the Tribunal in two stages, similar to state participation in the International Court of Justice. They may become parties to the Statute, accepting only limited duties of cooperation, without submitting to the jurisdiction of the Tribunal with respect to any particular offences. States parties to the Statute may also submit to the jurisdiction over specific offences defined in special treaties between states parties to the Statute or in unilateral instruments of individual states (who would not necessarily have to be parties to the Statute). Thus, there is no guarantee that the Tribunal will have a common core of crimes within its jurisdiction.

Under the draft Statute, some of these forms of consensual jurisdiction would require the consent of the state of the suspect's nationality if the suspect were in that state or the state where the act was alleged to have occurred if the suspect were in that state, which may severely limit the jurisdiction and effectiveness of the Tribunal. This approach seems unduly restrictive since many of the crimes under international law which should be within the jurisdiction of the International Criminal Tribunal are widely accepted as crimes of universal jurisdiction, including grave breaches of the 1949 Geneva Conventions, other war crimes and crimes against humanity. Moreover, authorities of the state of the nationality of the suspect and the state where the suspect is alleged to have committed the crime often will be responsible for such crimes and unlikely to be willing to surrender such suspects.

The draft Statute provides for two types of *à la carte* consensual jurisdiction. In the first type of consensual jurisdiction, set out in Article 22, the International Law Commission proposes various, complex alternatives (either opt-in or opt-out approaches to a common core of crimes), under which states could consent to jurisdiction over violations of the Genocide Convention, grave breaches of the Geneva Conventions and Protocol I, *apartheid* and crimes defined by various treaties designed to suppress hijacking or terrorist offences.

In the second type of consensual jurisdiction, set forth in Article 26 (2) (a), the Tribunal would have jurisdiction over two types of crimes. It could try cases involving crimes under international customary law which gave rise to individual criminal responsibility. The Commentary suggests that this would include breaches of Hague Convention IV, genocide as defined in the Genocide Convention when involving non-parties and war crimes, crimes against peace and crimes against humanity. It would also have jurisdiction over crimes under national law, such as drug-related crimes, which give effect to provisions of certain multilateral treaties.

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[11] Resolution 666 (XIII-0/83) in the Annual Report of the Inter-American Commission on Human Rights.

[12] Resolution 828, adopted on 26 September 1984.

[13] Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991, UN Doc. A/46/10.

It would be better if there were a small core of crimes within the jurisdiction of the International Criminal Tribunal, particularly ones which incorporate universal jurisdiction,[14] over which all states parties to the Statute would have to declare that the Tribunal had jurisdiction if they wished to go beyond the first stage of becoming parties to the Statute by recognizing the jurisdiction of the Tribunal over offences. As stated above, the common core of crimes should be somewhat broader than the crimes within the jurisdiction of the ad hoc Tribunal, which are limited to grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity during armed conflict. This would ensure that breaches of humanitarian law during non-international conflict and crimes against humanity during peacetime were included. There should be no opt-out provisions or reservations permitted. Other crimes under international law could be included if a state consented.

The Statute should also provide that when the crime in a complaint initiated by a state is a crime under international law subject to universal jurisdiction, that any state party which has submitted to the jurisdiction of the Tribunal over the relevant offence and has custody of a suspect would be obligated to try the suspect or to surrender the suspect to the International Criminal Tribunal on demand. This would ensure that the public readily understood which crimes were within the jurisdiction of the International Criminal Tribunal and would inspire confidence in the general public that the new court will be effective, at least within the states which had agreed to its jurisdiction. It would also increase the deterrent effect of the new institution since it would be widely and easily known that if someone committed one of these crimes in a state which had agreed to the common core of crimes or was found in that state, that person would could face trial in the International Criminal Tribunal, regardless of his or her nationality.

One set of problems which the Statute will have to address related to the issue of state consent is the obligation under Article 63 to surrender defendants in the custody of national authorities to the Tribunal. In resolving these complex and difficult questions, wording the obligation in the Statute in the most general terms to permit states to characterize the obligations in ways which satisfy constitutional restrictions may help. Thus, if the obligation is defined as one to surrender, submit, extradite or otherwise transfer a suspect to the International Criminal Tribunal, states with constitutional prohibitions regarding extradition of suspects to another state or constitutional guarantees which must be observed in trials before its own courts could characterize the transfer in a way which avoid such restrictions. Perhaps the Commentary to Article 63 should be revised to encourage states to be creative in interpreting the status of the International Criminal Tribunal under national law in order to fulfil their legal obligations under the Statute. Thus, a state could treat the International Criminal Tribunal as one of its own courts, as a foreign court or as an institution which does not fit national legal doctrine, so that it would have to develop new national legal principles to address the situation.

It also may be, however, that current international law doctrine is simply unable to deal with the relatively recent concept of transferring defendants from national jurisdictions to an international criminal court under traditional concepts governing transfer of defendants from one state to another, such as extradition. If so, the international community must develop doctrine by analogy to meet the new reality in a way which ensures the establishment of an international criminal jurisdiction which is just, fair and effective. Thus, when a state which is a party to a treaty which obligates it to try or extradite a suspect to another state party willing to try the suspect wishes to transfer the suspect to the International Criminal Tribunal, the transfer to the International Criminal Tribunal should be seen as satisfying its treaty obligations, even if the state with custody does not formally make the International Criminal Tribunal part of its legal system. The purpose of such treaties is to ensure that suspects of crimes under international law are brought to justice and that purpose will be served by trial in the International Criminal Tribunal.

2. The role of the Security Council

The Statute of the Tribunal should permit the Security Council to submit situations involving threats to international peace and security to the Prosecutor, but not individual cases.

Article 25 expressly permits the Security Council to refer "cases" to the Prosecutor and Article 29 permits the Security Council to submit a complaint. The Commentary to Article 25, however, states that it was the understanding that "the Security Council would not normally be expected to refer a 'case' in the sense of

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[14] It is generally accepted that war crimes under customary law and grave breaches of the Geneva Conventions and Protocol I are crimes of universal jurisdiction. It is also likely that crimes against humanity are crimes of universal jurisdiction, see M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law (1992), pp. 510-527; I. Brownlie, *Principles of Public International Law* (4th ed. 1990), p. 304. Under Article 7(2) of the UN Convention against Torture, each state party in which a person alleged to have committed an act of torture is present is obligated to try or extradite the suspect.

named individuals, but would more usually refer to the Tribunal a situation of aggression". Situations of traditional international aggression are increasingly rare since most threats to international peace and security today are largely internal conflicts with cross-border implications. There is some ambiguity in the Commentary to Article 25 and to Article 29, but it would appear that the draft Statute authorizes the Security Council to submit a case or situation to the Prosecutor even if the relevant states have not consented.

It would be better if the Statute were to state that the Security Council could refer situations - but not individual cases - in any member state which it determined posed a threat to international peace and security to the Prosecutor, who would then be free to determine whether to investigate and prosecute individual cases arising out of that situation. This would not only go far to protecting the independence of the Prosecutor and eliminating the need for the Security Council to establish ad hoc tribunals, but would make it more likely that the Tribunal would be able to act in the face of major human rights crises in cases where the state concerned was not a party to the Statute or the state was a party but had not consented to jurisdiction concerning that offence.

C. INDEPENDENCE AND QUALIFICATIONS OF THE JUDGES

The Statute of the Tribunal should ensure that the independence and impartiality of its judiciary is guaranteed, should be consistent with the UN Basic Principles on the Independence of the Judiciary and should ensure that judges are selected who have experience in international humanitarian law and human rights law.

Article 9 states that "[i]n their capacity as members of the Court, the judges shall be independent" and that they "shall not engage in any activity which interferes with their judicial functions, or which is likely to affect confidence in their independence", but provides few other guarantees of their independence or impartiality. The Statute would provide better protection for the independence and impartiality of the judges if it incorporated the guarantees in the UN Basic Principles on the Independence of the Judiciary, at least by reference. These Principles, although formulated to aid states "in their task of securing and promoting the independence of the judiciary", have equal application to judges of international courts.

The Court would be a permanent body, but would only sit when hearing a case. It would consist of eighteen judges, but the draft Statute fails to provide for the creation of additional judges if the number of cases warranted it. This could unduly limit the capacity of the Court in the future if the number of cases were to become unmanageable. At this stage no one knows how many cases will be submitted to the International Criminal Tribunal for investigation and how many of them will lead to prosecutions. Although the International Criminal Tribunal could begin as a relatively modest exercise, it must be flexible from the beginning to be able to increase the staff and resources rapidly to meet demand, if necessary. An arbitrary, maximum number of judges and other staff should not be rigidly fixed in the Statute.

Like Statute of the ad hoc Tribunal, the draft Statute requires that in the composition of the Court due account should be taken of the experience of the experience of the judges in criminal law and international law, including humanitarian law and human rights law.

Selection of judges by states parties alone might lead to a limited pool of candidates, possibly with an imbalance between regions and legal systems, depending on the pace of ratifications. The selection process should ensure that candidates can be nominated from any UN member state, even if that state is not a party to the Statute, to enhance the International Criminal Court's legitimacy and to ensure that the goal of Article 7 (5) of the draft Statute, "to elect persons representing diverse backgrounds and experience, with due regard to representation of the major legal systems", is achieved.[15] One possible method which could be considered would be to permit all UN member states to nominate candidates, but to leave it to the states parties to the Statute to select the judges from these candidates. In making such nominations and in selecting the judges, states should do so after consultation with their highest courts, law faculties, bar associations and other non-governmental organizations concerned with criminal justice and human rights.[16]

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[15] Other international courts do not require judges to be nationals of states parties to their constitutive instruments. See Article 2 of the Statute of the International Court of Justice; Articles 38 and 39 of the European Convention for the Protection of Fundamental Human Rights and Freedoms; and Article 52 of the Inter-American Court of Human Rights. Neither Article 6 nor 7 of the draft Statute expressly require the that the judges be nationals of states parties, but the Commentary to these articles suggests that a state party may only nominate one of its own nationals or "the national of another State Party".

[16] This would ensure wider consultation among concerned groups with relevant experience than the voluntary system of consultation envisaged in Article 6 of the Statute of the International Court of Justice.

D. THE PROSECUTOR

The Statute of the Tribunal should ensure that prosecutions are carried out by an independent and impartial body with adequate powers and that the prosecution body acts consistently with international human rights standards, particularly the UN Guidelines on the Role of Prosecutors.

1. Power to initiate investigations

The Prosecutor should be able to initiate investigations in any state where the Tribunal has jurisdiction over the offence.

The draft Statute restricts the power to bring complaints to states and the Security Council, but it is up to the Prosecutor to decide whether to initiate an investigation and to bring charges (Article 30 (1)). Amnesty International believes that in addition to these two methods of initiating investigations the Prosecutor should be able to initiate investigations in any state where the Tribunal has jurisdiction over the offence.

Under the draft Statute, the Prosecutor cannot initiate his or her own independent prosecution - even if an investigation based on a state or Security Council complaint reveals that other crimes have occurred in a particular state or that other individuals are involved not mentioned in the complaint. Moreover, non-governmental organizations and individuals cannot submit information about a crime within the jurisdiction of the International Criminal Tribunal in the state mentioned in the state or Security Council complaint - or in other states where there have been no such complaints - to the attention of the Prosecutor. In contrast, Article 18 of the Statute of the ad hoc Tribunal provides that

> "[t]he 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 organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed."

A similar provision should be included in the Statute as a supplement to the system of state and Security Council complaints.

There are several other problems with limiting complaints to states and the Security Council. Complaints could be brought for political reasons (the requirement that complaints include supporting documentation does not seem to be an adequate safeguard). Complaints by states or the Security Council may put undue pressure on the Prosecutor to initiate an investigation or prosecution in a particular case. There is also a risk that few states will bring complaints against nationals of other states because such complaints might be viewed as infringing the sovereignty of those states or as interfering with political relations with those states. Not many states have used the state complaint procedures in human rights treaties.[17]

2. Independence, duties and powers

The Statute of the Tribunal should guarantee the independence of the Prosecutor, spell out the Prosecutor's duties and ensure that the Prosecutor has adequate powers to be effective.

The draft Statute contains express guarantees of the independence of the Prosecutor and staff in Articles 13 and 34 along the lines of Article 16 (2) of the Statute of the ad hoc Tribunal and attempts to ensure that the Prosecutor will be independent of the Court by providing for the election of the Prosecutor and the Deputy Prosecutor by the states parties rather than by the Court. It is open to question whether the provisions in Article 15 (2) and Article 30 (1) are consistent with guarantees of independence - and the presumption of innocence (see discussion below in Section II.D.3). Article 15 (2) permits the Court to remove the Prosecutor, Deputy Prosecutor or Registrar when in the opinion of two-thirds of the Court one of these officials is guilty of proved misconduct or is in serious breach of the Statute. Article 30 (1) permits the Court to direct the Prosecutor who has decided not to prosecute to commence a prosecution.

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[17] No states have used the state complaint procedures in Article 41 of the International Covenant on Civil and Political Rights, Articles 45 and 61 of the American Convention on Human Rights or Article 47 of the African Charter on Human and Peoples' Rights; only a handful of states have used such procedures under Articles 24 and 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The draft Statute fails to spell out the duties and ethical obligations of the Prosecutor. The Statute should address this omission by expressly incorporating the UN Guidelines on the Role of Prosecutors or incorporating them by reference. These Guidelines, which were "formulated to assist Member States in their task of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings", have equal application to prosecutors in international criminal courts.

The draft Statute appears to provide the Prosecutor with many of the powers needed, but the Prosecutor's powers - like those of the Court - to obtain orders compelling assistance in particular cases are limited to situations - at least in cases involving state complaints - where the state concerned has consented to jurisdiction over the offence. The Prosecutor has the power to request the presence of and question suspects, victims and witnesses; to collect evidence and to seek the cooperation of any state (Article 30 (2)). The Prosecutor can ask the Court to issue subpoenas for documents and warrants for arrest (Article 30 (3)). The Prosecutor will be able to select prosecution staff (Article 13 (5)) and to request states parties to the Statute to designate persons to assist the Prosecution who will not be permitted to seek or receive instructions from any source other than the Prosecutor (Article 34). In cases in which states make complaints or the Prosecutor independently initiates such an investigation (see discussion in previous section), all states parties should be obligated to cooperate with the Prosecutor when exercising these powers, except that the obligation to carry out a provisional arrest of a suspect pursuant to Article 62 and to surrender a suspect under Article 63 would continue to depend on acceptance of jurisdiction by the state concerned over the particular offence. To ensure that the International Criminal Tribunal is effective, all states parties should be required to provide it with the greatest degree of assistance possible consistent with the principle of state consent regarding jurisdiction over individuals.

3. Review of a decision not to prosecute

Review of a decision not to prosecute must not impair the independence and impartiality of the Prosecutor.

Any suggestion that the Prosecutor has not proceeded with a case for reasons of international politics or the wishes of one or more states would seriously damage the authority of the Tribunal.[18] There should be some method for seeking a judicial review of a decision not to proceed with a prosecution which protects the independence and impartiality of the Prosecutor[19] and the rights of defendants. Victims are the most affected by such a decision and they should have the right to request the Prosecutor to reconsider a decision not to prosecute. One method which might be considered to ensure that judicial review under Article 30 (1) preserves the Prosecutor's independence would be in cases where the Court determines that a prosecution should proceed would be to refer the case to a special prosecutor to conduct an independent investigation and, if he or she determined that a prosecution should be brought, to conduct the prosecution. Other ways in which the rights of victims and their families may be effectively protected during proceedings are discussed below in Section IV.

4. Review of the indictment and jurisdictional challenges

The defendant should have the right to challenge the sufficiency of the indictment and to challenge the jurisdiction of the Tribunal before trial.

The draft Statute provides that the Bureau of the Court, sitting as an Indictment Chamber, will review a decision by the Prosecutor to indict a suspect to determine whether the indictment has established a prima facie case (Article 32 (2)). This is an improvement over Article 19 of the Statute of the ad hoc Tribunal, which requires the Trial Chamber to perform the dual and inherently conflicting roles of reviewing the indictment to decide if there is a prima facie case against the accused and conducting the trial to determine guilt or innocence. The standard of review is not clear and may be inadequate to prevent prosecution of cases where there is no realistic chance that it will be possible to secure a conviction. Article 30 (1) permits the Court to order the Prosecutor to commence a prosecution when the Prosecutor has decided not to proceed if the Court finds that there was "sufficient basis" to do so, which presumably is intended to mean that it believes that there is a prima facie case.

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[18] As indicated above in Sections II.B.1 and 2, however, it is far more likely that the system limiting the right to bring complaints in specific cases to states and to the Security Council - without permitting the Prosecutor to initiate such investigations independently - will lead to the public perception that the Tribunal bases its decisions to prosecute on reasons of international politics or state interest.

[19] Guideline 14 of the UN Guidelines on the Role of Prosecutors states: "Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded."

Article 32 (2) is silent on whether the accused may challenge the sufficiency of the indictment. The accused should have this right at a hearing affording all the relevant guarantees of fairness, including the right to be represented by a lawyer, to examine or have examined witnesses and to have access to all evidence to the hearing. On the other hand, many witnesses are likely to have to endure great trauma in recounting horrific events several times, for investigators, for the Prosecutor and at trial. They should not be made to repeat their testimony at a preliminary hearing as well as at trial unless absolutely necessary to ensure justice and fairness. Witnesses at preliminary hearings will need the same protection against reprisals and mental anguish which is provided at the trial (See Section IV below).

Defendants should also have the right to challenge the jurisdiction of the Court before the commencement of the trial.[20]

III. PROTECTION OF THE DEFENDANT

The Statute of the Tribunal should declare that all defendants are entitled to a fair and prompt trial before an independent and impartial tribunal affording all the internationally recognized safeguards at all stages of the proceedings - from the moment of arrest or indictment until exhaustion of all legal remedies - and incorporate these standards expressly or by reference.

[20] Article 38 (2) (b) appears to limit this right until the trial. The Commentary to this provision is ambiguous about whether that Article permits the accused to challenge the jurisdiction of the Court at any stage of the trial or at any stage of the proceedings, which would permit challenges at any time after indictment. The Commentary to this article invites comment on whether the accused should be able to raise pre-trial challenges to jurisdiction. Even if the Statute were to authorize post-indictment challenges to jurisdiction, however, this would not permit someone who was detained pursuant to Article 62 (c) as a measure "to prevent the escape of a suspect" to challenge the jurisdiction of the Tribunal. Although the Commentary to Article 62 (c) speaks of the accused rather than the suspect, this seems to be an error; the Commentary to Article 30 (3) makes it clear that the Prosecutor can ask a state "for the arrest and detention of a suspect" before indictment.

Although the draft Statute addresses many of the issues related to the rights of defendants at all stages of the proceedings, both when simply suspects and after they have been accused in an indictment,[21] Article 19 permits the Court to make rules for "the conduct of pre-trial investigations, in particular so as to ensure that the rights referred to in articles 38 to 44 are not infringed", "the procedure to be followed and the rules of evidence to be applied in any trial" and "any other matter which is necessary for the implementation of this Statute". Article 20 permits the Court to determine its own internal rules of procedure, provided that they are consistent with the Statute and the rules provided for in Article 19. There is no requirement that the Court circulate the draft rules for comment to states, as the Security Council required the ad hoc Tribunal to do in Resolution 827, or to non-governmental organizations for comment. As discussed below, many of the issues related to suspects and the accused should be addressed in the Statute itself or perhaps in the applicable substantive law. In any event, the draft rules should be circulated for comment as widely as possible, to governments, non-governmental organizations and others to ensure that the rules contribute to making the Court just, fair and effective.[22]

A. PRETRIAL INVESTIGATION

1. Rights of defendants in national courts and before indictment

The Statute should fully protect the internationally recognized rights of suspects when they are questioned by national authorities and before indictment.

Although the draft Statute contains a number of important protections for suspects before indictment, it omits others and fails to protect the rights of suspects questioned by national authorities, regardless whether they are in detention (Rights of persons in detention are discussed in the following section). Among the rights related to the investigation phase of a criminal case of those suspected, but not charged with a crime, which are recognized in the draft Statute, and which should be retained, are:

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[21] Amnesty International's mandate requires it to oppose "the detention of any political prisoner without fair trial within a reasonable time or any trial procedures relating to such prisoners that do not conform to internationally recognized norms". The rights of such persons to a fair trial could be severely undermined by unfair procedures before they have been arrested and placed in detention.

[22] The first comprehensive study of right to fair trial at all stages of the proceedings is being conducted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Four annual instalments of the five-year study have been published: The right to fair trial; Current recognition and measures necessary for its strengthening, UN Docs. E/CN.4/Sub.2/1990/34, E/CN.4/Sub.2/1991/29, E/CN.4/Sub.2/1992/24 and Adds.1-3, and E/CN.4/Sub.2/1993/24/Adds. 1-2. The fifth and final report is to be submitted to the Sub-Commission in August 1994.

- **the right to silence - with no adverse consequences being drawn from the exercise of that right - before any investigation by the Prosecutor** (Article 30 (4) (a)). This would be a major advance in international law and it is not included in the Statute of the ad hoc Tribunal. The Statute should make clear, however, that this right applies at all stages of the proceedings.[23]

- **the right to assistance of counsel of the defendant's choice before any investigation by the Prosecutor** (Article 30 (4) (a)). This is also expressly recognized in Article 18 (3) of the Statute of the ad hoc Tribunal.

- **the right to have legal assistance in the absence of means in all cases** (Article 30 (4) (a)). This goes beyond the wording of Article 14 (3) (d) of the ICCPR, which expressly applies only to persons charged with a crime. Unfortunately, the draft Statute does not make clear that this right applies to all stages of the proceedings, including detention pursuant to Article 62. (See discussion below of the right to fair trial). This right is expressly recognized in Article 18 (3) of the Statute of the ad hoc Tribunal for pretrial investigations, but that right is more narrowly defined in Article 21 (4) (d) of that Statute with respect to defendants charged with a crime as limited to "any case where the interests of justice so require".

- **the right to be informed before questioning of the above three rights** (Article 30 (4) (a)). The Commentary states that the right to be informed of one's rights extends to the following two rights, but this is not spelled out in the draft. The Statute of the ad hoc Tribunal does not expressly state that suspects have the right to be informed of any rights before indictment.

- **the right not to be compelled to testify against oneself or confess guilt** (Article 30 (4) (b)). This is essentially the same as the guarantees in Article 14 (3) (g) of the ICCPR and Article 21 (4) (g) of the Statute of the ad hoc Tribunal for persons charged with a crime.

- **the right to competent interpretation services and translation of documents on which the suspect is to be questioned** (Article 30 (4) (c)). This is stronger than the equivalent guarantees in Article 14 (3) (f) of the ICCPR and Article 21 (f) of the Statute of the ad hoc Tribunal for persons charged with a crime in that it requires interpretation to be competent and translations of documents on which the suspect is to be questioned.

The express extension of certain rights which in Article 14 of the ICCPR expressly apply to persons charged with a crime is welcome, and is consistent with the trend to consider that many of the rights in Article 14 necessarily apply to persons even before a criminal charge.

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[23] For further analysis of the scope of the right to silence under international law see Amnesty International's reports, *United Kingdom: Submission to the Royal Commission on Criminal Justice* (AI Index: EUR 45/17/91); *United Kingdom: Fair trial concerns in Northern Ireland - The right to silence* (AI Index: EUR 45/02/92); *United Kingdom: The right to silence - Update* (AI Index: EUR 45/15/93).

A potential loophole in the draft Statute, however, is that these rights may be read to apply only to the suspect vis-à-vis the Prosecutor and to state authorities providing assistance to the Prosecutor pursuant to a request under Article 30 (3), but not to state authorities who denied suspects these rights before they received requests for assistance from the Prosecutor. Thus, Article 30 (4) would not necessarily preclude the admission of a coerced confession obtained before the state authorities received and agreed to carry out such a request. It is not clear that the rights in Article 30 (4) apply to national authorities when they question a suspect and what the consequences are if these rights are not respected either by the national authorities or the Prosecutor. Although Article 48 (5) requires the exclusion of evidence obtained directly or indirectly by illegal means, this only applies when the means "constitute a serious violation of internationally protected rights".[24]

2. Pre-trial detention

The Statute of the Tribunal should expressly include or incorporate by reference all relevant internationally recognized rights applicable to pre-trial detainees.

The draft Statute includes a number of significant guarantees for pre-trial detainees - both before and after they have been charged with a crime - directly related to their preparation for trial (see discussion below in the section on the trial). Nevertheless, there are a wide range of other guarantees applicable to all persons in detention, including pre-trial detainees, whether held in the custody of national authorities or the Tribunal, which are not spelled out in the draft Statute and which should be.

A few of the key pre-trial detention rights which are omitted from the draft Statute and, in some cases from the Statute of the ad hoc Tribunal or its Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal (Detention Rules), adopted 5 May 1994 (UN Doc. IT/38/Rev.3), and should be included, are the following:

- **the right to be informed, at the time of arrest, of the reasons for the arrest** (Article 9 (2) of the ICCPR).

- **the right to immediate notice to families of one's detention and prompt access to one's family** (Rule 92 of the UN Standard Minimum Rules for the Treatment of Prisoners (UN Standard Minimum Rules); Principle 16 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles)).

- **the right to prompt access to a lawyer** (Principles 15, 17 and 18 of the UN Body of Principles; Principle 7 of the UN Basic Principles on the Role of Lawyers).

- **the right to prompt access to independent medical attention** (Rules 24 and 91 of the UN Standard Minimum Rules; Principle 24 of the UN Body of Principles).

[24] The Statute or the Court in its rules will have to address the question of the extent to which evidence obtained in violation of the rights recognized in Article 30 (4) and other parts of the Statute must be excluded.

- **the right to prompt access to the Court** (Article 9 (3) of the ICCPR). Article 35 (1) of the draft Statute does not require that a suspect who has been detained but not indicted be brought promptly before it after arrest.[25]

- **the right to bail, subject to guarantees to appear at trial** (Article 9 (3) of the ICCPR). That provision states in part: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.".[26]

- **to be entitled to trial within a reasonable time or to release** (Article 9 (3) of the ICCPR). That provision states in part: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". Article 31 (2) of the Statute permits the detention prior to indictment of a suspect "for such period as may be determined by the Court in each case" without these limitations.

- **the right not to be tortured or subjected to other cruel, inhuman or degrading treatment or punishment** (Article 7 of the ICCPR and numerous other international guarantees). The Commentary to Article 35 suggests that arrangements for pre-trial detention of the accused will be the subject of an agreement between the Tribunal and the state selected for the seat of the Tribunal, but the Statute should spell out the basic internationally recognized guarantees for pre-trial detainees both in the custody of the Tribunal and in the custody of national authorities who arrest the accused. [27]

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[25] The Statute of the ad hoc Tribunal is similarly deficient: the report of the Secretary-General commenting on Articles 20 (right of the accused to be "brought before a Trial Chamber without undue delay and formally charged") and Article 21 (rights of the accused to be tried without undue delay) of the Statute of the ad hoc Tribunal suggests that the right to trial without undue delay only attaches at the moment the indictment is confirmed. Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, paras. 102, 106.

[26] Unfortunately, this right is omitted from the Statute of the ad hoc Tribunal as well.

[27] Regrettably, this safeguard is omitted from the Statute of the ad hoc Tribunal as well.

- **the right of anyone in detention "to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"** (Article 9 (4) of the ICCPR). Article 35 (1) of the draft Statute, providing that "[t]he Court shall decide whether an accused person who is brought before it shall continue to be held in detention or be released on bail", does not satisfy this requirement because the accused has no right to prompt access to the Court, to seek release until after being brought before the Court or to challenge the lawfulness of the detention itself.[28]

- **the rights of juveniles in pre-trial detention** (Convention on the Rights of the Child; UN Rules for the Protection of Juveniles Deprived of their Liberty; UN Standard Minimum Rules for the Administration of Juvenile Justice). These guarantees could be omitted if the Statute of the Tribunal were to exclude jurisdiction over persons charged with offences committed when under the age of 18.

The current draft Statute should be amended to make it stronger than the Statute of the ad hoc Tribunal by expressly including or incorporating by reference all current international minimum standards for pre-trial detainees, including Article 9 of the Universal Declaration of Human Rights, Article 9 of the ICCPR, the UN Standard Minimum Rules, the UN Body of Principles, the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers and the UN Guidelines on the Role of Prosecutors. If the Statute permits the trial of persons for crimes committed when under 18, then it should include or incorporate by reference the Convention on the Rights of the Child; the UN Rules for the Protection of Juveniles Deprived of their Liberty; and the UN Standard Minimum Rules for the Administration of Juvenile Justice. The draft Statute should also contain a statement similar to the broad statement in the Secretary-General's report on the Statute of the ad hoc Tribunal making clear that any enumeration of rights in the statute does not exclude any other internationally recognized right so that the International Criminal Tribunal can take into account evolving concepts of fairness.[29]

A major area of concern is the lack of express protection in the draft Statute of the rights of pre-trial detainees in the custody of national authorities. Article 35 (2), for example, simply provides that if the Court decides to detain the accused the state in which the seat of the Tribunal is located "shall make available to the Court an appropriate place of detention and, where necessary, appropriate guards", but fails to provide for judicial supervision over such detention." The Statute should make clear that the rights spelled out in the Statute should apply to all persons from the moment of arrest or detention by national authorities (except for certain rights, such as the right to silence, which should apply to suspects when they are questioned even if not technically under arrest or detention). There should be appropriate steps taken to ensure the integrity of the Court when rights of pre-trial detainees are violated by the national authorities, such as excluding confessions which have been coerced by national authorities (see discussion below of Article 48 (5)).

B. THE TRIAL

1. Fair trial guarantees

The Statute of the Tribunal should expressly include or incorporate by reference all relevant internationally recognized rights applicable to defendants preparing for trial or at trial.

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[28] Unfortunately, this right is not guaranteed in the Statute of the ad hoc Tribunal either.

[29] "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of the proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights." (UN Doc. S/25704, para. 106).

The draft statute contains a number of important safeguards for defendants preparing for trial or at trial, including some of the rights found in Article 14 of the ICCPR, but in some provisions these rights are defined more restrictively than in internationally recognized standards. The draft Statute also omits a wide range of fundamental criminal justice guarantees for defendants found in instruments adopted or endorsed by the UN General Assembly.[30] It is essential that these fundamental guarantees be included in the Statute of the International Criminal Tribunal, whether expressly or by reference, to ensure that it is just, fair and effective.

The discussion below outlines the rights expressly spelled out in the draft Statute, notes which are consistent with international standards or stronger, identifies rights which are omitted and recommends improvements.

Supervisory duty of the Court. An important safeguard in the draft Statute is that - like Article 20 (3) of the Statute of the ad hoc Tribunal - it expressly states that the Court, through the trial Chamber, has the duty to ensure that the rights of the accused are respected. This duty arises under Articles 39 and 40 of the draft Statute, but only at the time the trial begins, which means that suspects and the accused before trial - often in detention - may receive only limited protection at the time they need judicial supervision the most.

Article 39 (3) states that at the commencement of the trial, the Court must "read the indictment, satisfy itself that the rights of the accused are respected, and allow the accused to enter a plea of guilty or not guilty". Article 40 (1) provides that it also "shall ensure that a trial is fair and expeditious, conducted in accordance with the present Statute and the rules of procedure and evidence of the Court, with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Although Articles 39 (3) and 40 (1) do not specify which rights should be respected, these provisions should be read expansively to include all internationally recognized rights to fair trial. Unfortunately, the Commentary to Article 40 states that the rights meant are only the limited set of rights "set forth in Articles 40 to 45 of the draft Statute".

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[30] These standards include the UN Standard Minimum Rules, the UN Body of Principles, the UN Convention against Torture, the UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors, the UN Basic Principles on the Role of Lawyers, the Convention on the Rights of the Child, the UN Rules for the Protection of Juveniles Deprived of their Liberty and the UN Standard Minimum Rules for the Administration of Juvenile Justice. Standards concerning juveniles should be included unless the Statute excludes jurisdiction over persons who have committed crimes when under the age of 18. The draft Statute also fails to mention the important fair trial guarantees in the Geneva Conventions of August 12, 1949 and Protocols I and II.

Right to be tried without undue delay. Article 44 (1) (e) of the draft Statute is the same as Article 14 (1) (c) of the ICCPR and Article 21 (4) (c) of the Statute of the ad hoc Tribunal. Unfortunately, the Commentary to Article 29 suggests that the right only attaches at the time of indictment. This would be inconsistent with the right to be tried without undue delay as recognized in Article 14 (1) (c), which attaches at least as early as the moment of arrest or detention.[31]

Fair hearing. Article 44 (1) states that in the determination of any charge under the Statute against an accused, the accused is entitled to a fair hearing and lists certain "minimum guarantees". This is similar to the wording of Article 14 of the ICCPR and it will be essential for the Court to interpret the right to fair trial as including other guarantees not expressly included in the Statute.[32] In view of the large number of internationally recognized rights of defendants at all stages of the proceedings which are not mentioned in the draft Statute, it would be better to incorporate these by reference in the Statute rather than simply leave this for the Court to determine. This would also ensure flexibility as international standards, jurisprudence and interpretation continue to develop.

Equality of arms. Article 44 (3) of the draft Statute contains an important guarantee, broader than in the Statute of the ad hoc Tribunal, that the defence will be treated on an equal basis with the prosecution. It provides:

> "All incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution prior to the commencement of the trial shall be made available to the defence as soon as possible and in reasonable time to prepare for the defence."

This is supplemented by Article 39 (2) (a), which permits - but does not require - the trial Chamber to disclose documentary or other evidence available to the Prosecutor to the defence, apparently in addition to the evidence mentioned in Article 44 (3). Although these provisions are in some respects stronger than Guideline 21 of the UN Guidelines on the Role of Prosecutors, other important safeguards in that guideline have been omitted and should be included in the Statute. Guideline 21 provides:

> "It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients."

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[31] The Human Rights Committee has stated that the right applies at "all stages" of criminal proceedings. General Comment 13, para. 10. (UN Doc. HRI/GEN/1). In *Bolanos v. Ecuador*, UN Doc. A/44/40, the Human Rights Committee found that the lengthy period of detention prior to indictment violated both Articles 9 (3) and 14 (3)(c) of the ICCPR.

[32] The Human Rights Committee has explained that the guarantees in Article 14 "are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1". General Comment 13, para. 5. (UN Doc. HRI/GEN/1). As indicated above, the report of the Secretary-General concerning the Statute of the ad hoc Tribunal makes clear that the rights of the accused to a fair trial listed in Article 21 are minimum guarantees and not an exclusive list. (UN Doc. S/25704, para. 106).

In light of the complexity of the legal and factual issues at all stages of proceedings before the Tribunal, to ensure a balance of resources between the Prosecutor and defendants, the International Law Commission should consider providing for an independent public defender's office.[33]

Public trial. Articles 40 (2) and 44 (2) of the draft Statute, guaranteeing the right to a public trial appear to be consistent with Article 14 (1) of the ICCPR, but the Statute should make clear that the right to a public trial applies to all stages of the proceedings, not just the trial itself. These articles permit the trial Chamber to hold certain proceedings in closed session in accordance with Article 46. That article requires the Chamber "to take all necessary measures available to it, to protect the accused, victims and witnesses, and may to that end conduct proceedings in camera or allow the presentation of evidence by electronic or other special means". Amnesty International welcomes the statement in the Commentary to this article that "the Court must have due regard for the need to protect both victims and witnesses but only to the extent that this is consistent with full respect for the rights of the accused, in accordance with article 40", and recognizes that this will require careful elaboration in the rules and practice of the Tribunal.

Equality. Article 42 of the draft Statute is based in part on Article 14 (1) of the ICCPR. The Commentary states that it is intended to ensure that victims and witnesses as well as accused persons are treated equally. It will be up to the Court to ensure that this Article does not prejudice the rights of the defendant, such as the right to presumption of innocence.

[33] The Government of Ethiopia has established a Public Defender's Office to represent the thousands of officials of the former government who are likely to be charged with war crimes and crimes against humanity, many of whom will be unable to afford counsel.

Presumption of innocence. Article 43 of the draft Statute guarantees that "[a] person shall be presumed innocent until proved guilty." This is similar to the guarantee in Article 14 (2) of the ICCPR, but it leaves out the added guarantee that the person must be proved guilty "according to law". Article 21 (3) of the Statute of the ad hoc Tribunal also omits this guarantee, replacing "according to law" with "according to the provisions of the present Statute". Moreover, there is some ambiguity in the Commentary about whether the standard of proof is beyond a reasonable doubt, as the Human Rights Committee has stated that Article 14 (2) of the ICCPR requires,[34] or some other standard for determining the guilt or innocence of the accused. Article 43 should be amended to clarify that its guarantees of the presumption of innocence are as strong as those in Article 14 (2) of the ICCPR, as interpreted by the Human Rights Committee.

Right to be informed of charges. Article 44 (1) (a) of the draft Statute, requiring that the defendant "be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge", is identical to Article 14 (3) (a) of the ICCPR and Article 21 (4) (a) of the Statute of the ad hoc Tribunal.

Right to be informed of defence rights. Article 44 (1) (b) of the draft Statute states that the accused has the right to be informed of the right "to conduct the defence or to have the assistance of counsel of the accused's choice or, in the absence of means to retain counsel, to have counsel and legal assistance assigned". This is broader than Article 14 (3) (d) of the ICCPR and Article 21 (4) (d) of the Statute of the ad hoc Tribunal because it guarantees legal assistance in all cases. It is broader than Article 21 (4) (d) of the Statute of the ad hoc Tribunal because it requires that the accused be informed of these rights.

It is not clear whether the distinction between counsel and legal assistance has any significance. Unfortunately, the requirement of notice of the accused's rights in the draft Statute is limited to defence rights. The draft Statute should be amended to guarantee, as does Principle 13 of the UN Body of Principles, that any person who has been arrested shall at the moment of arrest be provided "with information on and an explanation of his rights and how to avail himself of such rights".

Right to adequate time and facilities for a defence. Article 44 (1) (c) of the draft Statute is as broad as Article 14 (3) (b) of the ICCPR and Article 21 (4) (b) of the Statute of the ad hoc Tribunal, but does not include the extensive internationally recognized rights related to the conduct of one's defence in such standards as Rule 93 of the UN Standard Minimum Rules, Principles 15, 17 and 18 of the UN Body of Principles and the UN Basic Principles on the Role of Lawyers. All relevant internationally recognized standards concerning preparation of one's defence at all stages of the proceedings should be incorporated expressly or by reference into the Statute.

Rights associated with examination of witnesses. Article 44 (1) (d) of the draft Statute includes all the rights associated with examination of witnesses in Article 14 (3) (e) of the ICCPR and Article 21 (4) (e) of the Statute of the ad hoc Tribunal.

Defences and principles of responsibility. Most of the treaties defining crimes under international law and customary international law fail to spell out which defences are permissible and which are impermissible and what are the relevant principles of responsibility. Instead of leaving all of these issues for the Court to determine based on general principles of law, the Statute should do so. In particular, the Statute should make clear that certain defences are impermissible. For example, orders from superiors or a public authority may never be a justification for committing a crime within the jurisdiction of the Tribunal, even if they may be taken into account in determining the sentence. Similarly, the leaders behind the crimes - those who planned them, gave the orders and helped organize them - must be liable to prosecution as well as the people who carried them out. This principle applies also to officials who tolerated or acquiesced in the crimes.

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[34] The Human Rights Committee has explained that the presumption of innocence means that "[n]o guilt can be presumed until the charge has been proved beyond a reasonable doubt." (General Comment 13, para. 7; UN Doc. HRI/GEN/1).

Rules of evidence. Article 48 of the draft Statute sets forth certain rules of evidence, leaving others, according to the Commentary, to be established in the rules of the Court.[35] One of the most important provisions is Article 48 (5). It states:

> "Evidence obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights shall not be admissible."

To some extent, this goes beyond the exclusionary rules in Articles 12 of the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 15 of the UN Convention against Torture by excluding any evidence obtained by illegal means, not just a statement. As Guideline 16 of the UN Guidelines on the Role of Prosecutors makes clear, such unlawful methods include all forms of cruel, inhuman or degrading treatment, not just torture.

Prohibition of compelled testimony and coerced confessions. Article 44 (1) (g) of the draft Statute is the same as Article 14 (3) (g) of the ICCPR and Article 21 (4) (g) of the ad hoc Tribunal.

Interpretation and translation. Article 44 (1) (f) of the draft Statute provides that the accused has the right, "if any of the proceedings of, or documents presented to, the Court, are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness". The Commentary to Article 39 states that the accused is entitled "to a simultaneous interpretation of the proceedings". These are broader guarantees than in Article 14 (3) (f) of the ICCPR and Article 21 (4) (f) of the Statute of the ad hoc Tribunal, particularly because it makes clear that interpretation should be competent.

Prohibition of double jeopardy. Article 45 prohibits any other court from trying a person who has been tried by the Court. It also permits the Court to try an accused who has been tried by another court if the crime was an ordinary crime, the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently pursued, but the Court would have to take into account any time served under a sentence of that other court. Since the prohibition of double jeopardy (non bis in idem) prohibits only retrials after an acquittal by the same jurisdiction,[36] Article 45 appears to be consistent with international standards.

The Statute might also include a provision stating that amnesties, pardons or similar measures that might have the effect of exempting those responsible for crimes under international law which have been granted or made by national authorities will not prevent the Court - an international institution - from trying the accused. Amnesty laws, pardons or other similar measures which have the effect of preventing prosecutions or terminating pending investigations or trials contribute to impunity for human rights violators. The effect of amnesties, pardons or similar measures by one state are only valid within that jurisdiction and have no legal effect on prosecutions in another state and, therefore, should not prevent the Court from trying an accused for a crime under international law.

2. Trials in absentia

There should be no trials in absentia.

Amnesty International believes that trials in absentia of a defendant, except in the case of a defendant who has deliberately absented himself or herself after the trial has begun, are unjust. The function of a criminal trial is objectively to determine the guilt or innocence of individuals accused of crimes and the burden to establish guilt rests on the prosecution. Anything which fundamentally prejudices the ability of the Tribunal to make this decision should, as a matter of principle, be avoided. Amnesty International believes that because of the likely complexity and confusion surrounding the alleged facts, often exacerbated in the chaos of armed conflict and deliberate or unintentional misinformation, the accused should be present to hear the full prosecution case, to examine or have examined

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[35] As stated above, the Court should circulate the draft of any such rules of evidence to governments, non-governmental organizations and others for comment before adopting them.

[36] This was recognized during the drafting of Article 14 (7) of the ICCPR. See M. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), pp. 316-318.

witnesses, refute facts and present a full defence. With anything less the reliability of the verdict will always remain in doubt and justice will not be seen to be done.

Amnesty International is concerned that trials in absentia could simply be show trials. As some members of the International Law Commission pointed out, "judgments by the Court without the actual possibility of implementing them might lead to a progressive loss of its authority and effectiveness in the eyes of public opinion".[37] Moreover, even if the Court were to grant a de novo trial after a defendant convicted in absentia was subsequently arrested - which is not provided for in the draft Statute - such a de novo trial before the same court which convicted the defendant is not likely to be fair. In civil law jurisdictions permitting trials in absentia, the court trying the case de novo is likely to consist of the same judges and to use the evidence submitted at the previous trial which was not subjected to vigorous cross-examination by or on behalf of the defendant. If the same judges which presided at the first trial conduct the second trial, it would be difficult to ensure the right to the presumption of innocence was respected since the judges will have the difficult task of attempting to disregard the evidence presented at the first trial.

Article 44 (1) (h) of the draft Statute, which states that the defendant has the right "to be present at the trial, unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate", is contrary to the spirit of Article 14 (3) (d) of the ICCPR since it permits trials in absentia. It fails to provide even minimal safeguards such as appointment of a defence counsel, nullifying the judgment if the defendant is subsequently arrested, exclusion of all testimony made at the first trial where the defendant had no ability to test the evidence by cross-examination and trial de novo by judges who did not preside at the first trial.

Amnesty International recommends that the draft Statute be amended to prohibit trials in the absence of the defendant unless the defendant, present, voluntarily or in custody, at the commencement of the trial, has deliberately absented himself or herself after the trial has begun or has disrupted proceedings so that he or she had to be removed from the Court. This would be consistent with the Statute of the ad hoc Tribunal. The report of the Secretary-General makes clear that trials before that court "should not commence until the accused is physically present" (UN Doc. S/25704, para. 101) and Article 21 (4) (d) of the Statute of the ad hoc Tribunal expressly states that the accused is entitled "to be tried in his presence".

C. PENALTIES

The Statute of the Tribunal must exclude the death penalty and penalties must be clearly spelled out.

In a welcome development, the draft Statute excludes the death penalty as a possible punishment. However, it provides inadequate guidance about the appropriate penalties for particular offences. None of the treaties concerning crimes under international law provide for penalties. The draft Statute also fails to tackle this problem and, like the ad hoc Tribunal, leaves this issue to be decided by reference to national law. Unlike the Statute of the ad hoc Tribunal, however, which refers to penalties applicable in the territory where the crimes occurred, Article 53 (2) of the draft Statute allows the Court to

"have regard to the penalties provided for by the law of:

(a) the State of which the perpetrator of the crime is a national;

(b) the State on whose territory the crime was committed; or

(c) the State which had custody of and jurisdiction over the accused."

To be consistent with the principle of nulla poena sine lege, an essential part of the doctrine of nullum crimen sine lege recognized in Article 41 of the draft Statute and in Article 15 of the ICCPR, the penalties should be spelled out with greater precision. The draft Statute does not outline any basic principles for

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[37] In 1992 the Working Group on the question of an international jurisdiction stated: "In the case of an international criminal court, the requirement that the defendant be in the custody of the court at the time of trial is also important because otherwise such a trial risks being completely ineffective." Report of the International Law Commission on the work of its forty-fourth session - 4 May-24 July 1992, UN Doc. A/47/10, para. 504.

deciding this question and the Commentary is not that helpful to assuring certainty in sentencing. As a result, this could lead to inconsistent application of penalties to different defendants in the same case. In contrast, Article 4 (2) of the UN Convention against Torture at least requires states parties to make acts of torture "offences which take into account their grave nature", and Article 24 of the Statute of the ad hoc Tribunal states that "the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia" and that "[i]n imposing sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstance of the convicted person." None of the above approaches, however, seems to restrict the discretion of the court sufficiently to provide adequate certainty in sentencing to avoid arbitrary sentencing.

Different approaches might be considered, depending on when the crime occurred, which would be consistent with the principle that the punishment be spelled out at the time the offence is committed and the principle of equality of treatment of defendants convicted of similarly grave offences in the same jurisdiction. For crimes committed before the establishment of the Tribunal, the Statute should provide for the application of penalties in the national law of the state which is most consistent with general principles of criminal law, including certainty and consistency of application in all cases. The Statute might provide that this national law is the law of the state where the offence was committed, the state of the nationality of the defendant or the state which had custody of and jurisdiction over the accused, provided that the penalties in that jurisdiction are consistent with international law and the Statute (thus excluding the death penalty and corporal punishment). Instead of permitting the Court unfettered discretion to choose which national law would apply in a particular case as provided in Article 53 (2) of the draft Statute, the Statute should provide that only after the Court determined that there was no penalty in the jurisdiction of the state specified in the Statute which was consistent with international law and the Statute would the Court be permitted to look at other national law.[38] This would minimize the possibility of arbitrary application of penalties. For acts committed after the establishment of the Tribunal, the penalties should be spelled out in the Statute.

D. RIGHT TO APPEAL

The full right to appeal to a higher tribunal for review of a conviction and sentence must be assured.

Article 55 of the draft Statute provides that a convicted person, and in brackets that the Prosecutor, may appeal against the judgment or sentence on three grounds: "(a) material error of law; (b) error of fact which may occasion a miscarriage of justice; or (c) manifest disproportion between the crime and the sentence". This is an improvement over Article 25 of the Statute of the ad hoc Tribunal, which does not expressly authorize a challenge to sentences. Article 57 provides that when a new fact has come to light which was not known at the time of the proceedings in the Trial or Appellate Chambers which could have been a decisive factor in reaching the decision that the convicted person or the Prosecutor should be authorized to apply for review of the judgment. This makes express what the report of the Secretary-General suggests Article 25 of the Statute of the ad hoc Tribunal does, but fails to make explicit.

Article 55 (2) states that "[u]nless the Chamber otherwise orders, a convicted person shall remain in custody pending an appeal". This is appears to be inconsistent with Article 9 (3) of the ICCPR, which applies at all stages of the proceedings.

In contrast to Article 14 (3) of the Statute of the ad hoc Tribunal, which makes clear that judges of the Trial and Appeal Chambers may sit only on the Chamber to which they are originally assigned, Article 56 of the draft Statute simply states that no judge who sat in the Trial Chamber in an individual case may then sit in the Appellate Chamber in that case. The first approach is preferable because it assures the necessary impartiality of independent courts absent in the second where colleagues will have to sit in judgment of each other's performance.

E. SUPERVISION OF SENTENCES

The Statute of the Tribunal must ensure that international minimum safeguards apply to the custody of convicted defendants.

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[38] When the national law provides for the death penalty for the relevant offence, the Court should determine that the maximum penalty which the defendant could face will a be a penalty under that national law for a similar offence which takes into account the grave nature of the offence.

In contrast to Article 27 of the draft Statute of the ad hoc Tribunal, which requires that imprisonment of convicted persons in national facilities "shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal",[39] the draft Statute fails to provide even these minimal safeguards. These safeguards are inadequate because there is no requirement that such detention be in accordance with international minimum standards such as the UN Standard Minimum Rules or the UN Body of Principles. Article 66 (4) of the draft Statute simply states that such imprisonment "shall be subject to the supervision of the Court". The Statute should state that imprisonment must be in accordance with international standards, including the UN Standard Minimum Rules and the UN Body of Principles.

Pardons and commutations of sentences are an international responsibility.

Article 67 of the draft Statute does not provide as effective international control over pardon, parole or commutation of sentences as Article 28 of the Statute of the ad hoc Tribunal. It would give national authorities the initiative on these issues. By referring to national law standards for determining these questions the Statute could result in defendants convicted of similar crimes under international law with similar sentences being treated unequally based solely on the national law of the place of imprisonment.

IV. PROTECTION OF VICTIMS AND WITNESSES

Victims and their families have a vital interest in knowing the truth about past human rights violations, in seeing that justice is done and in protecting their own civil interests. Victims, witnesses and families, however, also remain vulnerable to intimidation and retaliation as a result of a trial, often long after the accused has been convicted or acquitted. Amnesty International believes that careful and detailed consideration must be given to the right of victims to participate in the judicial process and to ensure that they, their families and witnesses on their behalf are properly protected. International standards require that such participation must at all times be consistent with the defendant's right to a fair trial.

It has already been recommended in Section II.D.1 that the Statute provide that victims and their families be permitted to submit information to the Prosecutor. It has also been suggested in Section II.D.3 that victims and their families should have the right to seek reconsideration by the Prosecutor of a decision not to prosecute in a particular case.

A. THE RIGHTS OF VICTIMS, THEIR FAMILIES AND WITNESSES

1. Participation in the trial

The views and concerns of victims should be presented and considered at appropriate stages of the proceedings, without prejudice to defendants.

[39] The Detention Rules of the ad hoc Tribunal have significant - but incomplete - safeguards for detainees. Presumably the category, "any other person detained on the authority of the Tribunal" is intended to include persons convicted by the Tribunal, but, if so, the Detention Rules fail to address a number of questions applicable to convicted prisoners, whether held at the seat of the ad hoc Tribunal or in the custody of national authorities.

International standards, as well as some civil law jurisdictions, recognize that victims may have a right to participate in an appropriate way in the criminal trial. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Declaration on Victims)[40] provides in paragraph 6 (b) that the judicial process should allow:

> ". . . the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused . . ."

This provision could be implemented in a number of ways. For example, consideration could be given to permitting victims to be represented during the trial, provided that such representation is without prejudice to the right of defendants to a fair trial. The Declaration on Victims states that the judicial process should inform victims of "their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested information" (Paragraph 6 (a)).

2. Protection of victims, their families and witnesses

The Statute of the Tribunal should protect victims, their families and witnesses from reprisals and unnecessary anguish.

The Tribunal will need wide powers to protect victims, their families and witnesses on their behalf. Furthermore, witnesses could suffer considerable mental anguish by having repeatedly to relive horrific events before investigators, prosecutors and judges.

The Declaration on Victims emphasises that "victims should be treated with compassion and respect for their dignity" (para. 4). It also provides in paragraph 6 (d) that the judicial system should take

> "measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation".

[40] Adopted by the UN General Assembly on 29 November 1985 in Resolution 40/34.

Article 46 requires the Chamber to "take all necessary measures available to it, to protect the accused, victims and witnesses, and may to that end conduct proceedings in camera or allow the presentation of evidence by electronic or other special means". The Commentary to Article 46 indicates that it will provide better safeguards for the right of the defendant to a fair trial than Article 22 of the Statute of the ad hoc Tribunal, which does not require the Court to give primacy to the right of the defendant to a fair trial. The Commentary to Article 46 of the draft Statute declares: "In conducting the proceedings, the Court must have due regard for the need to protect both victims and witnesses but only to the extent that this is consistent with full respect for the rights of the accused". Although the Statute appears to strike an appropriate balance between the rights of victims, their families and witnesses and the rights of defendants, it will be up to the Tribunal to devise practical ways to do this.[41]

In addition, the requirement in Article 48 (2) that witnesses "shall make such oath or declaration as is customary in judicial proceedings in the State of which the witness is a national" might prevent certain witnesses from testifying since it could conflict with their rights to freedom of thought, conscience and religion. It should be amended to permit the witness to make a solemn undertaking, as in Article 14 of the Statute for members of the Tribunal, that they will tell the truth and to provide criminal penalties for perjury.

B. SPECIAL CONSIDERATION IN CASES INVOLVING VIOLENCE AGAINST WOMEN AND CHILDREN

The Statute of the Tribunal should take into account the special circumstances of cases involving violence against women and involving children.

Special measures may be needed to deal with the particular demands of investigating, prosecuting and judging crimes involving violence against women, including rape and other sexual abuse and forced prostitution. Women who have suffered such violence may be reluctant to come forward to testify. Special measures may also be needed to address the problems of children who have been the victims of violence or who have witnessed it. Creative use by the Tribunal of its powers to protect witnesses and victims will be particularly important to tackle these problems.

Fact-finders must have a particular awareness of cultural and religious mores and expertise in collecting evidence of violence against women with sensitivity. The Tribunal should hire investigators and prosecutorial staff with this type of experience and sensitivity if cases involving rape, sexual abuse and forced prostitution are to be successfully prosecuted without causing unnecessary trauma for the victims and their families. Experience shows that victims and witnesses in such cases are often more likely to confide in and trust other women. Female investigators and prosecutorial staff with the necessary expertise should be available for these cases. If the Statute gives trial judges a more inquisitorial role similar to the practice in some civil law jurisdictions, it will be essential for female judges to be involved in these cases. Similar efforts may be needed to investigate cases of violence against children or to address the particular problems faced by some children who have witnessed violence.

The draft Statute is silent on these issues. Although many of these matters will necessarily have to be addressed in the practice of the Tribunal rather than in the Statute, the Statute should expressly state that all three organs of the Tribunal - and any public defender's office which is established - should take into account the special circumstances of cases involving violence against women and involving children.

C. RIGHTS TO COMPENSATION, RESTITUTION AND REHABILITATION

The international community should ensure that victims and their families should be able to obtain restitution, compensation and rehabilitation, either from the Tribunal or from an other body.

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[41] Amnesty International made a number of suggestions about how this could be accomplished by the ad hoc Tribunal in its report, *Memorandum to the United Nations: The question of justice and fairness in the international war crimes tribunal for the former Yugoslavia* (AI Index: EUR 48/02/93), and some of these could be considered by the International Criminal Tribunal.

Victims or their dependents have an enforceable right to claim restitution, compensation and rehabilitation from those responsible for violations of their human rights. The UN Commission on Human Rights reaffirmed in Resolution 1994/35, adopted on 4 March 1994, that "pursuant to internationally proclaimed human rights and humanitarian law principles, victims of gross violations of human rights should receive, in appropriate cases, restitution, compensation and rehabilitation". Among the relevant international standards recognizing the right to a remedy are Article 8 of the Universal Declaration of Human Rights, Article 2 (3) (a) of the ICCPR. The Victims's Declaration states that victims and their families have a right to restitution, compensation and assistance. Article 14 (1) of the UN Convention on Torture requires states to ensure victims of torture with redress and "an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible". Article 19 of the UN Declaration on the Protection of All Persons from Enforced Disappearances recognizes a similar right for victims of "disappearance" and their families.[42]

The draft Statute provides for restitution, but fails to provide a means for victims and their families to obtain compensation and rehabilitation. The international community should ensure that the international criminal court or some other body does do so.

In contrast to Article 24 (3) of the Statute of the ad hoc Tribunal, which limits the supplementary remedies which that court can give to the victim to ordering "the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners", the draft Statute provides a somewhat wider range of remedies. Article 53 (3) authorizes the Trial Chamber to order the return of property or its proceeds to its rightful owners if they were acquired by the convicted person in the course of committing the crime or to order the forfeiture of the property or proceeds if the rightful owners cannot be located. The Trial Chamber may also order the defendant to pay fines.

Neither the ad hoc Tribunal nor the Trial Chamber of the International Criminal Tribunal can award compensation or rehabilitation. If the draft Statute is not amended to permit it to award such relief, an international civil court or claims commission should be established to do so. This independent civil court or claims commission could process claims against individuals as well as states, drawing on the experience of the fund and commission established to process claims regarding the 1991 Gulf conflict. This body might be better suited to grant relief to victims because the standard of proof would be less than that required in a criminal case so the victim could be awarded relief against individuals, even if they had not been convicted of a crime, or against the state when jurisdiction cannot be established over the individuals responsible. The Statute should expressly provide that the facts established during the trial are deemed to be proved for the purposes of subsequent civil proceedings at the international or national level. Subsequent civil proceedings could then focus on assessing the injury and determining appropriate remedies.

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[42] For a discussion of other international standards recognizing the right to restitution, compensation and rehabilitation, see Report of the Special Rapporteur on the question of compensation of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Theo van Boven. (UN Doc. E/CN.4/Sub.2/1993/8).