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## [A] OVERVIEW AND SUMMARY OF RECOMMENDATIONS

### 1. INTRODUCTION

The decision by the United Nations (UN) Security Council to establish an *ad hoc* international war crimes tribunal for the former Yugoslavia (the Tribunal) could be a first step towards breaking the cycle of impunity and gross human rights violations in the former Yugoslavia. Unfortunately, however, experience has shown that *ad hoc* judicial tribunals are too often created and manipulated to serve political interests of particular states. They often lack real independence and impartiality and fail the basic tests of justice and fairness which are well established in international law.

Amnesty International has consistently called for full and impartial investigations into all allegations of gross violations of human rights and humanitarian law in the former Yugoslavia and for all those responsible to be brought to justice. Amnesty International does not take a position on questions of statehood or territorial control. It does insist that bringing to justice those who violate basic rules of minimum civilised conduct is as essential in war as in peacetime. Military and civilian authorities must send a clear message that violations of basic human rights will not be tolerated and that those who commit such acts will be held personally accountable. This was the message reaffirmed in Nuremberg and Tokyo after the Second World War and which the international community has failed to enforce consistently. Sweeping aside the question of responsibility only leads to renewed cycles of violence and violations of human rights. The UN will be discredited if the Tribunal is not given the wide powers it needs and if it fails successfully to prosecute and convict those perpetrators it finds responsible.

Furthermore, the Security Council has already been subject to accusations of double standards in selectively enforcing universal human rights and humanitarian law. Universal principles must be implemented in all countries throughout the world. Amnesty International has therefore called on the UN expressly to recognise that the *ad hoc* Tribunal for the former Yugoslavia is only the first step in establishing a permanent, international criminal court competent to try cases involving gross violations of

humanitarian and human rights law. While some aspects of the law and practice of this *ad hoc* Tribunal should be a model of high standards for the future, on some issues different solutions will be more appropriate for a permanent institution.

Several of the issues raised in this Memorandum respond directly to the concrete proposals which have been made about how to establish this Tribunal, especially those submitted to the Security Council by France[1] (the French proposal), Italy[2] (the Italian proposal), Sweden on behalf of the Conference on Security and Co-operation in Europe[3] (the CSCE proposal), USA[4] and Egypt, Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey on behalf of the Organization of Islamic Conference[5]. Some issues have been raised by Amnesty International because the organization considers they have not been dealt with at all, or adequately, in existing proposals.

## 2. SUMMARY OF AMNESTY INTERNATIONAL'S RECOMMENDATIONS

For many years Amnesty International has consistently worked both for fair trial of political prisoners and against the impunity of human rights violators, throughout the world. On the basis of this experience we offer a number of recommendations about practices and safeguards which we consider would help to make the Tribunal more fair, just and effective, in accordance with internationally accepted standards. This Memorandum does not set out a blueprint for the Tribunal; it addresses a number of issues which are within the specific mandate of Amnesty International[6]. Our recommendations also arise out of our continuing research of human rights violations in the former Yugoslavia[7].

### I. <u>Creation of Tribunal</u> (see section 3 below)

A Security Council resolution under Chapter VII of the UN Charter would be a quick and effective method of establishing the Tribunal. However, the life of the Tribunal should not be determined by political considerations, such as the conclusion of a peace settlement, but be based on an objective, professional judgment by the Tribunal's lawyers and judges that its work is completed:

1. Report of the Committee of French Jurists set up by Mr. Roland Dumas, Minister of State and Minister for Foreign Affairs, to study the establishment of an International Criminal Tribunal to judge crimes in the former Yugoslavia, reproduced in UN Doc.S/25266, 10 February 1993.
2. Study carried out by a Commission of Italian Jurists, set up by the Italian Government, reproduced in UN Doc.S/25300, 17 February 1993.
3. Proposal for an International War Crimes Tribunal for the Former Yugoslavia by Rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia, 9 February 1993, only the contents reproduced in UN Doc.S/25307, 18 February 1993.
4. Attached to Letter dated March 1993 from the Permanent Representative of the USA to the UN addressed to the Secretary-General.
5. See UN Doc: A/47/920, S/25512, 5 April 1993.
6. Amnesty International works for the release of prisoners of conscience (those detained by reason of their political, religious or other conscientiously held beliefs or by reason of their colour, sex, ethnic origin or language, provided they have not used or advocated violence) fair trials for political prisoners, an end to the death penalty, torture and other cruel treatment, and a stop to extrajudicial executions and "disappearances".
7. See **Bosnia-Herzegovina: Gross abuses of basic human rights**, AI Index: EUR 63/01/92, October 1992; **Bosnia-Herzegovina: Rana u duši - A wound to the soul**, AI Index: EUR 63/03/93, January 1993; **Bosnia-Herzegovina: Rape and sexual abuse by armed forces**, AI Index: EUR 63/01/93, January 1993; **Yugoslavia: Torture and deliberate and arbitrary killings in war zones**, AI Index: EUR 48/26/91, November 1991; **Yugoslavia: Further reports of torture and deliberate and arbitrary killings in war zones**, AI Index: EUR 48/13/92, March 1992; **Yugoslavia: Ethnic Albanians - Victims of torture and ill-treatment by police in Kosovo province**, AI Index: EUR 48/18/92, June 1992.

1. The Security Council should expressly recognise that the Tribunal will continue to operate as long as is necessary to bring to justice gross violators of human rights and humanitarian law in the conflicts in the former Yugoslavia.

2. The Tribunal should be in operation and investigating cases as soon as possible.

## II. Independence and qualification of judges (see section 4)

Judges must have proven competence, independence and impartiality and be free to carry out their duties without external interference. If states are to appoint judges, as many states should be involved as possible, in order to enhance the Tribunal's legitimacy and to ensure a broad cross-section of different legal systems and regional experience on the bench:

1. The majority of judges should have proven competence as criminal trial judges or criminal lawyers. Some judges should have experience in international criminal law, humanitarian law and human rights law.

2. The Security Council and the Generaly Assembly should jointly appoint judges, in the way appointments are made to the International Court of Justice (ICJ), except that the ICJ and/or other international judicial bodies should nominate candidates.

3. The Statute should incorporate by reference the UN Basic Principles on the Independence of the Judiciary.

## III. Competence of the Tribunal (see section 5)

The Tribunal should have jurisdiction over a broad enough range of crimes to cover all gross human rights and humanitarian law violations committed in the conflicts, without violating the principle that criminal law must not have retroactive effect. The starting point for Amnesty International will be to study whether the jurisdiction is wide enough to cover acts which violate people's rights to be free from arbitrary deprivation of life, torture and cruel, inhuman or degrading treatment or punishment, arbitrary detention and enforced disappearance and the right of political prisoners to receive a fair trial:

1. The punishable crimes should not be limited to crimes of a mass or systematic nature.

2. The Tribunal should at least have competence over acts which amount to violations of the laws and customs of war, crimes against humanity, genocide, torture and other relevant crimes under domestic law in force at the time in the former Yugoslavia.

3. Crimes against humanity will be a particularly important category of crimes for the Tribunal to ensure the prosecution of gross human rights violations committed against any civilian population. In international law people can be tried for crimes against humanity independently of war crimes. The use of crimes against humanity avoids the unresolved controversy about whether the various conflicts are international or non-international (torture and genocide also avoid this question).

**IV. Membership of a "criminal" organization** (see section5.2)

The imposition of collective punishment has no place in criminal trials which must determine individual criminal responsibility:

1. No one should be deemed to have committed specific criminal acts merely by being a member of an organization that had as its object the commission of these crimes.

2. Nor should past membership of a "criminal" organization be a crime by itself if the organization was not criminal under national or international law at the time.

**V. People over whom the Tribunal should have competence** (see section 5.3)

1. Justice will not be done - nor seen to be done - unless both leaders and subordinates are prosecuted. Those who have committed or ordered or acquiesced in gross human rights violations should be brought to justice. Superior orders cannot be invoked as a defence.

2. Perpetrators from all parties to the conflict should be brought to justice.

**VI. Investigations** (see section 6)

1. There should be no restrictions on who can provide information to the investigation and prosecution body. This body should have the duty to assess all information received, including from victims, non-governmental organizations, governments and intergovernmental organizations.

2. Investigators and prosecutors will need wide powers to act quickly and effectively, including summoning witnesses for questioning and carrying out thorough investigations within the former Yugoslavia, including the power to search and seize evidence.

3. The Security Council must take the steps necessary to ensure that national authorities are obliged actively to cooperate with the Tribunal, including helping to investigate cases, arresting suspects and transferring them to the Tribunal, in accordance with the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the UN General Assembly in 1973.

4. All pre-trial measures, including pre-trial detention, search warrants and seizures, should be subject to supervision or review by judges of the Tribunal.

**VII. Prosecution** (see section 7)

Any suggestion that a person has not been indicted by the prosecution office for reasons of international politics or the wishes of states, would seriously damage the authority of the Tribunal:

1. There should be a method to seek review of a decision not to proceed with a prosecution, which should include the right of victims to make a complaint.

**VII. Trials in absentia** (see section 8)

1. Trials *in absentia* should be prohibited.

2. If an accused wilfully refuses to appear, the Tribunal may hold a preliminary hearing to establish basic facts about the crime, without determining the guilt or innocence of the accused.

**IX. Protection of the accused** (see section 9)

It would be unthinkable for the Tribunal to fall below internationally accepted standards for fair trial, particularly those adopted by the UN, which apply from the time of arrest until the exhaustion of all judicial and other remedies:

1. The Statute should incorporate by reference, and require all Tribunal organs to observe, at least the guarantees provided in Articles 9, 10, 14 and 15(1), International Covenant on Civil and Political Rights, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the UN Standard Minimum Rules for the Treatment of Prisoners.

2. The Statute should guarantee that every accused who cannot afford to pay will automatically receive free legal assistance.

3. A separate public defender's office should be created, with branch offices located in the former Yugoslavia.

**X. Protection of victims** (see section 10)

1. Victims or their families should be able to be represented at the trial to protect their interests, particularly relating to compensation, without prejudicing the rights of the accused.

2. The Tribunal should be given wide powers to protect victims, their families and witnesses, from reprisals and unnecessary mental anguish, including obtaining expert advice about how to minimise the psychological impact of the proceedings; excluding public and the press in exceptional circumstances, and ordering extraordinary measures to protect the identity of witnesses from the accused. In all cases the interests of the witnesses should be balanced against the right of the accused to hear all the prosecution evidence and to cross-examine witnesses.

3. A special unit should be set up to deal with such protection issues at every stage of the proceedings.

**XI. Rights to compensation, restitution and rehabilitation** (see section 11)

1. The Tribunal should have the power to order a convicted person to provide compensation and restitution to a victim or dependents, for injury caused by the criminal act, in accordance with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

2. The Security Council should indicate what mechanism will be established to protect the civil rights of victims and their dependents, including the establishment of a separate international commission to process compensation claims against individuals as well as claims against states.

**XII. Special considerations in cases involving violence against women** (see sec 10.3)

1. Rape, sexual abuse and forced prostitution should be separate indictable offences.

2. The investigation and prosecution body should specifically include people with experience and sensitivity in collecting evidence in cases involving violence against women and in prosecuting such cases.

3. The Tribunal should include female investigators, prosecutors and judges with such experience.

4. Creative use of the Tribunal's powers to protect victims and witnesses will be particularly important to deal with cases of violence against women.

**XIII. Relationship between international and national jurisdictions** (see section 12)

1. The Tribunal should retry a person who has been convicted or acquitted in a trial at the national level which was manifestly unfair or a sham.

2. National authorities should be prohibited from retrying a person who has been convicted or acquitted by the Tribunal for the same acts.

3. The Tribunal should be permitted to transfer a case to a national court, but only if it is satisfied that the trial will be just, fair and effective, carried out by a court which is manifestly independent and impartial, and provided that the national court cannot impose the death penalty and the accused would not face a genuine risk of his or her fundamental human rights being violated.

**XIV. Rights of appeal** (see section 13)

1. A convicted person should have the right to challenge a manifestly unfounded finding of fact by the Tribunal.

2. Both the convicted person and the prosecution should be able to appeal on questions of law or against sentence or seek a revision if decisive new evidence comes to light.

**XV. Penalties and supervision of sentences** (see section 14)

1. The death penalty must be expressly excluded.

2. Decisions about post-conviction pardons, compassionate release and remission of sentences should be supervised by an international, impartial and independent body.

3. Convicted persons serving sentences should have the right ultimately to complain to an international,

independent and impartial judicial body about conditions of imprisonment.

**XVI. Adequate resources** (see section 15)

The tribunal should be provided with the considerable resources and powers it will need to properly investigate all complaints and to ensure that those suspected of violations are brought before the court and prosecuted fairly and without delay:

1. The Tribunal should have the flexibility to increase the number of judges, prosecutors and investigators in light of the caseload.

2. The Tribunal will need enough resources to employ, or seek the advice of, experts at every stage of the proceedings.

**XVII. Towards a permanent international court** (see section 1 above)

The UN should expressly recognise that this *ad hoc* Tribunal is only the first step in establishing a permanent, international criminal court competent to try cases involving gross violations of humanitarian and human rights law.

# [B] DETAILED DISCUSSION OF RECOMMENDATIONS

## 3. CREATION OF THE TRIBUNAL

It appears likely that the Tribunal will be established by a resolution of the Security Council acting under Chapter VII of the UN Charter, though the possibility of a treaty based body has not been ruled out. Whatever method is used, certain principles should guide how it is set up. The Tribunal must be in operation and investigating cases as soon as possible, before evidence is destroyed and offenders flee. The Tribunal must be created in such a way that it is widely acknowledged as being legitimate, independent and impartial. Every effort must be made to demonstrate that this Tribunal is an expression of a collective, global responsibility for the enforcement of universal human rights principles. The General Assembly, which last year urged the Security Council to establish such an institution[8], should help to build this consensus by showing its support for steps taken to create the Tribunal.

A Security Council resolution under Chapter VII would be a quick and effective method of establishing the Tribunal. However, the full scope of measures which may be taken under Chapter VII "to maintain or restore international peace and security" (Article 39, UN Charter) is unknown and the Tribunal could be dissolved by the Security Council for political reasons as swiftly as it is created. Amnesty International therefore urges the Security Council expressly to recognise that the Tribunal will continue to operate as long as is necessary to bring to justice gross violators of human rights and humanitarian law in the conflicts in the former Yugoslavia and that this is a necessary measure to maintain international peace and security.

The Tribunal may even have to exist long after the last trial in order to supervise the execution of sentences. On the other hand, the jurisdiction of the Tribunal could be ceded to a future permanent international criminal court. In any case, the life of the Tribunal should not be determined by political considerations, such as the conclusion of a peace settlement, but be based on an objective, professional judgment that its work is completed. This assessment could be made by the Tribunal's lawyers and judges.

## 4. INDEPENDENCE AND QUALIFICATION OF JUDGES

In this highly politicised environment, particular efforts must be made to ensure that the Tribunal is able to carry out its work without any direct or indirect interference or improper influence and that judges (as well as prosecutors and investigators) are acknowledged as being independent, impartial and suitably qualified.

The main function of the Tribunal will be to assess complex and confusing facts in order to determine the guilt or innocence of individuals. Amnesty International considers that the majority of the judges should therefore have proven expertise as criminal trial judges or criminal lawyers. Depending on the way the Statute is drafted, the Tribunal will also have to decide questions of international law. Some judges should therefore also have competence in international criminal law, humanitarian law or human rights law, though such expertise could also be provided by specially appointed advisers.
To ensure absolute impartiality, any person who has formulated or implemented a government's policy in

8. UNGA Resolution 47/121, 18 December 1992, para. 10.

relation to the former Yugoslavia or who has otherwise been involved in activities which might put into doubt his or her impartiality on issues which the Tribunal may consider, should be disqualified as a candidate. The criteria for determining impartiality should be agreed before candidates are nominated. Furthermore, to ensure maximum independence and impartiality, Amnesty International does not consider that parties to the conflict in the former Yugoslavia should have a right to appoint judges.

If states are to appoint judges, the selection process should involve as many states as possible, in order to enhance the Tribunal's legitimacy and reflect a broad cross-section of different legal systems and regional experience. Both the Security Council and the General Assembly should participate along the lines used for appointing judges to the International Court of Justice. However, rather than involving the Permanent Court of Arbitration, it would be more appropriate for candidates to be nominated by the International Court of Justice and/or the international judicial institutions mentioned below.

The Italian proposal suggests that various UN treaty monitoring bodies should each appoint two judges. These committees, however, are not primarily judicial bodies and include many experts in fields such as medicine, journalism, and even law, who have little experience in criminal law. Nevertheless, some members, with the relevant expertise, could perhaps be consulted on this question.

The French proposal suggests that the ICJ and the highest regional human rights bodies in Europe, Africa and the Americas, should each select a number of judges. If this method is adopted, Amnesty International considers that only existing international courts should be involved in the selection, as these are most likely to have the judicial experience and independence to select other appropriate judges. This would limit participation to the: ICJ, Inter-American Court of Human Rights and European Court of Human Rights. It is unfortunate that there is no comparable court in Asia or Africa. However, the selecting institutions could appoint judges who reflect the major legal traditions in the Asian and African regions. Indeed, the ICJ, as the only global court, could be given a leading role in selecting a properly balanced bench.

Guarantees for the independence and impartiality of the Tribunal's judges will depend partly on factors already articulated in the UN Basic Principles on the Independence of the Judiciary (Basic Principles) which have been approved by the UN General Assembly[9]. They relate to matters such as tenure, conditions of office, court administration and procedure for suspending or removing judges. These standards represents an international consensus on guarantees for an independent judiciary and Amnesty International urges that the Basic Principles be incorporated by reference in the Statute.

The French and Italian proposals both provide for a fixed number of judges, 15 and 18 respectively. No one yet knows what will be the workload of the court and any *a priori* decision on the number of judges is necessarily arbitrary. Amnesty International believes the Statute should allow for more judges to be selected on the recommendation of the judges and/or prosecution organ, if needed in light of the caseload. However, to prevent political interference, such new judges should not be assigned to cases in which proceedings have already begun.

## 5. COMPETENCE OF THE TRIBUNAL

9. Adopted unanimously by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders in September 1985. Subsequently endorsed by UNGA Resolution 40/32 of 29 November 1985 and Resolution, 40/146 of 13 December 1985.

## 5.1. Jurisdiction & applicable law

The creation of this ad hoc international Tribunal embodies the principle clarified at the Nuremberg and Tokyo war crimes tribunals, reaffirmed in many UN General Assembly resolutions, repeated by the UN International Law Commission (ILC) and embodied in many UN conventions, that individuals are criminally responsible for any act which constitutes a crime under international law, even if internal law does not criminalize the same act or even authorises it. The Tribunal will be an expression of the collective responsibility of states to enforce international law. The primary source for the Tribunal's jurisdiction should be international law, independent of domestic law.

The principle of legality, or non-retroactive application of criminal law, will not be violated if the Tribunal is given competence over acts which violate clear rules of conventional or customary international criminal law at the time they were committed[10]. The ICCPR reaffirms this principle by providing firstly, that a person can be charged with a crime if it was an offence under either national or international law at the time it was committed (Article 15(1)) and, secondly, that the principle of legality does not prevent anyone being tried for an act which was "criminal according to the general principles of law recognised by the community of nations" (Article 15(2)). It is equally clear that procedural rules are not affected by the legality principle[11]. International law, however, does not set down penalties for crimes under international law, leaving this for states to decide. The principle would be violated if the Tribunal imposed sentences based on rules which were not sufficiently certain at the time the crimes were committed.

There is, however, a useful interplay between international law and national law. The former Socialist Federative Republic of Yugoslavia (SFRY) ratified all major human rights and humanitarian law conventions[12]. The Republic of Yugoslavia claims to be the successor state to the SFRY and has therefore succeeded to its international obligations. Under Article 210 of the 1974 Constitution of the SFRY, properly ratified international treaties can be applied directly by national courts. Furthermore, the

10. The ILC, in its latest report, reaffirmed that there are rules of both conventional and customary international law which bind individuals. It did recommend that the jurisdiction of a permanent criminal court should be limited to offences defined in treaties in force but this has more to do with practical concerns about whether states would accept an open-ended jurisdiction in advance which extended to crimes against general international law not yet defined. It also assumed that the draft Code of Crimes against the Peace and Security of Mankind would be included in the jurisdiction once completed and adopted. See Report of the International Law Commission on the work of its 44th session, 4 May - 24 July 1992, UN Doc: A/47/10 (hereafter ILC 1992 Report), paras. 449-451 and 492.

11. ILC 1992 report, para.500.

12. The former Yugoslav Republic had ratified the four 1949 Geneva Conventions and two 1977 Additional Protocols; the Genocide Convention; the Convention against Torture; International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR), the two UN Conventions against Slavery; ILO Convention No.29 concerning forced labour; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Rights of the Child and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Croatia and Bosnia-Herzegovina, as states which have emerged from the former Yugoslavia are bound by the conventions which the former Yugoslavia had ratified. In addition, Croatia, Slovenia and Bosnia-Herzegovina have all formally succeeded to a number of conventions: In 1992 Croatia formally succeeded to the ICCPR, ICESCR, Convention against Torture, CERD, the Geneva Conventions and two Additional Protocols, the Genocide Convention, the Convention on the Rights of the Child, the Convention relating to the status of refugees and Protocol, and the Convention relating to the Status of Stateless Persons. Bosnia-Herzegovina formally succeeded in 1992 to the Geneva Conventions and Additional Protocols and the Genocide Convention.

Criminal Code of the former Socialist Federative Republic of Yugoslav (the former Yugoslav Penal Code)[13], gave domestic effect to many of these international norms, particularly Chapter XVI which incorporated rules from the 1949 Geneva Conventions[14] and the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention)[15]. This domestic enforcement of international crimes parallels the more direct, international jurisdiction. Indeed, the Tribunal will largely do what the national courts in the former Yugoslavia could, but are unwilling or unable, to do. There is no reason why it could not draw on domestic Yugoslav law to support and strengthen its international jurisdiction in several ways:

1. Where crimes found in customary international law are so ill-defined that to incorporate them in the Tribunal's jurisdiction would have a retroactive effect, such crimes could be included in the Statute if they were also criminalized in the former Yugoslavia at the time the act was committed.

2. Conversely, because of the specific geographic focus, there is no reason why the Tribunal should not also have competence over crimes which are prohibited by Yugoslav law but are not crimes in international law, as long as the domestic law is not otherwise inconsistent with international law.

3. Former Yugoslav law could be used as a guide to decide penalties, except that the death penalty should not be imposed[16].

In this way the jurisdiction of the Tribunal should be broad enough to cover all gross human rights violations, without having retroactive effect.

What acts constitute crimes under international law has more to do with the haphazard influence of history and politics than with the reality of what acts should be criminalized. Because of the specific mandate of the organization, the starting point for Amnesty International will be to study whether the Tribunal has competence over crimes which violate people's rights to be free from arbitrary deprivation of life, torture and cruel, inhuman or degrading treatment or punishment, arbitrary detention and enforced disappearance and the right of political prisoners to receive a fair trial.

Amnesty International does not believe that the Statute should include a general restriction that only crimes of a mass or systematic nature can be prosecuted[17]. By basing its jurisdiction on crimes under international law, and possibly Chapter XVI of the former Yugoslav Penal Code, the competence of the

13. The whole former Yugoslav Penal Code has been incorporated into Bosnia-Herzegovina law and the new Croatian Penal Code expressly retains Chapter XVI of the code.

14.Hereafter the four 1949 Geneva Conventions referred to as Geneva I, II, III or IV; the two 1977 Additional Protocols hereafter referred to as Protocol I and Protocol II.

15. See for example, Articles 141 (Genocide), 142 (War crimes against civilian population), 143 (war crimes against the wounded and sick), 144 (war crimes against prisoners of war), 146 (unlawful killing and wounded of the enemy), 150 (brutal treatment of the wounded, sick or prisoners of war), and 151 (destruction of cultural and historical monuments), 152 (incitement to aggressive war), 154 (racial and other discrimination) of the former Yugoslav Penal Code.

16. The ILC has recommended that a future permanent criminal court will need a residual power to refer to penalties imposed under national law in the absence of international penalties. See ILC 1992 Report, para. 502.

17. The French proposal limits jurisdiction to crimes "committed on a mass and systematic scale, causing particular revulsion and calling for an international response" - art.VI of draft statute in French proposal. What is meant by "mass" and "systematic" is not clear. The ILC, in its 1991 draft Code of Crimes against the Peace and Security of Mankind, took "the mass-scale element [to] relate to the number of people affected by such violations or the entity that has been affected" . It defined "systematic" as relating to "a constant practice or to a methodical plan to carry out such violations".

Tribunal will necessarily be limited to the most serious crimes. Some categories of crimes under international law, such as crimes against humanity, are limited by definition to acts of a mass or systematic nature. But to place such a limitation on other crimes is arbitrarily to change the definition of these crimes. One act of torture is just as much a crime under international law as a pattern of torture. Finally, terms such as "mass or systematic" are inherently ambiguous and it would be difficult for the prosecution to decide whether some cases qualify.

Amnesty International urges the drafters of the Statute to ensure that interpretation of what acts are within the Tribunal's competence is not complicated by the unresolved question of whether the various conflicts are international or non-international. This controversy is a result of the undeveloped nature of international law, will not help to make the trials more just and fair and will present yet another legal hurdle for the prosecution.

There may be several ways to avoid this controversy. It may be necessary only to incorporate provisions from the Geneva Conventions and Protocols regulating non-international conflicts. The Tribunal's jurisdiction could then be supplemented by categories of crimes, such as crimes against humanity, genocide and torture, where the international-internal conflict distinction is irrelevant.

The former Yugoslav Penal Code could be another important source of crimes. Chapter XVI incorporates, *inter-alia*, rules relating to international armed conflict found in the grave breach provisions of the Geneva Conventions and the Hague Regulations of 1907. As they appear in Chapter XVI these provisions apply to such acts committed "in violation of the rules of international law" during "wartime or armed conflict". Although it is not clear, these articles may apply to both international and non-international armed conflict.

It is significant that in a series of written agreements, signed under the auspices of the International Committee of the Red Cross, the parties to the Croatian-Serbian conflict and the conflict in Bosnia-Herzegovina committed themselves to respecting various provisions in the Geneva Conventions and Protocol I relating to the protection of civilians, captured combatants and the wounded and sick[18]. Although the agreements are stated to be without prejudice to the legal status of the parties, this *de facto* recognition of provisions for international conflicts could justify applying rules for international conflict to the conflicts in the former Yugoslavia, at least from the date of the agreements, in relation to the parties to those agreements.

If use of the Geneva Convention and Protocols is limited to provisions on non-international conflict, Common Article 3 and Protocol I will still be a vital source of relevant crimes. Protocol II, Article 14, for example, prohibits the starvation of civilians as a method of combat and Protocol II, Article 13(2), provides that civilians "shall not be the object of attack". Article 13(2) prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population" and in Article

18. See, (i) Statement on respect of humanitarian principles made by the Presidents of the six republics in the Hague on 5 November 1991; (ii) Memorandum of Understanding, dated 27 November 1991, signed in Geneva by representatives of the Republic of Croatia, Federal Republic of Yugoslavia and Republic of Serbia; (iii) Addendum to the Memorandum of Understanding of 27 November 1991, signed by representatives of the Federal Republic of Yugoslavia and the Republic of Croatia; (iv) Agreement reached under ICRC auspices on 28 & 29 July 1992, signed by Prime Minister of Federal Republic of Yugoslavia and Vice-Prime Minister of Republic of Croatia; (v) Agreement signed on 22 May 1992 by representatives of the Presidency of the Republic of Bosnia-Herzegovina, the Serbian Democratic Party, the Party of Democratic Action and the Croatian Democratic Community.

4(2)(d), "acts of terrorism" are prohibited. Such tactics which spread a climate of fear and result in the civilian population having no option but to flee, have been an integral part of violations committed in the course of "ethnic cleansing". Protocol II also prohibits unlawful deportation or transfer of civilians[19]. Hostage taking, another widespread abuse in the conflicts, is prohibited regardless of whether the conflict is international or internal[20].

It is not clear whether atrocities committed in the former Yugoslavia amount to genocide, as defined by the Genocide Convention. The devastating effect on whole national, ethnic or religious groups of violations committed in the context of "ethnic cleansing" clearly raises this issue and Amnesty International would welcome the Tribunal being given an opportunity to make its own assessment.

In light of these comments Amnesty International considers the Tribunal should at least have competence over acts which amount to violations of:

- the **laws and customs of war** (drawing on conventional and customary rules regulating internal conflict and/or rules regulating international conflict), particularly those found in the Geneva Conventions and Additional Protocols;
- **crimes against humanity** (see the discussion below);
- **genocide** as defined in the Genocide Convention;
- **torture** as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and
- other relevant acts criminalized at the time they were committed by **laws in force in the former Yugoslavia**.

In light of the scale of allegations[21] of rape, forced prostitution and indecent assault in the conflicts in the former Yugoslavia, Amnesty International considers it should be unambiguous in the Tribunal's Statute that these acts are separate indictable crimes, although they are also clearly included within the meaning of provisions in the Geneva Conventions and Additional Protocols[22].

## Crimes against humanity

It was mentioned above that crimes against humanity is one useful category of offences to avoid a debilitating debate about whether the conflicts are international or non-international. It also avoids the need to determine whether the crime was committed against a belligerent party in war or against one's own civilian population. Crimes against humanity is a vigorous and well established category of crime,

19. See Protocol II, art.17, as well as Geneva IV, art.147, and Protocol I, art.85(4)(a).
20. See Geneva Conventions, Common Article 3, Protocol I, Article 75(2)(c), and Protocol II, Article 4(2)(c).
21. See Amnesty International, **Bosnia-Herzegovina: Rape and sexual abuse by armed forces**, AI Index: EUR 63/01/93, January 1993; European Community Investigative mission into the treatment of Muslim women in the former Yugoslavia (headed by Dame Ann Warburton), Report to European Community Foreign Ministers, January 1993; UN Commission on Human Rights Special Rapporteur on the former Yugoslavia, report to 49th session of Commission on Human Rights, Annex II, UN Doc: E/CN.4/1993/50.
22. Viz. within the meaning of Common Article 3, Protocol II, Article 4 and the grave breach provisions such as Geneva IV, Article 147 which prohibits "wilfully causing great suffering or serious injury or to body or health". The exploitation of others for the purposes of prostitution has also been prohibited by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, approved by the UNGA resolution 317(IV), 2 December 1949, although it is declared criminal only to the extent permitted by domestic law (art.3).

well suited to the needs of this Tribunal. Civilian and military authorities who have committed gross human rights violations against civilian populations under their administrative control could be prosecuted under this head. Many of these violations have led to the forcible expulsion of thousands of people. Existing international law requires states to cooperate in the detection, arrest, and bringing to trial of people suspected of crimes against humanity[23]. There is universal jurisdiction over crimes against humanity and every state must prosecute or extradite alleged offenders found in their territory. A state must also refuse asylum to anyone who may have committed such crimes. These international obligations will be important to help ensure perpetrators from the former Yugoslavia are brought to trial.

In the Nuremberg Charter crimes against humanity was established as a separate category of offences to enable Nazis to be tried for crimes committed against German citizens. However, such acts could not be prosecuted unless they were committed in execution of or in connection with a crime against peace or a war crime. Since then, however, crimes against humanity have developed into an independent category of international crimes. In other words, it is no longer necessary to show that the crime was committed in the execution of or in connection with a war crime or crime against peace.

Only months after signing of the Nuremberg Charter, Allied Control Council Law No.10 (20 December 1945) which formed the jurisdictional basis for war crimes trials in Germany after the Nuremberg 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 ..."

Although the UN General Assembly in 1946 retained the Nuremberg Charter formulation of crimes against humanity[24], the 1954 version of the ILC draft Code of Offences against the Peace and Security of Mankind (which largely followed the Nuremberg definition of crimes against humanity) did not require that the acts had to be committed in connection with war crimes or crimes against peace.

International law has continued to expand the category of crimes against humanity to include *apartheid*[25] and genocide[26]. Most recently, the UN General Assembly has recognised the systematic practice of enforced disappearance to be in the nature of a crime against humanity[27]. The ILC has included in its 1991 draft Code of Offences against the Peace and Security of Mankind an updated version of its 1954 description of crimes against humanity which reflects the enduring nature of this category of offences without the acts being dependent on any other crime[28].

23. See section 6.2 below.
24. UNGA Resolution 95 (1), 11 December 1946.
25. See art.1, International Convention on the Suppression and Punishment of the Crime of *Apartheid*, adopted by UNGA 30 November 1973.
26. Genocide is included as a crime against humanity in the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by UNGA 26 November 1968. This convention refers to "crimes against humanity whether committed in time of war or in time of peace".
27. Preamble to UN Declaration on the Protection of All Persons from Enforced Disappearance, adopted by UNGA Resolution 47/133, 18 December 1992.
28. Article 21 of the 1991 draft, entitled "systematic or mass violations of human rights" and is expressed to cover crimes against humanity, provides that: "An individual who commits or orders the commission of any of the following violations of human rights: murder, torture, establishing or maintaining over persons a status of slavery, servitude of forced labour, persecution on

### 5.2. Membership of a "criminal" organization

Amnesty International is concerned about the provision in the French proposal, based on the Nuremberg Charter, that crimes within the jurisdiction of the Tribunal "shall be deemed to have been committed" by any individual who was a member of an organization which had as its primary or secondary objective the commission of one or more such crimes. The imposition of this form of collective guilt should have no place in a criminal trial which must determine whether an individual has committed specific criminal acts in a particular place at a particular time, with the requisite criminal intent. Membership of an organization which had as its objective the commission of one or more of the crimes may be evidence towards proving that the accused participated in acts sponsored by the organization. But membership alone is not sufficient to prove individual guilt. It is ironic that such a crime is being contemplated, when the Geneva Conventions and Protocols expressly prohibit collective punishment[29] and require that no one can be convicted of an offence "except on the basis of individual penal responsibility"[30].

Amnesty International would also be concerned if the Statute included past membership of an organization declared to be "criminal" as a separate offence. If such organizations were not "criminal" under national or international law at the time an accused joined, such an *ex post facto* declaration with criminal consequences would amount to a retroactive application of the law.

What is not prohibited by criminal law principles is the indictment, as a separate criminal act, of anyone who has set up or helped to set up a formal or informal group of people for the purpose of committing crimes within the jurisdiction of the Tribunal. The prosecution would still have to establish, however, that the individual accused participated in the creation of the group with the necessary intent to create a group with such aims.

### 5.3. People over whom Tribunal should have competence

Justice will not be done - nor seen to be done - unless both leaders and subordinates are prosecuted. Those who have committed or ordered or acquiesced in gross human rights violations should be brought to justice. Superior orders cannot be invoked as a defence. Furthermore, perpetrators from all parties to the conflict should be brought to justice.

## 6. INVESTIGATIONS

### 6.1. Initiating investigations: the role of victims and NGOs

The investigation and prosecution organ should be free to seek and receive unsolicited information from the widest possible range of sources, including victims and their families, other individuals, non-governmental organizations, governments and inter-governmental organizations. There should be no restriction on who can provide information. It will then be up to the investigators and prosecutors to assess the weight of the information and whether it warrants further investigation and possible

social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or deportation or forcible transfer of population shall, on conviction thereof, be sentenced to ..."

29. Geneva IV, art.33, Protocol I, art.75(2)(d).

30. Protocol I, art.75(4)(b) & Protocol II, art.6(2)(b).

prosecution. The investigation and prosecution body should also be able to begin an investigation on its own initiative.

Amnesty International is concerned that if the Statute recognises specific organizations or categories such as "humanitarian organizations" which may submit denunciations, the implication is that the investigation and prosecution organ has no duty to take note of information submitted by other organizations and individuals. The reality is that an organization's size, or whether or not it has consultative status with intergovernmental organizations, bears little relationship to the importance or relevance of information submitted to the Tribunal. Some non-governmental organizations as well as bodies such as the UN Commission of Experts established pursuant to Security Council resolution 780 (1992) and the UN Commission on Human Rights Special Rapporteur on the former Yugoslavia, are systematically collecting evidence from a wide variety of sources which may be of considerable help to the Tribunal. However, no *a priori* assumption should be made in the Statute about the relevance or reliability of information from particular sources.

## 6.2. Rights and powers during pre-trial investigation

In the absence of an international police force, the investigators must be given wide powers to act quickly and effectively, including summoning witnesses for questioning and carrying out searches and seizure of evidence and full on-site investigations within the former Yugoslavia. Investigators will need unrestricted freedom to enter and travel within the territory of states. The Security Council must take the steps necessary to ensure that national authorities are obliged actively to cooperate with the Tribunal, including helping to investigate cases, arresting suspects and delivering them to the Tribunal. Indeed, in relation to war crimes and crimes against humanity, states are already obliged to provide such assistance, in accordance with the 1973 UN General Assembly's Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity[31].

The wide powers of the investigators, however, will have to be balanced against the right of any person whose freedom, privacy or property is affected by such intrusive powers to be treated fairly and justly. There is some divergence of opinion about whether the investigation and prosecution body should be quasi-judicial with autonomy to decide pre-trial measures, as in the civil law system, or an administrative body which should apply to a judge for intrusive, pre-trial orders.

Regardless of which system is chosen, all pre-trial procedures should at least be subject to supervision or review after the fact by an independent judicial authority. The French proposal gives a right of complaint to the prosecution body sitting collectively. This is not entirely satisfactory as this body would consist of colleagues of the prosecutor whose actions are being appealed. There should therefore be an ultimate right of appeal to a judge.

Specifically, Article 9(3) of the International Covenant on Civil and Political Rights (the ICCPR) requires that anyone arrested or detained on a criminal charge should be brought promptly before an authority exercising judicial power. Under Article 9(4), any detainee should be entitled to bring proceedings before

31. Adopted by the UNGA Resolution 3074 (XXVIII), 3 December 1973. See also the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by UNGA Resolution 2391 (XXIII), 26 November 1968.

a court to challenge the lawfulness of the detention. The judicial authority should exercise effective and continuing supervision throughout the detention. Anyone affected by pre-trial measures such as searches, seizures or orders to appear for questioning, should have the right to challenge their lawfulness before an independent judicial authority. In addition, law enforcement officials acting on behalf of the Tribunal should observe minimum standards on the use of force, as laid out in the UN Basic Principles on the use of force and firearms by law enforcement officials[32] and the Code of Conduct for Law Enforcement Officials[33].

Because of the turmoil of war and the fact that the Tribunal will probably sit outside the former Yugoslavia, access to the court will not be quick or easy. The Tribunal should take whatever steps are necessary to facilitate the exercise of the right to judicial review of pre-trial measures. This may include locating 'public defenders' in the region who can offer their services free of charge to those who cannot pay. Their existence would have to be widely publicised. Furthermore, at least one judge should be available to hear pre-trial matters as soon as the first investigation is launched, even if other trial judges are not convened until a case has been referred to the Tribunal.

## 7. PROSECUTION

Any suggestion that the prosecution 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. There should therefore be some method for seeking a review of a decision not to proceed with a prosecution. Victims are most affected by such a decision and Amnesty International supports the CSCE recommendation that they be able to make a complaint. Depending on the structure of the Tribunal, this application would be made either to a judge or the prosecution body sitting as a collective, quasi-judicial organ.

If the prosecution body decides to proceed with the prosecution, should there be a preliminary hearing in which a judicial body decides whether there is sufficient evidence to indict the suspect? Different legal traditions give different answers, but Amnesty International would highlight two factors which it considers should be taken into account in making this choice.

Firstly, many witnesses are likely to have to endure great trauma in recounting horrific events several times, for investigators, prosecution lawyers and in the trial. They should not be made to repeat their testimony at a preliminary hearing as well as at a 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 10 below).

Secondly, the preliminary hearing is likely to attract considerable publicity which could prejudice the interests of the accused. The accused should therefore enjoy basic guarantees of fairness, including the right to be represented by a lawyer, to cross-examine witnesses and to obtain copies of all documents tendered during the hearing. Any preliminary hearing, like the trial, should in principle always be open to the public.

## 8. TRIALS *IN ABSENTIA*

32. Adopted by consensus by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders, 7 September 1990.
33. Adopted by UNGA Resolution 34/169, 17 December 1979.

A difficult legal and policy question is whether the Tribunal should be able to try accused *in absentia*. The function of a criminal trial is objectively to determine the innocence or guilt of individual accused and the burden of establishing this guilt rests on the prosecution. Anything which fundamentally prejudices the ability of the Tribunal to make this decision should, in principle, be avoided[34]. Amnesty International believes that because of the likely complexity and confusion surrounding the alleged facts, exacerbated by the chaos of war and deliberate or unintentional misinformation, the accused should be present to hear the full prosecution case, to cross examine witnesses, refute facts and present a full defence. With anything less the reliability of the verdict will always be in doubt and justice will not be seen to be done.

Trials *in absentia* would seem to be excluded by the unambiguous words of ICCPR, Article 14(3)(d) which guarantees the right of an accused "to be tried in his presence". The UN Human Rights Committee has held that trials *in absentia* are justified in exceptional circumstances[35] and the European Court of Human Rights has interpreted the equivalent article[36] in the European Convention on Human Rights in a similar way. The ILC Working Group on the question of an international criminal jurisdiction, however, has expressly recommended against trials *in absentia* in any permanent international criminal court[37].

The creation of this Tribunal is already a highly politicised issue and every effort must be made to ensure that it fulfils its role objectively, and does not become a token, political gesture. Amnesty International is concerned that trials *in absentia* could be more like political show trials. Justice will not be done, particularly if, because of the difficulty of arresting accused, trials *in absentia* became the norm and not the exception. The French proposal provides that if the accused is subsequently arrested or voluntarily gives him or herself up, the conviction *in absentia* would be annulled and the case would be considered afresh by the prosecution body. Amnesty International does not consider that such safeguards would adequately balance the inherent dangers of trials *in absentia* in this forum.

There may, however, be another alternative. If the accused has been properly notified of the date and place of the trial and he or she wilfully refuses to appear, the Tribunal could hold a preliminary hearing. By establishing the basic facts of where, how and when a particular incident occurred, this hearing could begin to reveal the truth, for the benefit of victims and the community. It could also record evidence which is in danger of being lost. The determination of guilt or innocence of an individual, however, would be left to a subsequent trial in the presence of the accused.

If trials *in absentia* are permitted, additional guarantees will be needed to ensure that the prosecution evidence is tested as far as possible. In contrast to the French proposal, Amnesty International considers

34. In a 1975 resolution of the Committee of Ministers of the Council of Europe it is provided that where an accused has been served with a summons, the court "must order an adjournment if it considers personal appearance of the accused to be indispensable"; Resolution (75)11 of the Council of Europe Committee of Ministers, "on the criteria governing procedures held in the absence of the accused", adopted 21 May 1975.

35. See Human Rights Committee, General Comment 13(21), under article 40(4) ICCPR, as well as *Monguya Mbenge et al.* v. *Zaire* (16/1977), Report of the Human Rights Committee, GAOR, 38th Session, Supplement No.40, Annex X, in which the Committee said that a trial *in absentia* at least requires that "all due notification has been made to inform him [the accused] of the date and place of his trial and to request his attendance".

36. Art.6(3)(c) is not as strong as the ICCPR, as it only guarantees the right of an accused "to defend himself in person" and not the right to be "tried in his presence".

37. ILC 1992 report, para.504.

that a lawyer must be appointed by the Tribunal to represent the interests of an accused who is not present in court. The resolution of the Council of Europe Committee of Ministers referred to above also provides that when the accused is tried in his absence, "evidence must be taken in the usual manner and the defence must have the right to intervene"[38].

# 9. PROTECTION OF THE ACCUSED

## 9.1. Incorporating fair trial guarantees

There is a general international consensus on the minimum standards for a fair trial covering the period from arrest until the exhaustion of all judicial and other remedies. This consensus is expressed in international human rights and humanitarian law treaties and is also reflected in general principles of law.

The Universal Declaration of Human Rights and the ICCPR give broad guidance to the drafters of the Statute, but many of the rights are not detailed enough to help solve practical problems[39]. Amnesty International considers that the Statute should, at the very least, expressly incorporate by reference, and require all organs of the Tribunal to comply with:

- ICCPR Articles 9, 10, 14[40] and 15(1);
- the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles)[41], and
- the UN Standard Minimum Rules for the Treatment of Prisoners (the Standard Minimum Rules)[42].

Although these instruments - except for the ICCPR - are not in the form of treaties, they represent an international consensus on minimum standards for the treatment of anyone detained or imprisoned, including those awaiting trial and those imprisoned under sentence. They will be particularly important in regulating aspects of detention on which there is a wide divergence of national practice, such as limiting incommunicado detention by ensuring regular access to family, doctors and lawyers[43].

In addition, Amnesty International would recommend that the Statute incorporate the UN Guidelines on the Role of Prosecutors[44] and the UN Basic Principles on the Role of Lawyers[45], which set out minimum rights and duties of lawyers in general and prosecutors in particular.

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38. See para. 5 of resolution cited footnote 34 above.
39. The General Comments of the Human Rights Committee give some guidance to the meaning of the broad rights guaranteed in the ICCPR.
40. Most of the guarantees in ICCPR Article 14 are also found in Protocol I, Article 75(4) and Protocol II, Article 6. See more detailed guarantees for prisoners of war, in Geneva III, Articles 99-108.
41. Adopted by UNGA Resolution 43/173, 9 December 1988, without a vote.
42. Adopted by First UN Congress on the Prevention of Crime and the Treatment of Offenders, 1955, approved by ECOSOC resolutions 663 C (XXIV) 31 July 1957 and 2076 (LXII) 13 May 1977. In 1984 UNGA endorsed the ECOSOC Procedures for the Effective Implementation of the Standards Minimum Rules for the Treatment of Prisoners, in Resolution 39/118, 14 December 1984.
43. See especially Principles 15-19, 24 and 25, Body of Principles.
44. Adopted by consensus by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders on 7 September 1990 and welcomed by the UNGA Resolution 45/121 of 14 December 1990.
45. Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders by consensus on 7 September 1990 and welcomed by the UNGA Resolution 45/121 on 14 December 1990.

It would unthinkable for an institution created by the UN to fall below such standards approved by the General Assembly. The Tribunal has on opportunity to be a model of high standards by expressly adhering to minimum standards which had not been codified at the time of the Nuremberg tribunal.

In regard to rules of evidence, Amnesty International would urge that the Tribunal be required to comply with the well established rule, reaffirmed in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that evidence made as a result of torture cannot be invoked in any proceedings (Article 15). Amnesty International would urge that this rule be extended to include evidence extracted through the use of cruel, inhuman or degrading treatment or punishment[46]. We would also recommend that the Tribunal be required to observe the provision in Body of Principles, Principle 27, that the failure to comply with that instrument must be taken into account when determining the admissibility of evidence against the accused. Amnesty International would also be concerned if the Tribunal was able to convict solely on the basis of contested, uncorroborated confessions.

## 9.2. Access to legal assistance

The Statute should expressly require that all detainees have the right of legal assistance of their choice, not only for the trial, but promptly after arrest and throughout every stage of the proceedings, including any preliminary hearing. Counsel should have access to their clients on the conditions guaranteed by Principles 15, 17 and 18 in the Body of Principles and by the Standard Minimum Rules and the Basic Principles on the Role of Lawyers.

Free legal assistance is required to be provided by Article 14(3)(d) if the accused cannot pay, "where the interests of justice so require". Amnesty International considers that because of the seriousness and consequences of crimes being tried, the interests of justice demand that every accused who cannot afford to pay should automatically receive free legal assistance and that this should be expressly guaranteed in the Statute. The detainee must, of course, be informed of his or her right to legal assistance as well as other rights[47].

It may be difficult to ensure that defence lawyers with the necessary expertise and even language skills are available quickly. Amnesty International would recommend that a separate public defender's office be established, independent of other organs of the Tribunal but created by the Tribunal's Statute. Just like the prosecutors, the defence lawyers in this office would build up considerable experience in operating in this unique jurisdiction. It could provide free legal assistance for those who cannot afford to pay and who would be unlikely to know how to find appropriate counsel. The public defender's office could be responsible for basing some lawyers in the former Yugoslavia, as recommended above in relation to pre-trial measures. Defence lawyers should at all times comply with the principles and enjoy the rights set

46. See the much broader prohibition on interrogation methods which use "violence, threats or methods of interrogation which impair his [the detained person's] capacity of decision or his judgment", Principle 21, Body of Principles which would apply if the Body of Principles was incorporated.
47. ICCPR, Art.14(3)(d) & Body of Principles, Principle 13.

out in the UN Basic Principles on the Role of Lawyers[48].

# 10. PROTECTION OF VICTIMS

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. Yet victims, witnesses and families 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.

It has already been recommended in section 6.1 that victims and their families, like any other individual or organization should be able to give information to the investigation and prosecution body, who will assess its weight. It has also been suggested in section 7 that alleged victims or their families should have standing to challenge a decision not to prosecute an individual.

## 10.1. Participation in the trial

International standards, as well as some civil law jurisdictions, recognise that victims may have a right to participate in the criminal trial. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Declaration on Victims)[49], provides in para.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 ..."

Amnesty International would urge the drafters of the Statute to consider how this provision could be implemented, for example, by permitting a victim to be represented during the trial. Victims should also be able to request information from the prosecutor's office about the progress of proceedings in which they have an interest.

## 10.2. Protection of victims, their families and witnesses

The hostility between national groups in the former Yugoslavia has been so intense that 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 para.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".

48. Adopted by consensus by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders, 7 September 1990.
49. Adopted by the UN General Assembly on 29 November 1985 (Resolution 40/34).

The Tribunal will also need to interpret sensitively the authority given in ICCPR Article 14(1) to exclude the press and public from trials in exceptional circumstances, "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

In addition to suppressing names of witnesses, the Tribunal should have the power to order extraordinary measures to protect the identity of witnesses from the accused. Amnesty International recognises that in all cases the interests of the witnesses will have to be balanced against the right of the accused to hear all the prosecution evidence and to cross-examine witnesses. Methods will have to be found to ensure that while all witnesses can be cross-examined, they can also receive adequate protection. At least defence lawyers from the Tribunal's public defenders' office as well as judges, should always be able to confront and cross-examine witnesses. In some cases the prosecution will need great care in selecting the evidence to present which will be sufficient to secure a conviction without unnecessarily endangering witnesses.

Protection also means actively supporting and caring for victims and witnesses who participate in the judicial process. If children give information to investigators or testimony to the court, the prosecution and the trial court should consult with psychologists on ways in which the potential psychological damage of the investigatory and court process could be minimized. A special unit should be set up to deal with all the protection issues which arise at each stage of the proceedings.

Witnesses and victims who fear the consequences of making a complaint or giving evidence should be able to seek protection, not only from officers of the Tribunal, but also from peace-keeping forces including civilian police monitors, as well as any human rights monitoring mission which may be established in the former Yugoslavia. Investigators, prosecutors and judges of the international Tribunal should all have a duty actively to refer witnesses and victims at risk to these other bodies as appropriate.

## 10.3. Special considerations in cases involving violence against women

The type of special measures described above should be used 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.

Several non-governmental organizations, including Amnesty International, have reported that women in the former Yugoslavia are very reluctant to come forward with testimony about violence against women[50]. Some women feel they must obliterate the experience from their memory; others feel degraded and ashamed or fear they will suffer social stigma should they disclose what has happened to them[51]. The trauma and stress has been exacerbated by the pressure to repeatedly give statements to fact-finding missions or press interviews. An expert mission of the UN Special Rapporteur on the former Yugoslavia has commented that:

" ... Fear of reprisals against themselves and their families, some of whom may still be in the areas affected by the conflict, also makes victims unwilling to speak ... Some of the women met by the team of

50. See Amnesty International, **Bosnia-Herzegovina: Rape and sexual abuse by armed forces**, cited footnote 21 above; Report of UN Special Rapporteur on the former Yugoslavia cited in footnote 21 above; Ecumenical Women's Team Visit, **Rape of Women in War**, World Council of Churches, Zagreb, December 1992.

51. See generally, Amnesty International, **Women in the Frontline**, AI Index: ACT 77/01/91, March 1991, esp. pp.18-24.

experts felt exploited by the media and the many missions 'studying' rape in the former Yugoslavia. Furthermore, health care providers were concerned about the effects on women of repeatedly recounting their experiences without adequate psychological and social support systems in place.[52]

Creative use by the Tribunal of wide powers to protect witnesses and victims will be particularly important to tackle these problems. A woman, for example, may be willing to testify or otherwise provide information against a suspect even though her husband and family do not know she was sexually attacked. Prevailing cultural and religious mores, the mental anguish and consequences for her family life if the woman's family discovered the truth, could justify the Tribunal suppressing her identity. In some cases such guarantees may be the only way to convince women to give evidence.

The fact-finders must have a particular awareness of cultural and religious mores and expertise in collecting such evidence with sensitivity. The Tribunal should specifically hire investigators and prosecutors 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 prosecutors with the necessary expertise should be available for these cases. Particularly if trial judges are given a more inquisitorial role akin to the practice in some civil law jurisdictions, it will be essential for female judges to be involved in these cases.

## 11. RIGHTS TO COMPENSATION, RESTITUTION AND REHABILITATION

Victims or their dependents have an enforceable right in international law to claim restitution, compensation and rehabilitation from those responsible for violations of their human rights[53]. The Tribunal should have the power to order a convicted person to provide compensation and restitution to a victim or dependents, for injury caused by the criminal act, in accordance with the UN Declaration on Victims[54]. This would be especially appropriate where the crime was clearly the cause of the victim's loss and the accused retains property which he or she could be ordered to return to the victim.

In addition, however, Amnesty International urges the Security Council to indicate in detail, at the same time as it creates the Tribunal, what mechanism will be established to protect the civil rights of victims and their dependents to compensation, restitution and rehabilitation for gross violations of human rights and humanitarian law. This could include the establishment of a separate international commission to process claims against individuals as well as claims against states, similar to the fund and commission established following the 1991 Gulf War[55].

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52. Report of UN Special Rapporteur on the former Yugoslavia to the 49th session of the UN Commission on Human Rights, cited in footnote 21 above, paras.51 & 52.

53. Last year the UN General Assembly reaffirmed the "right of victims of 'ethnic cleansing' to receive reparation for their losses", UNGA Resolution 47/147, 18 December 1992, para. 11. The Sub-Commission on Prevention of Discrimination and Protection of Minorities also recognised on 13 August 1992 the right to full reparation for losses suffered as a result of "displacement", E/CN.4/Sub.2/1992/52, 18 August 1992.

54. This could include, for example, compensation to cover the cost of bringing up children resulting from rape.

55. Pursuant to Security Council Resolution 687 (1991), paras 16 & 18. Reference should also be made to the Council of Europe, 1983 Convention on the Compensation of Victims of Violent Crimes, which came into force on 1 February 1988. In the context of the Yugoslav conflicts, the Commission on Human Rights and the General Assembly have reaffirmed that states are to be held accountable for violations of human rights which their agents commit upon the territory of another State, see UN Commission on Human Rights Resolution 1992/s-1/1, 14 August 1992, UNGA Resolution 47/147, 18 December 1992, para. 10.

The Security Council should also expressly provide that facts established during a criminal trial are deemed to be proved for the purposes of subsequent civil proceedings at the national or international level. Subsequent civil proceedings could then focus on assessing the injury and appropriate remedies. Acquittal of an accused in the criminal trial, however, should not prejudice the success of subsequent civil proceedings relating to similar facts, as the standard of proof and procedural rules will be different in a civil case.

## 12. RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL JURISDICTIONS

National authorities have the primary obligation to bring perpetrators of human rights violations to justice. If such trials are fair and just there is no reason for the verdict to be disturbed. Recent trials in the former Yugoslavia, however, amply demonstrate the real doubts about the fairness of many such trials. If a person has been convicted at the national level in a trial which was unfair, or if the trial was a sham, perhaps in an attempt to avoid justice, the international Tribunal could and should retry that person if the crimes are within its jurisdiction[56]. The conviction and punishment imposed by a national court would have no effect if the Tribunal is seized with the case. The Statute should set out the criteria on which the Tribunal may determine that a national trial was unfair or a sham and that a person could be retried.

Conversely, on the assumption that a trial before the international Tribunal will be fair and just, the Statute should expressly prohibit the retrial of that person by a national court. This is necessary to help prevent the staging of subsequent trials for purely political motives.

Because of the primary role of national courts, Amnesty International supports the proposal that the Tribunal should be able to transfer cases down to the national authorities. However, the Statute should enumerate several conditions which should be satisfied before the transfer is approved, only some of which are provided for in the various proposals. Clearly, the international Tribunal should consider whether the trial at the national level will be just and effective, comply with all international fair trial guarantees, and be carried out by a court which is manifestly independent and impartial. In addition, Amnesty International would oppose transfer of the accused if the national court could impose the death penalty, or if the accused faced a genuine risk that his or her fundamental human rights would be violated. The accused should have a right to appeal against a decision to transfer to the national court.

## 13. RIGHTS OF APPEAL

There is considerable divergence between civil law and common law systems on the scope of the right of appeal. The starting point for Amnesty International is the guarantee in ICCPR Article 14(5) that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". There is general agreement that in relation to the Tribunal both the convicted person and the prosecutor should be able to appeal on questions of law.

56. The rule against double jeopardy, embodied in ICCPR Article 14(7), does not prohibit the trial in different jurisdictions of the same person in relation to the same facts. It therefore does not prevent the Tribunal from trying a person who has been already convicted or acquitted by a national court.

There is disagreement about whether to allow any appeal on questions of fact. Amnesty International does not consider it is sufficient merely to reject the right to appeal on the facts, as the French proposal concludes, on the assumption that "the great formality of the trial and the publicity attracted by it would constitute major safeguards for the defendant"[57] On the contrary, the highly politicised nature of these trials may jeopardize the fairness of the trials. What ICCPR, Article 14(5) primarily demands is that the convicted person must be able to rectify a miscarriage of justice, regardless whether the mistake is described as one of fact or law. The Statute should therefore allow a convicted person to challenge a manifestly unfounded finding of fact by the trial court. It does not matter in substance whether this amounts to an appeal on the facts or a claim that the manifestly unfounded finding of fact resulted from a misapplication of substantive or procedural law.

In addition, both the convicted person and the prosecution should be able to appeal against the sentence imposed and also seek a revision of the judgment if decisive new evidence comes to light. The Statute will have to set out the procedure if a revision of the judgment is sought after the Tribunal has been dissolved.

In all cases it will be for the appeal court to determine the appropriate remedy, whether to acquit the convicted person or to return the case for retrial according to law or to substitute another judgment for the lower court judgment or to alter the sentence.

To guarantee impartial and objective justice, the appeal court should be clearly separate from the trial court, either through an independent chamber of the trial court or by creating a different institution. The appeal proceedings should follow the same fair trial standards guaranteed at the trial.

## 14. PENALTIES AND SUPERVISION OF SENTENCES

Amnesty International unconditionally opposes the imposition of the death penalty and welcomes the fact that the French, CSCE and Italian proposals all exclude capital punishment. Amnesty International takes no position on the imposition of other appropriate penalties, except that it would oppose the systematic imposition of penalties that bear little relationship to the seriousness of the offences.

It is not clear where convicted persons will be imprisoned and wether they will be under the control of national or international authorities. If specific national authorities are to be responsible, Amnesty International considers that decisions about pardons, compassionate release and remission of sentences should not be left to the sole discretion of the national authorities. Any review or supervision of such decisions should be carried out by an international body which is impartial and independent.

Regardless of where prisoners are located and who is responsible for them, the conditions of their imprisonment should never fall below minimum international standards. Amnesty International has already recommended above that the Body of Principles and the Standard Minimum Rules should be incorporated as binding obligations in the Statute.

57. French proposal, *opcit* para.140.

In line with Principles 32 and 33 of the Body of Principles, detainees should have a continuing right to complain about their treatment, ultimately to a judicial authority. Amnesty International considers that either the *ad hoc* Tribunal or some other independent and impartial international body should continue to supervise the imprisonment by having the authority to hear applications from the imprisoned person or his or her family.

## 15. RESOURCES

All of the Tribunal's powers and safeguards will be of little use unless it is given adequate human and financial resources. Even with a generous allocation of investigators, prosecutors, judges, experts and support staff, the size of the whole institution would probably number in the hundreds rather than the thousands. In comparison, UNPROFOR has more than 23,000 personnel and costs more than US $40 million every month. If the Tribunal is starved of resources, members of the UN, and the Security Council in particular, will be guilty of turning the whole process into a political gesture.

At this stage no one knows how many cases should be investigated and how many will be brought to trial. While the Tribunal could begin as a relatively modest exercise, it must be flexible from the outset to be able to increase the staff and resources rapidly to meet demand. An arbitrary, maximum number of judges, investigators and prosecutors should not be rigidly fixed in the Statute.

Investigators, prosecutors and judges will need the resources to hire expert advice, including in the fields of forensic science, medicine, psychology, law, fact-finding and research, information technology, translation and military affairs. The protection of victims, their families and witnesses on their behalf will need special attention. Mention has already been made of the need to employ specialists at all stages of the process to deal with particular crimes such as rape and sexual abuse, or those committed against children.

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