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@ESTABLISHING A JUST, FAIR AND EFFECTIVE INTERNATIONAL CRIMINAL COURT

I. INTRODUCTION, BASIC PRINCIPLES AND RECOMMENDATIONS[1]

A. INTRODUCTION

For the first time in the nearly half a century which has elapsed since the adoption of the Charter of the International Military Tribunal of 8 August 1945, there is a realistic chance that the United Nations (UN) General Assembly could approve a statute for a permanent international criminal court to bring to justice those responsible for war crimes, crimes against humanity and crimes against peace. The General Assembly will consider a draft statute of an international criminal court during its 49th session which began on 20 September 1994. With sufficient political will, the Member States of the UN could complete by December 1994 the necessary revisions of this draft to ensure that the international criminal court is just, fair and effective and to ratify early next year a treaty incorporating the Statute so that it can begin work next year. If the General Assembly decides instead to convene an international conference to adopt such a text, it should ensure that the conference is convened as soon as possible. The need for a permanent institution is pressing. Most of those responsible for the millions of grave human rights violations which have occurred since the Second World War - most recently the nearly 50,000 civilians killed in Burundi and the more than half a million civilians killed in Rwanda - have escaped justice because national courts have been unwilling or unable to try them.

There were high expectations that the first *ad hoc* international criminal courts at Nuremberg and Tokyo[2] would lead quickly to the establishment of a permanent international

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[1] The statement on the cover is quoted in T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf 1992), p. 168.

[2] Nearly three quarters of a century have passed since the first serious attempt was made to establish an international criminal court. Articles 227 to 230 of the Treaty of Peace between the Allied and Associated Powers and Germany (Versailles Treaty), adopted on 28 June 1919, provided for the establishment of an international criminal court to try the former Emperor of Germany for "a supreme offence against international morality and

criminal court with stronger guarantees of the right to fair trial[3] which would be an effective replacement for national courts when they were unfair or ineffective. These hopes were soon dashed as work in the General Assembly on a draft code of crimes under international law and a criminal court were sidelined by the Cold War.[4] With the end of the Cold War, the International Law Commission was able to complete a first reading of a draft Code of Crimes against the Peace and Security of Mankind in July 1991. As work on the draft Code was drawing to a close, the General Assembly in November 1990 asked the International Law Commission to resume work on a statute of a permanent international criminal court.[5] In December 1993 the General Assembly asked it to complete work on the draft statute by July 1994.[6]

Amnesty International supports the establishment of a permanent international criminal court as one method to help end impunity for those responsible for extrajudicial executions, "disappearances", torture and other gross human rights violations within its mandate by ensuring that such persons are brought to justice. Such a court, however, must satisfy international 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

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the sanctity of treaties" and military tribunals to try "persons accused of having committed acts in violation of the laws and customs of war" against nationals of the victorious Allied and Associated Powers. The international criminal court, which would have been *ad hoc* rather than permanent, was not established and the trials of others were before national military tribunals.

[3] See, *e.g.*, A.C. Brackman, *The Other Nuremberg* (New York: Morrow 1987); R.C. Connor, *Justice at Nuremberg* (New York: Harper & Row 1983); R H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, New Jersey: Princeton University Press 1971); and A. Tusa & T. Tusa, *The Nuremberg Trial* (New York: Atheneum 1983). See also the reassessment in Telford Taylor's, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf 1992).

[4] The General Assembly first asked the International Law Commission to study the possibility of establishing a permanent international criminal court on 9 December 1948 in Resolution 260 B (III). The International Law Commission studied this question at its 1949 and 1950 sessions and concluded that such a court was desirable. See Report of the International Law Commission Covering its Second Session 5 June - 29 July 1950, 5 UN GAOR Supp. (No. 12) at para. 145, UN Doc. A/1316. Two successive Committees on International Criminal Jurisdiction appointed by the General Assembly submitted reports to that body with draft statutes for such a court in 1951, 7 UN GAOR Supp. (No.11) at 21, UN Doc. A/2136 (1952) and 1953, see 9 UN GAOR (Supp. 12), UN Doc. A/2625, but no further action was taken by the General Assembly.

[5] UNGA Res. 45/41 of 28 November 1990.

[6] UN GA Res. 48/31 of 9 December 1993. The General Assembly requested the International Law Commission "to continue its work as a matter of priority on this question with a view to elaborating a draft statute if possible at its forty-sixth session in 1994, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States". State comments were largely favourable to the concept of establishing a permanent international criminal court.

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 properly themselves.

When the UN Security Council faced just such a situation in former Yugoslavia, it decided in Resolution 808 of 22 February 1993 that an *ad hoc* tribunal should be established to bring to justice those responsible for serious violations of humanitarian law in that region since 1991. Amnesty International campaigned to ensure that the *ad hoc* tribunal would be just, fair and effective. It also urged that its jurisdiction included human rights violations and abuses.[7] After the UN Security Council decided in Resolution 827 of 25 May 1993 to establish the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (*ad hoc* Tribunal) in the form recommended by the UN Secretary-General,[8] Amnesty International supported it on the understanding that it was a step to establishing a permanent, international criminal court competent to try cases involving gross violations of humanitarian and human rights law.[9] The proposed expansion of its jurisdiction to include some of these crimes committed in Rwanda must be only a temporary stop-gap pending the establishment of a permanent court.

The draft Statute of the International Criminal Court prepared by the International Law Commission at its 46th session and transmitted to the General Assembly[10] is an important step in this direction, and a significant improvement in a number of respects on its 1993 draft,[11] but

[7] 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), designed for 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), designed for the general public.

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

[9] 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).

[10] The International Law Commission recommended that the General Assembly "convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court". Report of the International Law Commission on the work of its fourty-fifth session 2 May-22 July 1994, 49 UN GAOR Supp. (No. xx) at 19, para. 17, UN Doc. A/48/xx (1994).

[11] Amnesty International submitted a detailed memorandum on 12 June 1994 to the International Law Commission making recommendations for strengthening the 1993 draft Statute. For an analysis of that draft, see James Crawford, "The ILC's Draft Statute for an International Criminal Court", 88 American Journal of International Law (January 1994), pp. 140-152. A number of the concerns about the draft raised in the June 1994 memorandum have been addressed in the draft adopted at the 46th session. This report is based on the report of

it needs to be strengthened by the General Assembly, or any international conference to consider the draft,to ensure that it is a just, fair and effective institution. Although the draft Statute has a number of stronger provisions 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 some gaps which need to be addressed to ensure that the rights of defendants are adequately protected. The international community must ensure that the Statute of the International Criminal Court retains and strengthens the human rights guarantees in the draft Statute, that the Court is effective and achieves the widest possible acceptance among the 184 member states of the UN and other states in the shortest possible time.

Among the positive aspects of the draft Statute are the following:

- The International Criminal Court will have jurisdiction over some of the most serious violations of international human rights and humanitarian law: genocide; serious violations of the laws and customs applicable to armed conflicts; grave breaches of the Geneva Conventions of August 12, 1949 and the Additional Protocol I of 1977; crimes against humanity; and torture.

- All states which become parties to the Statute will have to submit to the Court's jurisdiction over the crime of genocide.

- Jurisdiction of the International Criminal Court will be integrated into a framework of existing international treaty obligations so that most states parties to the Statute will have to bring those responsible for crimes to justice, extradite them to states which will do so or transfer them to the Court.

- Some of the important guarantees of the right to fair trial are included.

- The Statute excludes the death penalty.

Unfortunately, however, Amnesty International is concerned that the draft Statute will revisions to ensure that the International Criminal Court will be just, fair and effective. This report discusses these concerns. In particular, Amnesty International is concerned about the following aspects of the draft Statute:

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the Working Group of the International Law Commission, which contains the draft Statute and a detailed Commentary. UN Docs. A/CN.4/L.491/Rev.2 (14 July 1994); A/CN.4/L.491/Rev.2/Add.1 (19 July 1994); A/CN.4/L.491/Rev.2/Add.2 (18 July 1994); and A/CN.4/L.491/Rev.2/Add.3 (18 July 1994). The final Report of the International Law Commission on the work of its forty-sixth session 2 May-22 July 1994, 49 UN GAOR Supp. (No. 10), UN Doc. A/49/10 (1994), was not available when this paper was written.

- The requirement that both the states where war crimes or crimes against humanity occurred and states parties to treaties with an obligation to try or extradite must consent before a state party having custody can transfer an accused to the International Criminal Court is likely to limit severely the effectiveness of the Court as a last resort when such states are unwilling or unable to prosecute these cases fairly or effectively.

- The Statute omits or defines inadequately safeguards of the right to fair trial and, in particular, fails to provide effective judicial supervision over the provisional arrest[12] of suspects and over the arrest of the accused when they are being detained by national authorities.

The following memorandum is designed to assist members of the general public and governments during the forthcoming debates in the Sixth Committee of the General Assembly and any working group or international conference established to discuss the draft Statute. It contains some basic principles which should be retained or incorporated where lacking in the Statute, Rules and practice of the International Criminal Court; discusses some of the positive aspects of the draft Statute which Amnesty International believes should be retained as the General Assembly considers the draft; and suggests several ways in which it should 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 at Nuremberg. Key recommendations are summarized below.

B. BASIC PRINCIPLES

THE JURISDICTION OF THE COURT

The Court should have jurisdiction over a broad enough range of crimes to cover all grave violations of international human rights and humanitarian law. Those crimes should be defined in a manner consistent with international human rights standards.

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

The Statute of the Court should permit the Security Council to submit to the Court situations involving threats to, or breaches of, peace and acts of aggression, but not individual cases. The Statute should not permit the Security Council to prevent the investigation and prosecution of cases involving such situations.

[12] Provisional arrest kkkkk

OBLIGATION OF STATES TO BRING TO JUSTICE, EXTRADITE OR TRANSFER THOSE RESPONSIBLE FOR GRAVE HUMAN RIGHTS VIOLATIONS

The Statute of the Court should require all states parties to bring to justice, extradite or transfer to the Court persons suspected or accused of grave human rights violations.

THE STRUCTURE OF THE COURT

The Court should be closely linked to the United Nations.

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

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

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

THE DUTIES AND POWERS OF THE PROSECUTOR

The Statute of the Court 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 with respect to any crime as to which the Court has jurisdiction over the suspect and the crime.

The Statute of the Court 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 PROTECTION OF THE RIGHTS OF DEFENDANTS

The Statute of the Court 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 the suspect is first interrogated with a view to prosecution until exhaustion of all legal remedies - and incorporate these standards expressly or by reference.

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

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

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

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

There should be no trials *in absentia*.

The Statute of the Court must exclude the death penalty and clearly define appropriate penalties.

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

The Statute of the Court must ensure that internationally recognized safeguards apply to the custody of convicted defendants.

The Statute of the Court should ensure that 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 Court should ensure that victims, their families and witnesses are protected from reprisals and unnecessary anguish.

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

The Statute of the Court or some other mechanism should ensure that victims and their families should be able to obtain restitution, compensation and rehabilitation.

C. SUMMARY OF KEY RECOMMENDATIONS

The draft Statute forms a strong foundation for a permanent international criminal court, but Amnesty International urges that the General Assembly make a number of changes to ensure that the Statute will lead to the establishment of a just, fair and effective international criminal court:

- The organization also urges the General Assembly to complete at its 49th session the necessary revisions of this draft to ensure that the international criminal court is just, fair and effective. This would permit states to ratify early next year a treaty incorporating the Statute so that it can begin work next year. If the General Assembly decides instead to convene an international conference to complete work on such a treaty, it should ensure that the conference is convened as soon as possible.

- The Statute should include acts prohibited by humanitarian law in internal armed conflict within the jurisdiction of the Court and the Statute or the Commentary should make clear that the systematic practice of extrajudicial execution and "disappearance" are within the Court's jurisdiction.

- The Statute should provide that the Court may exercise its jurisdiction over persons suspected of crimes under international law subject to universal jurisdiction when they are in the custody of a state party to the Statute which has consented to the jurisdiction over the crime, even if other states also would have jurisdiction.

-The Statute should ensure that it incorporates, directly or by reference, all internationally recognized safeguards of the right to fair trial, from the moment the suspect is interrogated with a view to prosecution, and effective international supervision over detention at all stages of the proceedings and during imprisonment after a conviction.

II. JURISDICTION OF THE COURT

A. CRIMES WITHIN THE JURISDICTION OF THE COURT

The Court should have jurisdiction over a broad enough range of crimes to cover all grave violations of international human rights and humanitarian law. Those crimes should be defined in a manner consistent with international human rights standards.

Amnesty International believes that the International Criminal Court should have jurisdiction over a broad range of crimes under international law, including war crimes and other acts prohibited under humanitarian law applicable 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. The draft Statute appears to include most of such crimes which could fall within the jurisdiction of the Court. Amnesty International welcomes the decision by the International Law Commission to submit the draft Statute to the General Assembly for consideration separately from the draft Code of Crimes against the Peace and Security of Mankind.[13]

Crimes within the Court's jurisdiction. The draft Statute in Article 20 provides for jurisdiction over:

"(a) the crime of genocide;

(b) the crime of aggression;

(c) serious violations of the laws and customs applicable in armed conflict;

(d) crimes against humanity;

(e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which having regard to the conduct alleged, constitute exceptionally serious crimes of international concern."

The crimes defined in the treaties listed in the Annex include 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), and torture as defined in the UN Convention against Torture.[14] These crimes constitute some

[13] 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. See, *e.g., Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind* (Association Internationale de Droit Pénal 1993, M. Cherif Bassiouni ed.). 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.

[14] The Annex also includes *apartheid* and crimes defined by various treaties, including those designed to suppress hijacking or terrorist offences.

of the most serious violations of international human rights and humanitarian law and should be within the jurisdiction of any international criminal court. The express inclusion of the crime of torture is a welcome advance over the 1993 draft Statute, which omitted this crime.[15]

Acts prohibited under humanitarian law governing internal armed conflicts. In reviewing the widespread loss of life in international and internal armed conflicts, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions recently declared that "[a]ll those responsible for violations of the right to life in situations of armed conflicts must be held accountable."[16] Failure to include acts prohibited by Common Article 3 of the Geneva Conventions or by Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol II), both of which apply only to internal armed conflicts, or acts prohibited by other humanitarian law governing such conflicts could mean that those committing such acts occurring in *internal* armed conflict - the most common form of armed conflict today - might go unpunished.

The draft Statute appears to include violations of humanitarian law applicable to international and non-international armed conflicts. Article 20 (e) does not expressly include acts prohibited in Common Article 3 or Additional Protocol II. Nonetheless, the crime, "serious violations of the laws and customs applicable to armed conflict", found in Article 20 (c) is broad enough to include violations of humanitarian law in both international and non-international armed conflict. Indeed, nothing in the Commentary suggests that Article 20 (c) is limited to international armed conflict.[17] Article 20 (c) is distinct from the term, "violations of the laws or

[15] Since it is possible that not all relevant states parties to the Statute will be parties to the Convention against Torture at the time the crime occurred, the Commentary should make clear that the systematic practice of torture, a crime under international law, falls within the jurisdiction of the Court as 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 Statute 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". Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991, UN Doc. A/46/10.

[16] UN Doc. E/CN.4/1994/7, para. 707 (discussing both international and internal armed conflicts).

[17] The Commentary states that Article 20 (e) reflects both Article 3 of the Statute of the *ad hoc* Tribunal and Article 22 of the Draft Code of Crimes against the Peace and Security of Mankind. The latter defines an exceptionally serious war crime as "an exceptionally serious violation of principles and rules of international law applicable in armed conflict". The Commentary to Article 22 states that "armed conflict" includes "non-international armed conflicts covered by article 3 common to the four 1949 Geneva Conventions". Report of the International Law Commission on the work of its forty-third session 29- April-19 July 1991, 46 UN GAOR Supp. (No. 10) at 270, UN Doc. A/46/10 (1991).

customs of war", in Article 3 of the Statute of the *ad hoc* Tribunal. That term hitherto has had an accepted meaning limited to violations of certain aspects of humanitarian law applicable to *international* armed conflict, primarily those defined in the Hague Convention IV of 1907 and the annexed Regulations. Some states, however, have argued that "laws and customs of war" as defined in Article 3 of the Statute of the *ad hoc* Tribunal is broad enough to include the entire body of humanitarian law "in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions".[18] As part of an effort to expand the jurisdiction of the *ad hoc* Tribunal to include crimes committed in Rwanda, several states are now seeking to have the Security Council amend the Statute of that Tribunal to clarify that the jurisdiction includes "serious violations of international agreements on the laws of war in force at the time of the acts in question in the territory of Rwanda, since the applicable standards for internal armed conflicts are contained in Common Article 3 to the 1949 Geneva conventions and Additional Protocol II".

Common Article 3 (1) requires all parties to an internal armed conflict to apply, "as a minimum" these provisions:

> "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (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."

[18] Statement of United States Ambassador Albright, UN Doc. S/PV.3217, at 15 (25 May 1993), *quoted in* Theodor Meron, "War Crimes in Yugoslavia and the Development of International Law", 88 Amer. J. Int'l L. (Jan. 1994), p. 82.

Among the crimes prohibited during certain internal armed conflicts by Additional 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).

Some of the acts prohibited by Common Article 3 and by Additional Protocol II would amount to crimes against humanity when committed against a civilian population, but not necessarily all of them. Moreover, to the extent that crimes against humanity are limited to acts against a civilian population, they would not cover all persons protected by Common Article 3 or Additional Protocol II.

The jurisdiction of the Court should extend to acts prohibited by Common Article 3, Additional Protocol II and other humanitarian law applicable to internal armed conflicts. As the International Court of Justice determined in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, para. 218, the rules in Common Article 3

> "constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22; paragraph 215 above)."

The Court considered that the minimum rules applicable to international and non-international conflicts were identical and that the obligation to ensure respect for them in all circumstances derived not only from the Geneva Conventions themselves, "but from the general principles of humanitarian law to which the Conventions merely give expression". *Ibid.*, para. 220. What better way to ensure respect for these general principles than to ensure that they are within the jurisdiction of the International Criminal Court, an institution embodying the authority of the international community? Moreover, it would be unfortunate if the permanent International Criminal Court were to have a more restrictive jurisdiction than the *ad hoc* Tribunal.

Crimes against humanity. Crimes against humanity in the Statute are not linked to armed conflict or war crimes and thus would include crimes against humanity in peacetime. The Commentary to Article 20 states that it was the Working Group's understanding that "the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violation aimed at the civilian population in whole or in part". This is a positive step and consistent with the historic understanding of these crimes. Unfortunately, however, the Commentary to Article 20 suggests that such crimes must be based on "national, political, ethnic racial or religious grounds". This would be a regressive step.

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 (Nuremberg Tribunal) interpreted its jurisdiction under the Nuremberg Charter 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.[19] Indeed, only four months after the Nuremberg Charter was signed and nine months before the judgment of the Nuremberg Tribunal, 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, or persecutions on political, racial or religious grounds. . . ."

In the Justice Case (Case 3), decided under Allied Control Council Law No. 10, the tribunal treated crimes against humanity as independent of violations of the laws and customs of war. National courts have also considered these crimes as independent of each other. The French courts in both the Klaus Barbie and Paul Touvier cases treated crimes against humanity as independent of war crimes and crimes against peace.

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.[20] 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

[19] See T. Meron, "War crimes in Yugoslavia and the development of international law", American Journal of International Law (January 1994), Vol. 88, p. 85.

[20] 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).

to involve 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). Commentators have also concluded that crimes against humanity exist independently of war crimes or crimes against peace[21] and the Commission of Experts on Rwanda has reached a similar conclusion.[22]

The systematic practice of extrajudicial executions and "disappearances". The The Commentary's definition of crimes against inhumanity as encompassing "inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part" is broad enough to include the systematic practice of extrajudicial executions and "disappearances". It will be left to the Court to clarify that such acts under certain circumstances constitute crimes against humanity.[23] 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". The identification of murder in the Commentary to Article 20 (d) as one of the crimes against humanity provides strong support for the conclusion that extrajudicial executions are crimes against humanity when commited on a widespread or systematic scale.

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

[21] See, *e.g.*, T. Meron, "War crimes in Yugoslavia and the development of international law", American Journal of International Law (January 1994), Vol. 88, pp. 85-87 (and sources cited).

[22] Commission of Experts on Rwanda, Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994), pp. 26-27.

[23] 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 the Americas . . . constitutes a crime against humanity".[24] 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.[25] 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". Although "disappearances" are not expressly mentioned in the Commentary to Article 20 (d), they are certainly "inhumane acts of a very serious character".

B. CONSENT BY STATES TO JURISDICTION

1. Common core of crimes

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

The International Criminal Court will have inherent jurisdiction over the crime of genocide (Article 21 (1) (a)). All states parties to the Statute will have to submit to the Court's jurisdiction over the crime and all states parties to the Convention for the Prevention and Punishment of the Crime of Genocide (114 states of the 184 UN Member States, as of 31 May 1994) - whether parties to the Statute or not - may submit complaints concerning genocide to the Court, as envisaged in Article VI of that treaty. This provision is a major advance over the 1993 draft Statute in that it ensures that the Court will have at least one crime within its jurisdiction applicable to all states parties to the Statute.

States parties to the Statute may also submit to jurisdiction over specific crimes listed in Article 20 by depositing a declaration to that effect with the Court (Article 22 (1)). States which are not parties will be able deposit similar declarations accepting the Court's jurisdiction over particular crimes listed in Article 20 (Article 22 (4)). Thus, there is no guarantee that the Court will have a common core of grave crimes within its jurisdiction other than genocide.

Amnesty International believes that the core of crimes within the jurisdiction of the International Criminal Court were expanded beyond the crime of genocide, particularly to include

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

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

crimes subject to universal jurisdiction,[26] over which all states parties to the Statute would have to declare that the Court had jurisdiction. As stated above, the common core of crimes should be somewhat broader than the crimes within the jurisdiction of the *ad hoc* Tribunal, to include, addition to genocide, serious violations of the laws and customs applicable to international and non-international armed conflict, including acts prohibited by Common Article 3 and Additional Protocol II; grave breaches of the 1949 Geneva Conventions; crimes against humanity and torture as defined in the UN Convention against Torture. There should be no opt-out provisions or reservations permitted. The Statute should also ensure that the jurisdiction of the Court can be expanded as international criminal law develops.

2. Obligation of all states parties to bring to justice, extradite or transfer

The Statute of the Court should require all states parties to bring to justice, extradite or transfer to the Court persons suspected or accused of grave human rights violations.

Jurisdiction of the International Criminal Court will be integrated into a framework of existing international treaty obligations so that most states parties to the Statute will have to bring those responsible for crimes to justice, extradite them to states which will do so or transfer them to the Court. Nevertheless, the Court's role in this system as a final resort when states are unable or unwilling in practice to extradite or bring to justice those responsible for crimes under international law is likely to be limited in practice. In cases other than those involving the crime of genocide, transfer of suspects to the Court will be subject to consent to its jurisdiction, not only of the state having custody of the suspect, but also of the state where the crime occurred and, in many cases, of states which have the right to request extradition of the suspect. Moreover, authorities of the state where the suspect is alleged to have committed the crime often will be responsible for such crimes; if the state has not previously accepted the jurisdiction of the Court

[26] It is generally accepted that grave breaches of the Geneva Conventions and Protocol I and some war crimes under customary law and are crimes under international law which any state may punish. See, *e.g.*, I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press 1990), p. 316 ("It is now generally accepted that breaches of the laws of war, and especially of the Hague Convention of 1907 and the Geneva Conventions of 1949, may be punished by any state which obtains custody of persons suspected of responsibility."); International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva 1987), para. 3539 (serious violations of the laws of war). It is also now generally accepted that most, if not all, crimes against humanity are crimes of universal jurisdiction. See, *e.g.*, 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; N. Rodley, *The Treatment of Prisoners under International Law* (Oxford: Clarendon Press 1987), pp. 101-102. 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.

it is unlikely to be willing to surrender jurisdiction over such suspects pursuant to Article 53 (2) (c), even if located in another state, or to bring them to justice effectively.

Four situations. There are four basic situations related to the obligations to transfer, extradite or prosecute an accused. (1) All states parties to the Statute must cooperate with a request to arrest and transfer to the Court a person accused of the crime of genocide (Article 53 (2) (a) (i)). (2) With respect to crimes other than genocide, all states parties to the Statute which have accepted the Court's jurisdiction with respect to the crime must cooperate with a request to arrest and transfer an accused to the Court (Article 53 (2) (a) (ii)). (3) With respect to crimes defined in treaties listed in the Annex (such as grave breaches of the Geneva Conventions and Protocol I and the crime of torture), if the state party to the Statute has not accepted the Court's jurisdiction over the crime, but is a party to the treaty defining the crime, when the state party to the Statute receives a request from the Court to arrest the accused it then must either transfer the accused to the Court, extradite the accused to a state willing to do so or prosecute the accused itself (Article 53 (2) (b)). (4) In any other case, the state party to the Statute must consider whether it can, in accordance with its own law, arrest and transfer the accused to the Court, extradite the accused to a state requesting extradition or prosecute the accused itself. Although the obligation is limited to making this determination, the requirement that it must conduct such a review in good faith may encourage such states parties to the Statute to take one of these steps.

Treaty obligations to extradite or try. As indicated above, the Statute integrates the jurisdiction of the Court into an existing framework of international treaty obligations to try or extradite persons suspected of grave human rights violations. In particular, Article 54 requires that any state party to the Statute which is also a party to the treaty defining the crime and which has custody of a person suspected of that crime, but which has not accepted the jurisdiction of the Court over the crime, must take all necessary steps to extradite the suspect or to refer the suspect to its own authorities for prosecution. Article 53 (3) of the draft Statute provides that transfer of a suspect to the Court will satisfy the obligation of states parties to the treaty defining the relevant crime to extradite or try suspects with respect to those states parties which have accepted the Court's jurisdiction over the crime. Unfortunately, Article 53 (3) does not also provide that transfer to the Court would satisfy the extradite or try obligation with respect to other states parties to the treaty defining the crime. By failing to do so, Article 53 (3) gives such states a veto over the Court's jurisdiction in these cases. It is not certain whether the Court would have jurisdiction if the trial in one of these states was a sham proceeding. Although Article 42 (2) (b) would permit the Court to try someone who had been convicted in a proceeding in another court when the proceedings "were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted", it is not clear whether this provision would permit the Court to overcome the problems posed in Article 53 (3).

Although the Commentary states that the term "transfer" has been used to avoid confusion with the notion of extradition or other forms of surrender of persons, it does not recognize that the concept of transfer to an international criminal court is *sui generis*. Since it falls outside the extradite or try obligation among states parties to a treaty, the International Law Commission could have carried out its role of progressively developing and codifying international law by stating that transfer to the Court should be seen as satisfying the object and purpose of such treaties in all cases.

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 Court, the transfer to the International Criminal Court should be seen as satisfying its treaty obligations, even if the state with custody does not formally make the International Criminal Court 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 Court.

Universal jurisdiction and non-treaty obligations to extradite or try. Unfortunately, the Statute does not integrate the jurisdiction of the Court into the framework of non-treaty law permitting or requiring states to try or extradite persons suspected of grave human rights violations which constitute crimes under international law subject to universal jurisdiction. The Commentary to Article 54 states that Working Group gave careful consideration to whether an equivalent obligation should be imposed on all states parties with respect to acts of aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity. It decided that this would be difficult to accomplish "in the absence of a secure jurisdictional basis or a widely accepted extradition regime". It saw the problem as most acute with respect to crimes against humanity, but noted that many states did not have provisions in their criminal law specifically dealing with such crimes.

This approach is unduly restrictive since many of the crimes under international law which are within the jurisdiction of the International Criminal Court are widely accepted as crimes of universal jurisdiction, including grave breaches of the 1949 Geneva Conventions, other war crimes and crimes against humanity (see Section II.B above), *permitting* any state to bring those responsible to justice. Many of the crimes which are included or which Amnesty International recommends should be included also *require* states to extradite or try (*aut dedere, aut judicare*) those responsible.[27] Nevertheless, it should not matter whether crimes subject to

[27] See, *e.g.*, I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press 4th ed. 1990), p. 315 (war crimes, crimes against humanity and crimes against peace), N. Rodley, *The Treatment of Prisoners under International Law* (Oxford: Clarendon Press 1987), p. 102 (war crimes); M. Cherif Bassiouni, *Crimes*

universal jurisdiction are also subject to an extradite or try obligation; as long as the crime is subject to universal jurisdiction it would appear appropriate to require all states parties to undertake to as a minimum obligation the duty to extradite or try and to implement this obligation in their national legislation. It would also appear appropriate to require all states parties to the Statute where universal jurisdiction exists to do this. In both cases it would appear appropriate for the Statute to require transfer to the Court on request.

C. THE ROLE OF THE SECURITY COUNCIL

The Statute of the Court should permit the Security Council to submit to the Court situations involving threats to, or breaches of, peace and acts of aggression, but not individual cases. The Statute should not permit the Security Council to prevent the investigation and prosecution of cases involving such situations.

To some extent the restrictions on the number of cases which the Court will be able to try as a result of the requirements of state consent set forth in Articles 21 and 53 are offset by its power to accept referrals by the Security Council. Article 23 of the draft Statute expressly gives the Court jurisdiction over crimes listed in Article 20 as a consequence of a referral of a matter to the Court by the Security Council. Article 23 would also eliminate the need for the Security Council to establish *ad hoc* tribunals, but would make it more likely that the Court 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 crime. Nevertheless, the Security Council is a political body and it would not necessarily invoke its power to refer every situation which poses a threat to or breach of peace or an act of aggression within the meaning of Chapter VII of the UN Charter to the Court, even if crimes within its jurisdiction may have been committed. Moreover, since Article 23 (2) provides that no complaint of or directly related to an act of aggression may be brought unless the Security Council has first determined that an act of aggression has committed the act of aggression which is the subject of the complaint and since Article 23 (3) provides that no prosecution may be commenced under the Statute arising from a situation being dealt with by the Security Council under Chapter VII unless the Security Council so decides, the Security Council has an effective veto over state complaints in cases of aggression and prosecutions - but not investigations - in Chapter VII cases. See also discussion below in Point III.C.1.

Article 25 (4) provides that the Prosecutor may begin an investigation when the Security Council refers a matter without the Security Council having to file a complaint. The

against Humanity in International Criminal Law (Dordrecht: Martinus Nijhoff Publishers 1992), pp. 499-508 (crimes against humanity); UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 18); UN Declaration on the Protection of All Persons from Enforced Disappearance (Article 14).

Commentary to Article 23 states that it was the understanding of the Working Group that "the Security Council would not normally refer a 'case' in the sense of named individuals. Article 23 (1) envisages that the Security Council would refer to the court a 'matter', that is to say, a situation to which Chapter VII of the Charter applies. It would then be the responsibility of the Prosecutor to determine which individuals would be charged with crimes referred to in article 20 in relation to that 'matter'."

It would be better if the word "normally" were to be deleted in the Commentary to make clear that the Security Council could refer only situations - but not individual cases - concerning any member state which it determined posed a threat to or breached peace or had committed an act of aggression to the Court. The Prosecutor would then be free to determine whether to investigate and prosecute individual cases arising out of that situation. This would help to protect the independence of the Prosecutor and the integrity of the Court by ensuring that the Security Council could not select particular cases for prosecution arising out of a situation involving a threat to or breach of peace or acts of aggression.

III. THE STRUCTURE OF THE COURT

A. CREATION OF THE COURT

1. Relationship to the United Nations

The Court should be closely linked to the United Nations.

The draft Statute defines the International Criminal Court as a separate institution which could be linked to the UN by a special agreement (Article 2). The Commentary recognizes that the Court could either be a judicial organ of the UN or a body established by a treaty and linked to the UN in some way. The Working Group preferred the latter, but the International Law Commission has left this for the General Assembly to decide.

Amendment of the UN Charter. In the long run, Amnesty International believes that it would be best if the International Criminal Court 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 Court 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 the Court's 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. Close links with the UN will be essential to the success of the International Criminal Court. The Security Council will have the right to submit matters to the Court under Articles 23 of the draft Statute. Under Article 23 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 Court's work in bringing to justice those responsible for acts prohibited by humanitarian law will be directly related to Security Council peace-keeping and action to protect international peace and security.[28] The International Criminal Court would benefit from the universal nature of the UN.

Establishment by treaty. If the General Assembly 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 Court by treaty, with the UN providing the Secretariat (subject to guarantees of independence) and the budget as it does for certain independent human rights treaty bodies such as the Human Rights Committee. Unfortunately, the draft Statute does not contain treaty provisions, although the Commentary contains a note on possible clauses of a treaty to accompany the draft Statute. If the General Assembly decides to establish the Court by treaty, it will be essential for the Sixth Committee of the General Assembly to give a high priority during the 49th session to the drafting of the necessary treaty provisions and should draw upon the treaty provisions in human rights treaties, such as the International Covenant on Civil and Political Rights which establish treaty bodies linked to the UN. The number of ratifications or accessions required for the treaty to enter into force should be low enough for it to enter into force quickly, as with such treaties as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture). Amnesty International agrees with the recommendation of the Working Group that reservations should not be permitted.

Establishment by the Security Council or General Assembly. Establishment of the International Criminal Court 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

[28] 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 Court. Consideration should be given to expanding the jurisdiction over these crimes to include defendants who are UN peace-keeping personnel.

Security Council its compulsory jurisdiction would probably be limited to situations where the Security Council was acting pursuant to Chapter VII of the UN Charter (threats to the peace, breaches of the peace and acts of aggression). Both the Security Council and the General Assembly are political organs and establishment by these bodies might lead to questions about the independence and permanence of the International Criminal Court. 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 Court, including a legal aid program or public defender's office, must have adequate resources.

The draft Statute does not indicate how the International Criminal Court will be financed if it is not to be an independent judicial organ of the UN. This has been left to the General Assembly to resolve and Amnesty International agrees with the recommendation of the Working Group that "[d]etailed consideration must be given to financial issues at an early stage of any discussion of the proposed Court." If it is to be established by treaty and linked to the UN, then the Secretariat should be provided by the UN (subject to guarantees of independence) 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 Court. 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 has led to calls to amend that treaty to provide for funding from the general budget of the UN. Resources of the International Criminal Court should be adequate to provide an effective legal aid program or public defender's office (see discussion below in Section IV.B.1).

3. Seat of the Court and place of trial

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

The draft Statute gives the International Criminal Court, like Rule 4 of the Rules of Procedure and Evidence of the *ad hoc* Tribunal,[29] flexibility to conduct trials in places other than its seat (Article 32 (1)). The Commentary indicates that the drafters intended this provision to have stronger safeguards for defendants than those which are found in the Rules of Procedure and Evidence of the *ad hoc* Tribunal. In some cases, trials should be conducted near the place

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

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 Court 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 "[p]roximity of the trial to the place where the crime was allegedly committed may cast a shadow over the proceedings, 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 or the staff of the Court", 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 interests of justice to do so". Article 32 (1), with its Commentary, should be retained.

B. INDEPENDENCE AND QUALIFICATIONS OF THE JUDGES

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

Independence of the judges. Article 10 states that "[i]n performing their functions, the judges shall be independent" and that they "shall not engage in any activity which is likely to interfere with their judicial functions, or to affect confidence in their independence", and provides several other guarantees of their independence or impartiality. The Statute should reinforce this protection of the independence and impartiality of the judges by incorporating applicable guarantees in the UN Basic Principles on the Independence of the Judiciary, at least by reference, possibly in the Preamble. 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.

Flexibility in the size of the Court. The Court would be a permanent body, but would only sit when hearing a case. It would consist of eighteen judges (Article 6 (3)), 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 Court for investigation and how many of them will lead to prosecutions. Although the International Criminal Court could begin as a relatively modest exercise, recent events suggest that it will have to 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. In addition, as a way of maximizing the

limited resources of the Court, consideration could be given to three-judge or even one-judge Trial Chambers and a smaller Appeals Chamber.

Experience of the judges. Ten of the judges selected must have criminal trial experience and eight must have recognized competence in international law (Article 6 (1). The Commentary states that the latter requirement "may be met by competence in international humanitarian law and international human rights law". Since most of the crimes within the jurisdiction of the Court are violations of these bodies of law, many of the judges should possess such experience. It would be better if the Statute had a provision similar to that in Article 13 (1) of the Statute of the *ad hoc* Tribunal and Article 6 (1) of the 1993 draft Statute, both of which require 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.

Article 6 (2) of the draft Statute permits each state party to nominate up to two persons each of different nationality. They do not have to be nationals of states parties. This is an improvement over the 1993 draft Statute, which limited candidates to nationals of states parties, and is consistent with international practice.[30] It will help to assure a broader pool of candidates and to avoid a possible imbalance between regions and legal systems, depending on the pace of ratifications. The Statute should provide that 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.[31]

C. THE PROSECUTOR

The Statute of the Court 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

[30] 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".

[31] 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.

The Prosecutor should be able to initiate investigations with respect to any crime as to which the Court has jurisdiction over the suspect and the crime.

The Commentary sees the Court as a tool for states [cite xxxx], rather than a tool for the general public. Consistent with this approach, the draft Statute restricts the jurisdiction of the Court to crimes where a state has submitted a complaints or the Security Council has referred a matter to the Court, but it is up to the Prosecutor to decide whether to initiate an investigation and to bring charges (Articles 25 (4), 26 and 27). Amnesty International believes that in addition to these two methods of initiating investigations the Prosecutor should be able to initiate investigations on his own initiative or after receiving a complaint by or on behalf of an individual with respect to any crime where the Court has jurisdiction over the suspect and the crime. This would also permit the Prosecutor to bypass the requirements in Article 23 (2) that the Security Council determine that an act of aggression have occurred before a state complaint can be made and that it determine whether a prosecution can commence concerning a situation being considered by the Security Council under Chapter VII. See discussion above in Point II.C.

Under the draft Statute, the Prosecutor cannot initiate his or her own independent investigation or prosecution even if the Prosecutor becomes aware during the course of an investigation or prosecution that crimes have occurred which are not mentioned in a state complaint or Security Council referral. Moreover, intergovernmental organizations, non-governmental organizations and individuals cannot submit information about a crime or suspect within the jurisdiction of the International Criminal Court to the Prosecutor which could lead to an independent investigation or prosecution. 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 complaints and Security Council referrals.

There are several other problems with limiting the initiation of prosecutorial investigations to complaints by states and referrals by the Security Council. State 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 referrals of matters (if the referral is limited to individual cases) by 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.[32] Similarly, the Security Council, a political body, may not refer all matters which would involve Chapter VII of the UN Charter, even if crimes within the Court's jurisdiction may have occurred.

2. Independence, duties and powers

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

Guarantees of independence. Neither the Prosecutor nor any Procuracy staff may "seek or act on instructions from any source" (Article 12 (1)) and the Prosecutor is expected to act "as a representative of the international community as a whole". Commentary to Article 12. The draft Statute contains other guarantees of the independence of the Prosecutor and staff in Articles 12 and 31 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 Deputy Prosecutors by the states parties rather than by the Court. In a significant strengthening of the Prosecutor's independence over the 1993 draft Statute, which permitted the Court to remove the Prosecutor for misconduct, Article 15 provides that the Prosecutor and Deputy Prosecutors may only be removed after a determination by a majority of states parties in a secret ballot that the official has committed misconduct or a serious breach of the Statute or is unable to exercise his or her functions because of long-term illness or disability.

Duties and ethical obligations. The draft Statute and the Commentary fail to spell out the duties and ethical obligations of the Prosecutor in any detail. 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.

Powers. 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

[32] 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.

- where the state concerned has consented to jurisdiction over the crime. The Prosecutor has the power to request the presence of and question suspects, victims and witnesses; to collect evidence; to conduct on-site investigations; to take necessary measures to ensure confidentiality of information or to protect any person; and to seek the cooperation of any state or the UN (Article 26 (2)). The Prosecutor can ask the Court to issue subpoenas and warrants for arrest (Article 26 (3)). The Prosecutor will be able to select prosecution staff (Article 12 (2)) 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 31). In cases in which states make complaints or - if the Prosecutor is given this power - 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 28 (1) and to transfer a suspect under Article 53 would continue to depend on acceptance of jurisdiction by the state concerned over the particular crime. To ensure that the International Criminal Court 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. To a large extent this is addressed in Articles 51 to 57 (See also Section II.B above).

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.[33] 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[34]

[33] As indicated above in Section II.C, however, it is far more likely that the system limiting the right to bring complaints in specific cases to states and failing exclude the possibility that the Security Council could refer specific cases - 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.

[34] 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."

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.[35]

Article 26 (5) of the draft Statute provides that the Presidency shall review a decision of a prosecutor not to initiate an investigation or to file an indictment on the request of the complainant state or the Security Council, if it referred a matter to the Court, but the Presidency may only request the Prosecutor to reconsider the decision. This provision helps to protect the Prosecutor's independence and impartiality. It is a major improvement over the 1993 draft Statute, which permitted the Court to direct the Prosecutor to commence a prosecution. Nevertheless, it does not give victims the right to seek a review of a decision not to prosecute; their only recourse is to ask the complainant state or the Security Council, if it referred the matter, to seek such a review. Other ways in which the rights of victims and their families may be effectively protected during proceedings are discussed below in Section IV.

IV. PROTECTION OF THE DEFENDANT

The Statute of the Court 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 the suspect is first interrogated with a view to prosecution until exhaustion of all legal remedies - and incorporate these standards expressly or by reference.

If Justice Jackson's high standards are to be better realized in a permanent international criminal court than they were in the Nuremberg and Tokyo Tribunals, the Statute is to be an advance on the Statute of the *ad hoc* Tribunal, and if the Court is to serve as a model for national courts, the international community must first ensure that the Statute establishing the Court fully satisfies strict international standards for a fair trial applicable to all stages of the proceedings. These standards are found not only in Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), but also in the framework of internationally recognized standards

[35] Principle 6 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states:

> "The responsiveness of judicial and administrative process to the needs of victims should be facilitated by:
>
> (a) Informing 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 such information;
>
> (b) Allowing 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 an consistent with the relevant national justice system."

which have been adopted or welcomed by the UN General Assembly during the nearly three decades since the ICCPR was opened for signature on 16 December 1966.[36] Although the draft Statute contains some important safeguards for defendants, in many ways it is sadly lacking.

Relevant international standards. These international standards, which should be incorporated directly or by reference in the body of the Statute and recalled in the Preamble, include Article 9 of the Universal Declaration of Human Rights, the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Articles 7 and 15 of the UN Convention against Torture, 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.[37] 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, some of which provide greater protection for the rights of defendants than those in the draft Statute. The 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 Court can take into account evolving concepts of fairness.[38]

Incorporation of the standards in the Rules. To the extent that it is decided not to incorporate these standards in the Statute or to refer to them in the Commentary, they should be incoporated in the Rules. 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, Article 19 permits the Court to make rules for "the conduct of investigations", "the procedure to be followed and the rules of evidence to be applied"

[36] The first comprehensive study of the scope of the right to fair trial at all stages of the proceedings, by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, has just been completed. *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; E/CN.4/Sub.2/1993/24/Adds. 1-2; E/CN.4/Sub.2/1994/24; E/CN.4/1994/Sub.2/1994/25 and Add.1; E/CN.4/Sub.2/1994/26. This five-year study documents the broad network of international instruments, jurisprudence and interpretation concerning the right to fair trial.

[37] 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.

[38] "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).

and "any other matter which is necessary for the implementation of this Statute". Article 19 requires the Court to circulate the draft initial Rules within six months for approval by states within a further six months. This could mean up to a one-year delay before the Court could begin to process cases. Since the Court could draw heavily upon the Rules adopted by the *ad hoc* Tribunal, this seems excessive. The period should be shortened or the Court permitted to operate pursuant to provisional rules pending final approval by states parties. Unfortunately, there is no provision expressly authorizing the Court to circulate the draft initial Rules to non-governmental organizations and others 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, it would be helpful if the draft rules were to 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.

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.

The Commentary to Article 26 recognizes that "the rights of the accused would have little meaning in the absence of respect for the rights of the suspect during the investigation". Although the draft Statute contains a number of important protections for suspects before indictment, it omits others and apparrently fails to protect the rights of suspects questioned by national authorities, regardless whether they are in detention (other rights of pre-trial detainees are discussed in the following section).

Provisions concerning the rights of suspects which should be retained. 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:

- the right to silence - without such silence being a consideration in the determination of guilt or innocence - before any investigation by the Prosecutor (Article 26 (6) (a) (i)). Amnesty International believes that this is a key aspect of the presumption of innocence and the right of a defendant not to be compelled to testify or confess guilt. 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.[39]

- the right to assistance of counsel of the defendant's choice before any questioning (Article 26 (6) (a) (ii)). 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 26 (6) (a) (ii)). Like Article 18 (3) of the Statute of the *ad hoc* Tribunal, which also applies to pretrial investigations, this provision affords greater protection than Article 14 (3) (d) of the ICCPR, which expressly applies only to persons charged with a crime. Article 26 (6) (a) (ii) provides greater protection than either Article 21 (4) (d) of the Statute of the *ad hoc* Tribunal or Article 14 (3) (d) of the ICCPR, both of which limit the right of defendants without means to free legal assistance to "any case where the interests of justice so require".

- the right not to be compelled to testify against oneself or confess guilt (Article 26 (6) (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 26 (6) (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 right to be informed before questioning of the above rights and other rights under the Statute (Articles 26 (6) and 30 (1) (c)). Article 26 (6), which applies to any suspect, whether at liberty or under provisional arrest, is an improvement over the 1993 draft Statute, which failed to make clear that the right to be informed of rights applied to all of the above rights (this was mentioned only in the Commentary). The Statute of the *ad hoc* Tribunal does not expressly state that suspects have the right to be informed of *any* rights before indictment. Article 30 (1) (c) requires that suspects who have been provisionally arrested are entitled to be informed of all their rights under the Statute, but it would be better if it also applied to suspects being questioned by the Prosecutor who are not in detention.

[39] 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).

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.

Rights of suspects questioned or detained by national authorities. A potential loophole in the draft Statute, however, is that the rights in Article 26 (6) could be read to apply only to the suspect *vis-à-vis* the Prosecutor. Neither the draft Statute nor the Commentary expressly state that the rights apply when suspects are being questioned or detained by national authorities providing assistance to the Prosecutor pursuant to a request under Article 26 (2) (e), although this would be a logical interpretation of the draft Statute since the Prosecutor will be dependent on national authorities in carrying out many ofthe tasks investigation. They also do not address the problem which exists when national authorities have denied suspects these rights before they received requests for assistance from the Prosecutor. Thus, Article 26 (b) would not necessarily preclude the admission of a coerced confession obtained by the national authorities before they had received and agreed to carry out such a request. Indeed, neither the draft Statute nor the Commentary make clear what the consequences are if these rights are not respected either by the national authorities or the Prosecutor. Article 44 (5) requires the exclusion of evidence obtained by means which constitute "a serious violation of this Statute or of other rules of international law". This wording, however, could be interpreted as affording less protection than Article 48 (5) of the 1993 draft Statute, which required the exclusion of "[e]vidence obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected rights".[40]

2. Pre-trial detention

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

In a welcome improvement over the Commentary to the 1993 draft Statute, the Commentary to Articles 28 and 29 of the draft Statute now makes clear that provisions dealing with pre-trial detention and release on bail of suspects and detainees have been drafted with the intention to ensure compliance with relevant provisions of the ICCPR. The draft Statute includes a number of significant guarantees for the accused in pre-trial detention, some of which were entirely omitted in the 1993 draft Statute (rights directly related to their preparation for trial are discussed below in the section concerning the trial).

However, as shown below, the draft Statute does not appear to fulfill the drafters' intent to be consistent with Article 9 of the ICCPR with respect to the provisional arrest of suspects. They have no rights expressly stated under the draft Statute to prompt access to a national judge

[40] 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 26 and other parts of the Statute must be excluded.

at which they could challenge their detention, to seek a review of the length of their provisional arrest, to seek release unconditionally or on bail or to challenge the lawfulness of their detention. The absence of such avenues of review, combined with the absence of other rights, is a major flaw in the draft Statute which could lead to the indefinite pre-trial detention of suspects without charge or trial.[41] Moreover, there are a number of other important guarantees applicable to all persons in detention, both suspects and accused, whether held in the custody of national authorities or the Court, which are not included or which are inadequately defined in the draft Statute. These rights should be included in a form which satisfies international minimum standards of fairness.

Some of the key pre-trial detention rights which are omitted from the draft Statute - or inadequately guaranteed - and should be included or properly guaranteed,[42] are the following:

- the right to be informed, at the time of arrest, of the reasons for the arrest and to be promptly informed of any charges (Article 9 (2) of the ICCPR). Although Article 28 (4) of the draft Statute now includes this right, Article 30 (1) (a) provides that suspects under provisional arrest, who, until the indictment is confirmed, are entitled only to be informed of "the grounds for arrest". Since Article 28 (2) permits the detention without charge of a suspect under provisional arrest for 90 days or "such longer time as the Presidency shall allow", suspects could be detained indefinitely without charge. Nothing in the Commentary or the draft Statute suggests a time limit for detention of suspects by the national authorities without charge under provisional arrest; such indefinite pre-trial detention would deny suspects their right to trial without undue delay as guaranteed by Article 14 (3) (c) of the ICCPR (see discussion below in Section IV.B.1 of Article 41 (1) (c)).

- the right to have one's family immediately notified of the detention and to prompt access to the family (Rule 92 of the UN Standard Minimum Rules; Principle 16 of the UN Body of Principles). These rights are important safeguards against torture and ill-treatment and are helpful to the preparation of a defence.

- 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). This right is a important safeguard against torture and ill-treatment, as well as essential to the preparation of a defence.

[41] The Commentary to Article 27 clearly distinguishes between suspects and accused.

[42] In some cases they have also been omitted 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),

- the right to prompt access to medical attention and access to independent medical attention (Rules 24 and 91 of the UN Standard Minimum Rules; Principle 24 of the UN Body of Principles). These rights are important safeguards against torture and ill-treatment, as well as the health of the detainee.

- the right to prompt access to the Court (Article 9 (3) of the ICCPR). Article 29 (1) of the draft Statute requires that a person who has been arrested - as opposed to provisionally arrested - shall be brought promptly before a judicial officer of the state where the arrest occurred. However, the role of the national judicial officer is limited to determining "in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused have been respected".

Article 29 (1) is severely flawed in a number of respects. The Commentary recognizes that "there is some risk in entrusting these powers to a State official", but expects that because the national court "will be cooperating with the Court, there is no reason to expect that this preliminary procedure will cause difficulties". This expectation is sadly misconceived: Amnesty International and numerous other independent observers regularly document that criminal procedure codes and practices in many states fail to satisfy fundamental standards of fairness. Article 29 (1) also does not expressly state that "the rights of the accused" include the accused's rights under the Statute and under international standards as well as under national law.[43] Equally troubling, however, is the failure of Article 29 (1) to state that it applies to suspects who have been provisionally arrested pursuant to Article 28 (1) or that the national judicial officer may grant any relief to such suspects. If there is a concern that any such judicial supervision over suspects under provisional arrest should not be delegated to a national judge, then the Statute should require the Court to supervise such detention from the moment of provisional arrest.

- 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."[44] In contrast to the 1993 draft Statute, which omitted this right entirely, Article 29 (2) provides that "[a] person arrested may apply to the Presidency for release pending bail. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial." Unfortunately, this right appears to be limited to the accused; it does not apply to a suspect provisionally arrested pursuant to Article 28 (1).

[43] Article 38 (1) (c) provides that at the commencement of the trial - which could be months later - the Court must satisfy itself that the accused's rights "under this Statute have been respected".

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

- the right 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 entitled to trial within a reasonable time or to release". The right of an accused to trial without undue delay is guaranteed by Article 41 (1) (c) of the draft Statute, but this provision does not expressly state that it includes the right of an accused under arrest to release if the trial has been unduly delayed. If the Court interprets Article 41 (1) (c) consistently with the interpretation of Article 14 (3) (c) by the Human Rights Committee, then it would apply to suspects under provisional arrest as well as the accused and would entitle the detainee to release if a trial was unduly delayed (see discussion of Article 41 (1) (c) below in Section IV.B).

- 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 standards). The Statute should expressly incorporate this fundamental right and provide the same judicial supervision by the Court over pre-trial detainees as it does over convicted persons; the Commentary to Article 59 makes clear that the terms and conditions of imprisonment in national prisons "should be in accordance with international standards".[45]

- 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 29 (3) of the draft Statute, provides that "[a] person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation." This provision expressly applies to persons who have been arrested - as opposed to provisionally arrested - and the Presidency is authorized to release only an accused - as opposed to a suspect.[46] Thus, Article 29 (3) fails to provide an effective safeguard against unlawful detention for suspects under provisional arrest - those who are most vulnerable to abuse since they will be detained by national authorities and have no other avenue under the draft Statute to challenge any aspect of their detention or seek release.[47]

[45] Regrettably, this safeguard is omitted from the Statute of the *ad hoc* Tribunal as well. Nevertheless, the Preamble of the Detention Rules states: "The primary principles on which these Rules of Detention rest reflect the overriding requirements of humanity, respect for human dignity and the presumption of innocence."

[46] It is not clear what the drafters intended by the words "or detention" and whether they intended this to include provisional arrest. Even if this were the case, however, the only relief under this provision the Presidency is authorized to grant is to an accused.

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

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. It should make clear that these rights, and the rights spelled out in the Statute, apply to all persons from the moment of provisional arrest or arrest 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 under provisional arrest or arrest).

3. 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 Court before trial.

The draft Statute provides that the Presidency (or a Trial Chamber if constituted for the case) shall review a decision by the Prosecutor to indict a suspect to determine whether the indictment has established a *prima facie* case (Article 27 (2)). This would permit 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.[48] The standard of review is an improvement over the 1993 draft. The Commentary states that a *prima facie* case "is understood to be a credible case which would (if not contradicted by the defence) be a sufficient basis to convict the accused on the charge".

Challenges to the indictment. The accused should have the right to challenge the sufficiency of the indictment 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 V.A.2 below). The accused may be able to challenge the sufficiency of the indictment under Article 41 (1) (a) of the draft Statute, which guarantees the right "to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge", but the scope of the right and the nature of any hearing in which the accused may challenge the sufficiency of the indictment should be spelled out in the Statute or in the Commentary.

[48] The Commentary to Article 8 concludes, based on jurisprudence of the European Court of Human Rights, that it would be permissible for a judge who determined whether there was a *prima facie* case to sit as part of the Trial Chamber or Appeals Chamber since the issues of guilt or innocence are not the same. Nevertheless, the issues are sufficiently similar as to suggest that the persons performing these functions should be different.

Challenges to jurisdiction. Defendants - whether simply suspects under provisional arrest or accused in an indictment - should have the right to challenge the jurisdiction of the Court before the commencement of the trial or after the trial has begun. Article 34 of the draft Statute is an improvement over the 1993 draft Statute in that it permits challenges to jurisdiction before or after the commencement of the trial, but it limits this right to the accused. In addition, Article 35 permits the accused to challenge the admissibility of a state complaint at any time before the trial starts on grounds that the case has been or is being investigated or "is not of such gravity to justify further action by the Court." Suspects under provisional arrest - which could involve lengthy detention in state custody without charge and without adequate avenues of review - should be permitted to challenge the jurisdiction of the Court. Concerns about the adequacy of the definitions of jurisdiction are addressed above in Section II.B above.

B. THE TRIAL

1. Fair trial guarantees

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

The draft statute contains a number of important safeguards for defendants preparing for trial or at trial, including most 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 internationally recognized human rights standards found in instruments other than the ICCPR.[49] It is essential that these fundamental guarantees be included in the Statute of the International Criminal Court, 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 provisions 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 37 (concerning proceedings *in absentia*) and 38 of the draft Statute, but only at the time the trial begins. As demonstrated above, however, suspects under

[49] These standards are listed in the introduction to Section IV.

provisional arrest by national authorities receive almost no protection at the very time they need judicial supervision the most.

The draft Statute states that at the commencement of the trial, the Trial Chamber must "have the indictment read" (Article 38 (1)), satisfy itself that the rights of the accused under Articles 27 (5) (b) (concerning disclosure of evidence) and 30 (concerning notification of the indictment) have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence" (Article 38 (1) (b)) and "allow the accused to enter a plea of guilty or not guilty" (Article 38 (1) (c)). Article 38 (2) provides that the Trial Chamber also "shall ensure that a trial is fair and expeditious, and is conducted in accordance with the this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Although Article 38 does not specify which rights should be respected, these provisions should be interpreted to include all internationally recognized rights to fair trial. This appears to be the intent of the International Law Commission since the Commentary no longer contains the language in the Commentary to the 1993 draft Statute limiting "the rights of the accused" to a limited set of rights in certain articles of the draft Statute. If the draft Statute is not amended, it will be up to the Court to ensure that these rights are fully respected.

Right to be tried without undue delay. Article 41 (1) (c) of the draft Statute is the same as Article 14 (3) (c) of the ICCPR and Article 21 (4) (c) of the Statute of the *ad hoc* Tribunal. It should be interpreted consistently with Article 14 (3) (c) of the ICCPR to apply at all stages of the proceedings, from the moment the suspect or accused is informed that the government is planning a prosecution.[50]

Fair hearing. Article 41 (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.[51] In view of the large number of internationally recognized rights of

[50] 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. See also M. Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary* (Kehl: N.P. Engel 1993).

[51] 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).

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 defendants before the Court. Article 41 of the draft Statute omits the important safeguard of the right to a fair trial in Article 14 (1) that "[a]ll persons shall be equal before the courts and tribunals." In contrast, the Statute of the *ad hoc* Tribunal and Article 42 of the 1993 draft Statute included this right. It should be restored.

Equality of arms. Article 27 (5) (b) of the draft Statute permits the Court to require "the disclosure to the defence within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence". Article 41 (2) provides for disclosure of exculpatory evidence to the defence before the conclusion of the trial:

> "Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide."

Read together, these provisions appear to be consistent with Principle 21 of the UN Basic Principles on the Role of Lawyers, which 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."

Nevertheless, it would be better if the Statute were to make clear that the defence was entitled to the evidence covered in Article 27 (5) (b) as of right.

In light of the complexity of the legal and factual issues at all stages of proceedings before the Court, to ensure a balance of resources between the Prosecutor and defendants, the General Assembly should consider providing for an independent public defender's office.[52]

Public trial. Article 41 (1) of the draft Statute, guaranteeing the right to a public trial appears 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. Article

[52] 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.

40 (4) of the draft Statute, on the other hand, states that "[t]he trial shall be held in public, unless the Chamber determines that certain proceedings be in closed session in accordance with Article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence".

Article 43 requires the Court "to take necessary measures available to it to protect the accused, victims and witnesses, and may to that end conduct closed proceedings 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 should throughout take the necessary steps to protect the accused, as well as victims and witnesses" and that "due regard for the protection of victims and witnesses . . . must not interfere with full respect for the right of the accused to a fair trial." For further discussion of the rights of victims and witnesses, see Section V below. It will be essential for the Court to ensure that the definition of "confidential or sensitive information" is interpreted consistently with the right to a fair and public trial.

Presumption of innocence. Article 40 of the draft Statute guarantees that "[a]n accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt." This is similar to the guarantee in Article 14 (2) of the ICCPR, as interpreted by the Human Rights Committee.[53] The Commentary takes a restrictive view of the phrase "according to law". It states that "[s]ince the Statute is the basic law which governs trials before the Court, it is the Statute which gives content to the words 'according to law'".[54] Since the draft Statute falls short of international minimum standards of fairness in a number of respects, these shortcomings will have to be remedied to ensure that this provision is an adequate guarantee of the presumption of innocence. One provision which may be inconsistent with the presumption of innocence is Article 27 (5) (c), which permits the Court to order the defence and Prosecutor exchange information "so that both parties are sufficiently aware of the issues to be decided at trial", since this could require the defence to present evidence before the Prosecutor had presented the prosecution case.

Right to be informed of charges. Article 14 (3) (a) of the ICCPR provides that everyone charged with a criminal offence is entitled "[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". This right,

[53] 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).

[54] 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".

which is also included in Article 21 (4) (a) of the Statute of the *ad hoc* Tribunal, is protected both by Article 30 (1) and (2) and by Article 41 (1) (a).

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 - such as the right to communicate confidentially with one's lawyer - 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.

Right to conduct a defence.[55] Article 41 (1) (d) of the draft Statute states that the accused has the right "to conduct the defence in person or to through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court, without payment if the accused lacks sufficient means to pay for such assistance". 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.

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 Court, even if they may be taken into account in determining the sentence.[56] Similarly, the Statute should make clear that the leaders behind the crimes - those who planned them, gave the orders and helped organize them -

[55] The right to be tried in one's presence is discussed in Section IV.B.2 below.

[56] See, *e.g.*, UN Principles on the Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 19); UN Declaration on the Protection of All Persons from Enforced Disappearance (Article 6); the Nürnberg Principles (Principle IV).

must be liable to prosecution as well as the people who carried them out.[57] This principle applies also to officials who tolerated or acquiesced in the crimes.[58]

Rules of evidence. Article 44 (5) 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. It provides:

> "Evidence obtained by means of a serious violation of this Statute or of other rules of international law shall not be admissible."

To the extent that it requires exclusion of evidence obtained by a serious violation of the Statute or Rules, it would provide a defendant with more protection than a similar provision in the 1993 draft Statute.[59] Article 44 (5) would provide a stronger protection than 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 form of prohibited evidence, not just a statement. As Guideline 16 of the UN Guidelines on the Role of Prosecutors makes clear, a serious violation of a rule of international law would include all forms of cruel, inhuman or degrading treatment, not just torture. On the other hand, the term "internationally protected human rights" in the 1993 draft Statute could be interpreted to include more criminal justice and human rights standards than "rules of international law".

Prohibition of compelled testimony and coerced confessions. Article 41 (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 41 (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". These are broader guarantees than in Article 14 (3) (f) of the ICCPR and Article 21

[57] See, *e.g.*, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (Article II); UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 19).

[58] See, *e.g.*, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (Article II).

[59] Article 48 (5) of the 1993 draft Statute provided: "Evidence obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights shall not be admissible."

(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 42 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 not within the jurisdiction of the Court, 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 prosecuted, 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,[60] Article 42 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.

Right to compensation for miscarriage of justice. Article 14 (6) of the ICCPR recognizes a right to compensation in cases of miscarriage of justice. Although Article 29 (3) permits the Presidency to award compensation if an arrest or detention is determined to be unlawful, this seems to be limited to unlawful arrest or detention before trial. The Statute should expressly recognize a right to compensation for miscarriages of justice.

2. Trials *in absentia*

There should be no trials *in absentia*.

[60] The Human Rights Committee has concluded that Article 14 (7) of the ICCPR "does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State." *A.P. v. Italy*, No. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This was also 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.

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 to determine objectively 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 Court 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 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 have 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".[61] Moreover, even if the a 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 37 (1) of the draft Statute states that "[a]s a general rule, the accused should be present during the trial", but Article 37 (2) permits the Trial Chamber to order a trial to proceed in the absence of the accused where the accused who is in custody or who has been released pending trial on grounds of ill-health or security risks to the accused; the accused continues to disrupt the trial; and the accused has escaped from lawful custody under the Statute or has absconded when on bail. Article 37 (2) covers escape from custody of national authorities of an accused under arrest before the trial has begun. This article would permit trials *in absentia* against the will of an accused who is ill or against whom threats have been made. Security risks to an accused normally are addressed in national courts by other measures such as searching

[61] 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.

members of the public entering the courtroom and use of bulletproof glass around the accused during the trial.

If the Trial Chamber decides to conduct a trial *in absentia*, Article 37 (3) requires the Chamber to "ensure that the rights of the accused under this Statute are respected", particularly that "all reasonable steps have been taken to inform the accused of the charge" and that "the accused is legally represented, if necessary by a lawyer appointed by the Court". The draft Statute does not, however, expressly require a *de novo* trial if the accused is subsequently arrested, although one of the authorities cited in the Commentary suggest that drafters intended that the Court should conduct a retrial if the accused can prove that he or she was not served with a summons or that his or her absence was involuntary.[62] This would cover only a limited number of cases.

As an alternative to trials *in absentia*, in cases where the absence of the accused is deliberate, Article 37 (4) provides that the Court may establish an Indictment Chamber to record the evidence, determine whether the evidence establishes a *prima facie* case and, if so, issue an arrest warrant. If the Court later tries the accused, the record of evidence before the Indictment Chamber is admissible, but judges who were members of the Indictment Chamber may not be members of the Trial Chamber (Article 37 (5)). Thus, evidence presented in the absence of the accused, without adequate opportunity for the accused to contradict the evidence or assist counsel to identify and locate evidence in support of the defence, will be admitted at the 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. It should also require that evidence presented in a hearing before the Indictment Chamber could only be submitted at a subsequent trial subject to all of the safeguards governing submission of any evidence at trial. 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

[62] The Commentary states that international human rights bodies have held that there must be provisions for setting aside the judgment and sentence on subsequent appearance. See Council of Europe, Committee of Ministers, Resolution (7) 11 on the Criteria Governing Proceedings Held in the Absence of the Accused, adopted 21 May 1975, para. 8 (8) and (9).

The Statute of the Court must exclude the death penalty and clearly define appropriate penalties.

In a welcome development, the draft Statute - like the Statute of the *ad hoc* Tribunal - excludes the death penalty as a possible punishment. Article 47 (1) permits the Court to impose a sentence of a term of life imprisonment or of imprisonment for a specified term of years and a fine. 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 47 (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 convicted person is a national;

(b) the State where the crime was committed; and

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

In addition, Article 46 (2) requires the Trial Chamber to "take into account such factors as the gravity of the crime and the individual circumstances of the convicted person".[63]

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 34 of the draft Statute and in Article 15 of the ICCPR, the penalties should be spelled out with greater precision. Apart from the principles in Article 46 (2) - which are not exclusive - the draft Statute does not outline any basic principles for deciding which national law is to apply to assure certainty in sentencing. Indeed, the lack of certainty appears to be greater than in the 1993 draft Statute, which required the Court to choose one national law; Article 47 (2) seems to permit the Court to take into account elements of more than one national law in determining a sentence. The Commentary does not explain the reasons for this change. As a result, this could lead to inconsistent and arbitrary application of penalties to different defendants in the same case.

[63] Article 4 (2) of the UN Convention against Torture 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."

Different approaches might be considered to decide which national law should apply, 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 Court, 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 47 (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.[64] This would minimize the possibility of arbitrary application of penalties. For acts committed *after* the establishment of the Court, however, the penalties should be spelled out in the Statute to ensure international consistency in the application of sentences.

D. RIGHT TO APPEAL

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

Article 48 of the draft Statute provides that a convicted person and the Prosecutor, may appeal against the judgment or sentence on three grounds: "procedural unfairness, error of fact or law or 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 50 provides that a convicted person or the Prosecutor may apply to the Presidency for revision of a conviction on the ground that evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the decision.

Article 48 (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.

[64] 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 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 9 of the draft Statute permits judges not members of Trial Chambers to act as substitute members of the Appellate Chamber and permits members of the Appellate Chamber after their three-year term has ended to be eligible for membership in a Trial Chamber. 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 Court must ensure that internationally recognized safeguards apply to the custody of convicted defendants.

Article 59 (1) of the draft Statute provides that sentences of imprisonment will be served in national prison facilities "subject to the supervision of the Court in accordance with the Rules". The Commentary makes clear that "[w]hile prison facilities would continue to be administered by the relevant national authority, the terms and conditions of imprisonment should be in accordance with international standards, notably the Standard Minimum Rules for the Treatment of Prisoners".[65] These safeguards are a major improvement over the 1993 draft Statute, which simply provided in Article 66 (4) that imprisonment in national facilities "shall be subject to the supervision of the Court", without specifying any standards.

The Statute of the Court should ensure that pardons and commutations of sentences are an international responsibility.

Neither of the two methods in Article 60 of the draft Statute for administering pardon, parole and commutation of sentences provide as effective international control over these matters as Article 28 of the Statute of the *ad hoc* Tribunal. Both methods provide that states - not the Court - determine when prisoners held in that state can seek a decision on pardon or commutation. Under Article 60 (1) and (2), a prisoner may not seek such relief unless permitted to do so under national law and the national authorities have notified the Court that the prisoner is eligible to apply for such relief. Under Article 60 (3), if the Presidency decides that such an application

[65] This is a stronger guarantee than in 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". The Detention Rules of the *ad hoc* Tribunal have significant - but incomplete - safeguards for detainees. Presumably the category in the Preamble, "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.

"is apparently well-founded, it shall convene a Chamber of five judges to consider and decide whether in the interests of justice the person convicted should be pardoned or paroled or the sentence commuted, and on what basis". Article 60 (4), however, permits a Chamber to specify that a sentence is to be served in accordance with the national law of the place of imprisonment and to delegate to the state the power to decide when prisoners would be pardoned, be paroled or have their sentences commuted. Both methods 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.

V. 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 III.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 III.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 the rights of defendants.

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)[66] provides in paragraph 6 (b) that the judicial process should allow:

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

> ". . . 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 . . ."

The draft Statute fails to do this, but it could implement this provision 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 Court should ensure that victims, their families and witnesses are protected from reprisals and unnecessary anguish.

The Court 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. These needs are now addressed by the power of the Court under Article 43 to "take necessary measures available to it, to protect the accused, victims and witnesses", supplemented by the power of the Prosecutor under Article 26 (2) (e) "to take necessary measures to ensure the confidentiality of information or the protection of any person".

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".

Article 43 requires the Chamber to "take all necessary measures available to it, to protect the accused, victims and witnesses, and may to that end conduct closed proceedings 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 43 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.[67]

The requirement in Article 44 (1) that witnesses "shall give an undertaking as to the truthfulness of the evidence given by that witness" is an advance over the 1993 draft Statute, which required witnesses to "make such oath or declaration as is customary in judicial proceedings in the State of which the witness is a national" and might have prevented certain witnesses from testifying since the requirement of an oath could conflict with their rights to freedom of thought, conscience and religion. Delegation of the responsibility for prosecution of cases of perjury to national authorities may undermine the authority of the Court; it should retain ultimate authority over such prosecutions in case national authorities fail to do this effectively. In addition, some states impose impermissible penalties, such as flogging, in certain cases of perjury.

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

The Statute of the Court 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 Court 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 Court 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

[67] 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 Court.

cases. If the Statute is amended to give 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 and the Commentary are silent on these issues. Although many of these matters will necessarily have to be addressed in the practice of the Court rather than in the Statute, the Statute should expressly state that all three organs of the Court - 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 Statute of the Court or some other mechanism should ensure that victims and their families should be able to obtain restitution, compensation and rehabilitation.

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 and 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.[68]

[68] 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).

The draft Statute fails to provide for restitution[69] or 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.

If the draft Statute is not amended to permit it to award restitution, compensation and rehabilitation, 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.

[69] Article 53 (3) of the 1993 draft Statute provided for restitution by authorizing 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 could not be located. Article 24 (3) of the Statute of the *ad hoc* Tribunal also authorizes restitution by authorizing the Tribunal to order "the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners".