ANNEX C3

PUBLIC

THE INTERNATIONAL CRIMINAL COURT
Making the right choices - Part II
Organizing the court and ensuring a fair trial

> "The public interest requires that the tribunal exist before and not after crimes are committed. Justice cannot be an effective deterrent to prevent crimes unless prosecutions are certain. And that requires the permanence and the authority of an international criminal court which is given the necessary resources."
>
> Robert Badinter, former President of the Conseil constitutionnel of France, 26 June 1997[1]

INTRODUCTION

This is the second position paper of a series by Amnesty International in support of the establishment of a just, fair and effective international criminal court. It is designed as an easy-to-use manual for decision-makers addressing topics scheduled to be discussed at the four sessions in 1997 and 1998 of the United Nations (UN) Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee). Each section of the paper discusses the relevant international law, standards and practice; identifies the strengths and weaknesses of the International Law Commission's 1994 draft statute (ILC draft statute); and makes recommendations for improvements.

This position paper addresses some of the topics scheduled to be addressed at the second session of the Preparatory Committee (4 to 15 August 1997), including organization of the court and criminal procedure. Other topics to be discussed at the August session which were originally proposed to be discussed at the February session, trigger mechanisms and complementarity, or which were not fully discussed at that session, are addressed in the first Amnesty International position paper, The international criminal court: Making the right choices - Part I (AI Index: IOR 40/01/97).[2] That paper includes the text of the ILC draft statute for the convenience of the reader. Therefore, those interested in Amnesty International's position on the full range of topics to be discussed at the August session should consult both Part I and Part II. Readers are also urged to consult the broad range of papers being published by other members of the NGO Coalition for an International Criminal Court.[3]

It is anticipated that the Preparatory Committee will consider the question of state cooperation with the international criminal court at the session scheduled to take place from 1 to 12 December 1997 and will review the results of the previous sessions at its final session, scheduled to take place from 16 March to 3 April 1998. At that session it is expected to complete work on the draft consolidated text of a statute for the court for adoption at the diplomatic conference scheduled to open on 15 June 1998 in Rome and to last five or six weeks.

Amnesty International takes no position on whether the organization of the court should follow a common law or a civil law model, although with certain aspects of court organization it hasrecommended that the structure of the court follow a model which may draw more from one system than from another. In any event, the organization of the court, like the four previous ad hoc international criminal tribunals established in this century, is likely to be a hybrid, incorporating elements of various criminal justice systems. Amnesty International also takes no position on whether the criminal procedure should follow a common law, civil law or other model, although Amnesty International believes that it is essential that the accused or the accused's counsel be able to cross-examine witnesses thoroughly and effectively as in some common law or mixed systems. In any event, when incorporating one element of organization or criminal procedure from a particular system, it may be necessary to incorporate other aspects of that system to make it coherent and effective.

This position paper spells out Amnesty International's recommendations for strengthening some of the more important aspects of the ILC draft statute. Nevertheless, as it is possible that the Preparatory Commission will also propose rules of procedure and evidence for the diplomatic conference to recommend to the court for adoption, subject to approval by the states parties or, more likely, propose a set of essential principles to be considered by the court in drafting the rules, this position paper also makes suggestions concerning some of the matters which should be addressed in the rules. See Section I below. In the light of the large number of proposals for amendment of the ILC draft statute or for drafting rules which were included in Volume II of the 1996 Preparatory Committee report, many of which were duplicative, these proposals are not specifically discussed in this position paper.[4] Instead, Amnesty International recommends principles which should be incorporated in the statute or rules and identifies strengths or weaknesses in particular approaches reflected in some of these proposals which could help the delegates in preparing a short draft consolidated text of a statute and recommendations to the court concerning rules.

Two important related efforts have been undertaken recently to assist the Preparatory Committee at the August session in this regard. An informal meeting to which experts from all government delegations, the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal), the International Criminal Tribunal for Rwanda (Rwanda Tribunal) and other relevant organizations, including members of the NGO Coalition for an International Criminal Court, such as Amnesty International, were invited in their personal capacity took place in Siracusa from 29 May to 4 June 1997.[5] In addition, the University of Nottingham Human Rights Law Centre sponsored a workshop on comparative criminal procedure and the international criminal court, entitled Toward a Procedural Regime for the International Criminal Court (University of Nottingham workshop), in London from 6 to 7 June 1997.[6]

AMNESTY INTERNATIONAL'S BASIC PRINCIPLES CONCERNING ORGANIZATION OF THE COURT AND FAIR PROCEDURE

The court should be closely linked to the United Nations (UN).

The court should have the flexibility to conduct trials in places other than the seat of the court, subject to effective safeguards for the accused.

The statute and rules of the court should ensure that the independence and impartiality of the judiciary is guaranteed, as required by international standards such as the UN Basic Principles on the Independence of the Judiciary, and that judges are selected in an open process who are experienced either in international humanitarian law and human rights or in criminal law.

The statute and rules of the court should ensure that investigations and prosecutions are carried out by an independent and impartial prosecutor, with adequate powers, acting consistently with international human rights standards, particularly the UN Guidelines on the Role of Prosecutors.

The views and concerns of victims and witnesses should be presented and considered at appropriate stages of the proceedings, without prejudice to the rights of suspects and accused to a fair trial.

The statute and rules of the court should ensure that victims, witnesses and their families are protected from reprisals and unnecessary anguish, consistently with due process.

The statute and rules of the court should take into account the special circumstances of cases involving violence against women and involving children, without prejudice to the rights of suspects and accused to a fair trial.

The statute of the court or some other effective mechanism should ensure that victims and their families are able t obtain restitution, compensation and rehabilitation.

The statute and rules of the court should declare that all suspects and accused are entitled to a fair and prompt public trial before an independent and impartial court 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 or detaine until exhaustion of all legal remedies - and incorporate these standards expressly or by reference.

The statute and rules of the court should fully protect the rights of suspects and accused when they are interrogated or detained by national authorities.

The court, including a legal aid program or a public defender's office, must have adequate resources to ensure tha suspects and accused have an opportunity equal to that of the prosecutor to defend themselves.

The statute and rules of the court should ensure that imprisonment, pardons and commutation of sentences are an international responsibility.

I. DIVISION BETWEEN STATUTE AND RULES

In general, Amnesty International believes that essential matters of principle, such as guaranteeing the right to counsel without payment to indigents, and fundamental matters of organization and general powers, such as the power to authorize pre-trial restraints on liberty which are less restrictive than detention, should be in the statute. Such an approach would facilitate the speedy adoption of a statute which had the broadest possible international support. Most provisions implementing essential matters of principle, such as the details of a legal aid program or public defenders office or spelling out pre-trial measures less restrictive than detention which could be imposed by the court, such as house arrest, withholding of passports and electronic bracelets and similar technical measures yet to be developed, and provisions implementing fundamental matters of organization and general powers might be better left to the rules. This would permit the court to adjust its procedures, subject to review by states parties, to new developments in international law and standards, to changes in workload and technological developments. It would also avoid the cumbersome procedure and lengthy delays involved if every change in the rules required amendment of the statute by ratification of states parties. This is the general approach followed in the Rules of Procedure and Evidence of the Yugoslavia Tribunal (Yugoslavia Rules)[7] and the Rules of Procedure and Evidence of the Rwanda Tribunal (Rwanda Rules).[8]

To ensure that such rules are effective and fair, they should be drafted in consultation with states, intergovernmental organizations and non-governmental organizations, including international and national lawyers groups, and the president should ensure that all three branches of the court are involved in the process in some fashion. Nevertheless, such consultation should not be a recipe for delay and, with modern means of alerting the international community available, such as the Internet, it would be possible to ensure rapid and in-depth consideration of proposed initial rules in a short period, such as 60 days, and a prompt consideration by states parties in a similar period. Moreover, there is a wealth of experience in the rules of procedure, evidence, legal assistance and detention of the four international criminal tribunals which will facilitate the task of the court.[9] In most cases, the rules proposed by the court would not be controversial and could go into effect after such a period unless a certain number of states parties considered that it was necessary to convene a conference to discuss one or more of the rules. This approach would ensure that the court could be operational at the earliest possible date.

It is to be hoped that the Preparatory Committee and the diplomatic conference will not attempt to draft detailed rules of procedure, evidence, legal assistance and detention, but instead make general recommendations to guide the court in drafting such rules. An attempt by the Preparatory Committee and diplomatic conference to draft detailed rules could lead to prolonged and, possibly, inconclusive political negotiations over technical matters better left to the court to resolve on the basis of its practical needs.[10] If the Preparatory Committee and the diplomatic conference do decide to draft such rules, however, it would be advisable to follow the approach of the Security Council when it established the Rwanda Tribunal and provided that the Rwanda Tribunal should use the rules of the Yugoslavia Tribunal "with such changes as they deem necessary".[11] In either case, the states parties could retain ultimate control over the drafting of the rules.

Article 19 (1) of the ILC draft statute provides for the judges by majority vote to draft rules concerning the conduct of investigations, the procedure to be followed and the rules of evidence to be applied and any other matter which is necessary for the implementation of the statute, but it does not require that the prosecutor and registrar be consulted when drafting the rules. It would be advisable to state in the statute that both the prosecutor and the registrar must be consulted in the drafting of the rules. Moreover, it fails to require consultation with states parties and non-governmental

organizations. Article 19 (1) should be amended to require such consultation before the judges adopt the rules.

Article 19 (2) of the ILC draft statute sets up a cumbersome and slow system for adopting the initial rules, which could lead to a delay of up to a year before the court could begin operating. It provides that the initial rules shall be drafted by the judges within six months of the first elections of the court (which could be several months after the treaty establishing the court enters into force) and that they be submitted to a conference of states parties for approval (without setting any deadline for the states parties to meet or to complete their review of the rules), which could lead to further delays. Article 19 (2) should be amended to provide for the drafting of initial rules of procedure and evidence within a short period, such as no more than 60 days. The rules would go into effect within a similarly short period, such as 60 days, unless a majority of states parties objected to one or more rules (this procedure would be similar to that provided for with respect to other rules in Article 19 (3) as explained below) or call for a conference of states parties to review one or more rules.

The first approach would avoid significant delays and permit the court promptly to draft a new rule or rules which would meet the objections of a majority of states parties. The second approach involving a conference of states parties could lead to significant delays and some provision should ensure that this does not lead to further delay in the operation of the court. For example, all the rules except the challenged rule or rules could enter in force, the rules could enter into force on a provisional basis until otherwise decided by the states parties (Article 19 (4) now states that "[a] rule may provide for its provisional application in the period prior to its approval or confirmation.") or the states parties could be required to complete their consideration of the rules within a short period, such as 30 days, and if consideration was not completed within this time limit the rule or rules would enter into force.

Article 19 (3) provides that rules other than the initial rules "shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections". As with the initial rules, however, it would be better to involve all the judges and to consult with the prosecutor and registrar, as well as states parties and non-governmental organizations, before adopting additional rules. In addition, the time limit for objections by states parties should be shortened to a more reasonable period, such as 60 days.

II. ORGANIZATION OF THE COURT

As envisaged in Article 5 of the ILC draft statute, the court would be composed of several independent organs: the presidency, as provided in Article 8; an appeals chamber, trial chambers, an indictment chamber and other chambers, as provided in Article 9 and Article 37 (4); a procuracy (office of the prosecutor), as provided in Article 12; and a registry, as provided in Article 13.[12] The judges initially would serve part-time, until a two-thirds majority of states parties decided that the workload of the court justified a full-time court (Article 10 (4)). As described below in Section II.B, however, there is widespread agreement that the powers and role of the presidency should be significantly reduced and that many of its functions and powers should be given to a new preliminary chamber. For those not familiar with the ILC draft statute, the summary which follows in Section

II.A of the way cases would be investigated and tried may facilitate the discussion of the proposals for strengthening the organization of the court in Section II, the protection of victims and witnesses in Section III and the guarantees for fair trial of suspects and accused in Section IV.

A. A brief overview of how cases would be investigated and tried

1. Initiating an investigation

Amnesty International has consistently urged that an independent prosecutor have the power to initiate investigations and prosecutions on his or her own initiative, without having to wait for a political body, such as the Security Council or a state party, to act, and without a political body being able to prevent a prosecution. Under the ILC draft statute, however, the prosecutor could not even initiate an investigation until the Security Council, acting pursuant to Chapter VII of the UN Charter (involving a threat to or breach of the peace or an act of aggression), referred a situation to the prosecutor (Article 23 (1)) or a state filed a complaint.[13] The prosecutor would then be required to initiate an investigation unless he or she concluded that there was "no possible basis for a prosecution" under the statute (Article 26 (1)). If, after investigation, the prosecutor concluded that there was "no sufficient basis" for a prosecution, he or she would inform the presidency (Article 26 (4)). At the request of the Security Council, if it had referred a situation, or of a state party which had made a complaint, the presidency would review the decision not to investigate or prosecute and could request, but not require, the prosecutor to review his or her decision (Article 26 (5)).

2. Pre-trial investigation

The ILC draft statute does not provide for an international police force to assist the prosecutor during the pre-trial investigation. The prosecutor will conduct the pre-trial investigation, presumably using investigators in the office of the prosecutor. Article 26 (2) provides that the prosecutor will have the power to request the presence of and question suspects, victims and witnesses; collect documentary evidence; conduct on-site investigations; take necessary measures to ensure confidentiality of information or the protection of persons; and, as appropriate, seek the cooperation of any state or the UN.

The prosecutor may apply to the presidency for subpoenas and warrants directed to the national authorities required during the investigation, including a warrant under Article 28 (1) for the provisional arrest of a suspect (Article 26 (3)). A suspect who has been provisionally arrested is entitled to be released if an indictment has not been confirmed within 90 days, or such longer time as the presidency may allow (Article 28 (2)).

3. The decision whether to prosecute

If the prosecutor concluded after an investigation of a situation arising under Chapter VII, whether it had been referred by the Security Council or had been in response to a state complaint, that a prima facie case existed for a prosecution (Article 27 (1)), the prosecution could not proceed unless the Security Council gave its permission (Article 23 (3)). After concluding that a prosecution was warranted, and receiving any necessary permission from the Security Council, the prosecutor would seek approval of an indictment by the presidency (Article 27 (1)). The presidency would then determine whether a prima facie case exists with respect to a crime within the court's jurisdiction and whether the case was admissible under Article 35. That article states that a case would be inadmissible if the crime "had been duly investigated" by a state with jurisdiction over it and the

decision not to prosecute was "apparently well-founded"; was under investigation by a state which had or might have jurisdiction and there was "no reason for the Court to take any further action for the time being" or was "not of such gravity to justify further action by the Court".

If the presidency decided not to confirm the indictment, it would inform the Security Council, if it had referred the situation, or the complainant state (Article 27 (3)). If, however, the presidency decided to confirm the indictment, it would establish a trial chamber (Article 27 (1)) and make any further orders required for the conduct of the trial, including those related to the languages to be used, disclosure of prosecution evidence, exchange of information between the prosecution and the accused and protection of the accused, victims, witnesses and evidence (Article 27 (5)).

4. Arrest of the accused and pre-trial motions

As soon as practicable after the indictment is confirmed, the prosecutor is to seek a warrant of arrest and transfer from the presidency (Article 28 (3)). The accused is to be informed at the time of arrest of the reasons for the arrest and promptly informed of the charges (Article 28 (4)). The accused must then be brought promptly before a judge if the state where the arrest occurred, who must determine "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)). The accused is to be held in the state where the arrest occurred, the state where the trial is to take place or the host state (Article 29(4)). The accused may apply to the presidency for release pending trial (Article 29 (2)) or for a determination whether arrest or detention is unlawful (Article 29 (3)).

The statute does not expressly provide for a hearing when the accused initially appears before the court. At any time before the commencement of the trial, however, the accused or an interested state (which is not defined in the statute, but is to be interpreted broadly according to the ILC commentary) may challenge the jurisdiction of the court (Article 34 (a)) or the admissibility of the case (Article 35). Such challenges are to be heard by the trial chamber or, exceptionally, by the appeals chamber (Article 36). The accused may also challenge the jurisdiction of the court at any later stage of the trial (Article 34 (b)).

5. The trial

At the commencement of the trial, the five-judge trial chamber is to have the indictment read, ensure that certain pre-trial motions have been implemented and that the accused received notice of the indictment, satisfy itself that other rights of the accused were respected and allow the accused to plead guilty or not guilty (Article 38 (1)). The trial is to take place in public (Article 38 (4), except when necessary to close proceedings to protect the accused, victims or witnesses (Article 43) or to protect confidential or sensitive information. Decisions are by majority verdict (Article 45 (2)), judgments are to be delivered in public with a reasoned statement of findings and conclusions (Article 45 (5)), and if the accused is convicted, there will be a sentencing hearing (Article 46).

The trial chamber may conduct trials in absentia if the accused is in custody or released pending trial and "for reasons of security or the ill-health of the accused it is undesirable for the accused to be present" (Article 37 (2) (a)). The trial chamber may also conduct trials in absentia if

"the accused is continuing to disrupt the trial" (Article 37 (2) (b)) or "has escaped from lawful custody under this Statute or has broken bail" (Article 37 (2) (c)). In cases where a trial cannot be held because of the deliberate absence of the accused, the court may establish an indictment chamber to record evidence and issue a warrant of arrest where there is a prima facie case established against the accused (Article 37 (4)).

6. Appeals and post-conviction review

The prosecutor and the convicted person may appeal against a decision by the trial chamber "on grounds of procedural error, error of fact or of law, or disproportion between the crime and the sentence" (Article 48 (1)). If the appeal is brought by the convicted person, the six-judge appeals chamber may "reverse or amend the decision, or, if necessary, order a new trial (Article 49 (2) (a)). If the appeal is brought by the prosecutor against an acquittal, it may order a new trial (Article 49 (2) (b)).

The convicted person or the prosecutor may apply to the presidency for revision of the 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 conviction" (Article 50 (1)). The presidency can convene a trial chamber or the appeals chamber to decide whether to revise the conviction (Article 53 (3)).

Sentences are to be served under the supervision of the court in a state designated by the court from a list of states which have offered their prison facilities for this purpose (Article 59). Eligibility for pardons, parole or commutation of sentences is to be decided on the basis of the law of the state of imprisonment, with decisions to be made either by the court or by the state, if so provided in the judgment (Article 60).

B. Establishing an effective and independent office of the prosecutor

1. Qualifications, independence, duties and other powers

The statute of the permanent international criminal court should require the highest possible qualifications for the prosecutor and staff, provide an effective and open method for selecting the prosecutor, guarantee the independence of the prosecutor, spell out the prosecutor's duties and ensure that the prosecutor has adequate powers to be effective. As explained in Section VII of Amnesty International's position paper, The international criminal court: Making the right choices - Part I,[14] the most important way to ensure that the prosecutor will be independent is to provide that the prosecutor has the power on his or her own initiative to initiate investigations and seek the approval of the appropriate judicial chamber of the court to begin a prosecution, without interference by any political body. In addressing these matters, the starting point should be the UN Guidelines on the Role of Prosecutors, which Amnesty International urges should be incorporated in the statute expressly or 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", necessarily have equal application to prosecutors in international criminal courts created by UN Members.

a. Qualifications and selection

The prosecutor, deputy prosecutor and staff of the office of the prosecutor, who will be acting on behalf of the entire international community, should be of high moral character, impartial, possessing integrity and independence and highly competent, with experience in criminal cases. There should be a strong commitment to achieving a balanced representation of women and candidates should be considered from all legal systems and regions of the world.[15] The method for selecting the prosecutor and deputy prosecutor should be open and permit careful scrutiny of the candidate's record and the method for selecting staff should ensure the prompt recruitment of the best possible personnel based on merit. Such a method of selection will go a long way to reassuring states when deciding whether to become parties to the statute and the rest of the international community that best possible persons have been selected and that the office of the prosecutor will operate consistently with the highest possible professional standards and without any political bias.

Qualifications. The Preamble of the UN Guidelines on the Role of Prosecutors recognizes that "it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions". Guideline 1 states that "[p]ersons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications"[16]

Article 16 (4) of the Yugoslavia Statute contains some of these requirements. It states that the Prosecutor "shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases". The drafters believed that the first qualification, which is required of the judges of the Yugoslavia Tribunal, was "obviously of equal importance with respect to the Prosecutor as the head of the investigative and prosecutorial organ".[17] It was also considered that "[e]xtensive practical experience in conducting major criminal investigations and prosecutions was . . . an essential requirement for the successful performance of the responsibilities entrusted to the Prosecutor."[18] International standards incorporating the other recommended qualifications for the prosecutor and deputy prosecutors are discussed below in more detail in Section II.C.2 concerning qualifications of judges. The 1993 report of the Secretary-General on the Yugoslavia Statute made clear that it was intended that staff of the Office of the Prosecutor meet the highest standards: "Staff appointed to the Office of the Prosecutor should meet rigorous criteria of professional experience and competence in their field. Persons should be sought who have had relevant experience in their own countries as investigators, prosecutors, criminal lawyers, law enforcement personnel or medical experts."[19]

Amnesty International believes that a concerted effort should be made to recruit women at all levels of the office of the prosecutor. This is consistent with frequent calls by the international community for the recruitment of women to positions at all levels in intergovernmental organizations, such as the UN, to be a priority.[20] World Conference on Human Rights, Vienna Declaration and Program of Action, adopted 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993, Section II.B., para. 43. Moreover, given the importance of crimes against women which will fall within the jurisdiction of the court, the office of the prosecutor should have a significant number of women with experience in investigating and prosecuting such crimes.[21] Of course, due consideration should be given to the employment of women in all positions of the office of the prosecutor and all staff should receive training in the investigation and prosecution of such crimes.

Article 12 (1) of the ILC draft statute provides that the prosecutor and deputy prosecutors "shall be persons of high moral character and have high competence and experience in the prosecution of criminal cases". This article makes clear that the qualifications apply to both the prosecutor and deputy prosecutors, but it only requires "high competence and experience" not the "highest level of competence and experience". This provision should provide for the same strict standard as in the Yugoslavia Statute. The requirement that the prosecutor and deputy prosecutor simply have experience in the prosecution of criminal cases, rather than experience both in the conduct of investigations and prosecutions, will ensure that prosecutors from criminal justice systems where they do not have responsibility for investigations can be considered as candidates, but at least one of the deputy prosecutors should have experience in conducting major criminal investigations if a prosecutor from one of those systems is selected. Efforts should be made to ensure that members of the office of the prosecutor have experience and training in international law, including humanitarian law and human rights, as well as in criminal law.

Selection procedure. It is essential to devise a method for selecting the prosecutor and deputy prosecutor which will ensure the selection of the best possible candidate satisfying the proposed qualifications based on merit and be perceived to do so, and to ensure that the prosecution team can work effectively together. It should be as open as possible and, as suggested below in Section II.C.2 concerning selection of judges, involve the broadest possible public consultation in the relevant state before making the nomination. States could consider making nominations from lists of candidates submitted by a national judicial, rather than an executive, body. The statute should also ensure that the states parties establish a similarly open procedure and careful review of qualifications of candidates, perhaps through an independent review committee, with ultimate selection by an outside body such as the International Court of Justice, to ensure selection primarily based on merit rather than political considerations. Such an open and thorough examination of nomination and selection at the national and international level could assure states that an independent prosecutor with powers to initiate investigations and commence prosecutions, subject to judicial approval by the relevant chamber, would act independently and impartially on the basis of professional ethics rather than on the basis of political views.

The selection procedure for the Prosecutor of the Yugoslavia and Rwanda Tribunals set forth in Article 16 (4) of the Yugoslavia Statute, which provides that "[t]he Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General", although it happened to lead to the appointment of excellent individuals who served as prosecutor, is not a satisfactory model for the permanent international criminal court. The procedure was secret, did not involve the broadest possible consultation within the states making the nominations or with the international community in the appointment, and led to lengthy delays with respect to the first two appointments, where political and other inappropriate considerations were seen as dominating the process.[22] These delays had a serious impact on the effectiveness of the Yugoslavia Tribunal, since it had to operate without a Prosecutor for more than a year. The delays and widespread perception that politics had dominated the process of nomination and appointment needlessly damaged the image of the institution in the international community at a critical stage.

It will also be essential to ensure that the staff are selected from as broad a pool of candidates as possible, from all legal systems and regions of the world and with a view to achieving a balanced representation of women and men. Although the court should have a close relationship with the UN, it will be essential to ensure that the prosecutor and deputy prosecutor can recruit staff without being subject to the bureaucratic restrictions of the UN recruitment system. These restrictions have plagued the Yugoslavia and Rwanda Tribunals since they began and have seriously undermined its

effectiveness.[23] The prosecutor and deputy prosecutors must be able to recruit promptly within a matter of weeks rather than half a year.

The ILC draft statute appears to give the prosecutors and deputy prosecutors sufficient freedom to hire qualified staff in accordance with the principles outlined above and without bureaucratic delays, although these matters should be further addressed in the rules of the office of the prosecutor. Article 12 (2) provides that the prosecutor "may appoint such other qualified staff as may be required"; Article 31 permits the prosecutor to request a state party to make persons available to assist in a prosecution, subject to strict guarantees of independence, a provision which will be particularly useful for recruiting short-term consultants or employees to address sudden changes in workload or unexpected developments; and Article 12 (7) provides that "[t]he staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor." However, it would be better to permit the prosecutor to appoint the deputy prosecutors, or at least to nominate the deputy prosecutors subject to approval by the states parties, to ensure that the leadership of the office of the prosecutor can work effectively together as a team.

b. Guarantees of independence

The statute of the permanent international criminal court should ensure that the prosecutor is independent. Guideline 4 of the UN Guidelines on the Role of Prosecutors declares: "States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability." Article 16 (2) of the Yugoslavia Statute provides that "[t]he Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or any other source."[24]

The ILC draft statute contains a number of guarantees of the independence of the prosecutor, all of which should be retained and, in some cases, strengthened or supplemented. Neither the prosecutor nor any staff of the office of the prosecutor may "seek or act on instructions from any source" (Article 12 (1)) and the ILC commentary states that the prosecutor is expected to act "as a representative of the international community as a whole". Article 16 (1) provides that the prosecutor, deputy prosecutors and staff of the office of the prosecutor "shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961".

The ILC draft statute contains other guarantees of the independence of the prosecutor and staff in Article 12 and Article 31 which in some respects are stronger than those in Article 16 (2) of the Yugoslavia Statute and Article 15 (2) of the Rwanda Statute. It attempts to ensure that the prosecutor will be independent of the judges by providing for the election of the prosecutor and deputy prosecutors by the states parties rather than by the judges. In a significant strengthening of the prosecutor's independence over the 1993 ILC 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.[25] Article 15 (3) provides that "the Prosecutor or any other

officer whose conduct or fitness for office is impugned shall have full opportunity to present evidence and to make submissions", but fails to guarantee the right to confront and cross-examine those who have made the accusations. To provide greater protection for the prosecutor, this right should be guaranteed in the statute and further spelled out in the rules.[26] In the light of the problems the Rwanda Tribunal experienced, it may be advisable to give the prosecutor the power to suspend the deputy prosecutor pending a determination by states parties whether the deputy prosecutor has committed misconduct, a serious breach of the statute or inability to exercise the functions of the office, so that the office of the prosecutor will not be paralyzed or weakened for an extended time.

Nevertheless, limiting the prosecutor's term of office to five years, subject to re-election by states parties, as provided in Article 12 (3), could undermine the independence of the prosecutor, who would have his or her record reviewed by states. A somewhat longer, non-renewable term of office would avoid the perception in the international community that the prosecutor was susceptible to state pressure.[27]

c. Duties and ethical obligations

The international community has agreed that prosecutors have a broad range of important duties and ethical obligations. Guideline 3 of the UN Guidelines on the Role of Prosecutors states that "[p]rosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession". Prosecutors must, "in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system".

When performing their duties, prosecutors shall carry out their duties impartially, protect the public interest, respect confidentiality and consider the views and interests of victims.[28] Prosecutors have other important duties. Guideline 14 states that prosecutors may "not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded". Guideline 16 provides that

> "[w]hen prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice."[29]

In jurisdictions "where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution".[30] In addition, "[i]n order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to co-operate with the police, the courts, the legal profession, public defenders and other government agencies or institutions".[31] Prosecutors must "respect the present Guidelines", "to the best of their capability, prevent and actively oppose any violations thereof" and, when they "have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power".[32]

The ILC draft statute and the commentary fail to spell out the duties and ethical obligations of the prosecutor in any detail. Some of these duties should be spelled out in the statute, although many of them could be included in the rules.

d. Other powers

The Yugoslavia and Rwanda Statutes provide that the Prosecutor is responsible for the investigation and prosecution of cases.[33] Article 18 (1) of the Yugoslavia Statute permits the Prosecutor to

> "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."

Article 17 (1) of the Rwanda Statute is identical. Article 18 (2) of the Yugoslavia Statute gives the Prosecutor "the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned." Article 17 (2) of the Rwanda Statute is identical. These essential powers are supplemented by a wide range of important provisions in the Yugoslavia Rules, including the power to request states to provide information,[34] to request a state to defer proceedings,[35] and to conduct investigations.[36] The Prosecutor may request provisional measures in cases of urgency, such as the provisional arrest of suspects, seizure of physical evidence and all necessary measures to prevent the escape of a suspect or an accused, to protect victims and witnesses and prevent the destruction of evidence.[37] and is responsible for the security of evidence. [38]

The statute or the rules will have to ensure that the prosecutor has all the powers possessed by the Prosecutor of the Yugoslavia and Rwanda Tribunals. Apart from the powers to initiate investigations or prosecutions on his or her own, the ILC draft statute appears to provide the prosecutor with many of the powers needed, but the prosecutor's powers - like those of the judges - to obtain orders compelling assistance in particular cases are limited to situations - at least in cases involving state complaints - where the state concerned has consented to jurisdiction over the crime.[39] 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 presidency (or the proposed new preliminary chamber) to issue subpoenas and warrants for arrest (Article 26 (3)). Many of these powers, particularly to the extent that defence lawyers will be expected to take an adversarial role, will have to be available to lawyers for suspects and accused (see Section IV.C.1.e below concerning equality of arms). 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). Of course, states parties will have to cooperate with the prosecutor of the permanent international criminal court for investigations and prosecutions of crimes under international law to be effective.[40]

2. The power to initiate an investigation and present an indictment for approval by the relevant chamber

To ensure that the permanent international criminal court is a competent, independent and impartial court, and accepted as such by the all sectors of the international community, the statute must provide for an independent prosecutor with the power to initiate investigations of crimes within the jurisdiction of the permanent international criminal court without waiting for a referral of a situation by the Security Council or a state complaint. The prosecutor should also be able to present an indictment, if the investigation warrants it, to the relevant chamber of the court (see Part II. B.4 below concerning the proposed preliminary chamber of the court) in all cases without prior approval of the Security Council. The reasons for these essential provisions are explained in the part concerning trigger mechanisms in The international criminal court: Making the right choices - Part I (AI Index: IOR 40/01/97), pages 94 to 99.[41]

The criteria for initiating an investigation and for commencing a prosecution should be clearly spelled out in the statute and rules, but should leave some flexibility for prosecutorial discretion, particularly since it is unlikely that the prosecutor will have the resources to investigate and prosecute every case where the court has jurisdiction and states have failed to fulfil their responsibility to bring those responsible to justice. Unfortunately, the criteria for the prosecutor to use in deciding whether to initiate an investigation or commence a prosecution are not found in one place in the ILC draft statute. One must examine provisions dealing with the prosecutor (Article 26 (1) and Article 26 (4)), confirmation of the indictment by the presidency (Article 27 (2)), judicial determinations concerning admissibility, as well as the ILC commentary on these articles. It might be helpful to place all of these criteria in one place in the statute.

The criteria for initiating an investigation. The ILC draft statute provides only limited guidance to the prosecutor in determining whether he or she may decline to investigate and the ILC commentary suggests criteria for reaching this decision which appear to be too limited. The criterion enunciated in Article 26 (1) of the ILC draft statute for the prosecutor to decline to initiate an investigation is too rigid. That article provides that "the Prosecutor shall initiate an investigation unless the prosecutor concludes that there is no possible basis for a prosecution under this Statute". This could be read to require that the prosecutor would have to expend finite resources to investigate every case conceivably falling within the jurisdiction of the court regardless of the scale or gravity of the particular crimes, the quality of the evidence and other legitimate factors. If this standard is retained, the international community will have to ensure that adequate resources are given to permit the prosecutor to do more than merely open a file on a case, without more. A standard should be set for opening an investigation which will ensure that all cases where there is a realistic possiblity of a prosecution receive an appropriately thorough investigation within existing resources, but this standard should not be as high as for determining whether to prosecute.

The criteria for initiating a prosecution. The ILC draft statute expressly identifies three types of considerations relevant to the decision by the prosecutor whether to prosecute or not, although these are not an exclusive list: whether there is a prima facie case, whether the case would be admissible and other unspecified factors. First, Article 27 (1) states that "[i]f upon investigation the Prosecutor concludes that there is a prima facie case, the Prosecutor shall file with the Registrar an indictment". It must be "a prima facie case exists with respect to a crime within the jurisdiction of the court" (see Article 27 (2) (a), which identifies the first consideration to be taken into account in the review by the presidency of the proposed indictment). The International Law Commission has explained in its commentary to Article 27 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". This straightforward standard, as explained in the ILC commentary, has the advantage of being simple, well understood in many national jurisdictions and under the Geneva Conventions of 1949, as well as relatively easy to apply. It might be useful to include this definition of prima facie in the statute to avoid some of the difficulties which were experienced by the Yugoslavia and Rwanda Tribunals in applying this standard.[42]

Second, according to the International Law Commission's commentary on Article 27, although this is not expressly stated in the ILC draft statute, the prosecutor should make a determination that "it is desirable having regard to article 35 [concerning admissibility] for the prosecution to be commenced". Article 35 identifies three factors which the court (which would mean the presidency, the proposed new preliminary chamber or the trial chamber, depending on the stage of proceedings - see Section II.C below) should consider in determining whether a case is admissible. Under this article, the court

> "may, . . . decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:
>
> (a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
>
> (b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
>
> (c) is not of such gravity to justify further action by the Court."

Third, it indirectly appears that the prosecutor may take into account other factors besides these two. Article 27 (2) (b) states that when the presidency determines whether to confirm an indictment may consider other criteria, as well: "whether, having regard, inter alia, to the matters referred to in article 35 [concerning admissibility], the case should on the information available be heard by the Court". It seems logical that the prosecutor may also take into account other legitimate considerations in deciding whether to prosecute.

The criteria for declining to prosecute or for accepting an acknowledgement of criminal responsibility for a lesser charge by an accomplice who cooperates with the prosecutor. The above provisions do not expressly authorize the prosecutor to take into account other factors which the Prosecutor of the Yugoslavia and Rwanda Tribunals may consider, such as the possible need to decline to prosecute on one or more possible charges or to seek lesser sentences for certain accomplices who cooperate with the prosecution to secure convictions of others who are more culpable so that they do not have impunity. Article 26 (4) of the ILC draft statute gives little guidance on this question. It provides:

> "If, upon investigation and having regard, inter alia, to the matters referred to in article 35 [concerning admissibility], the Prosecutor concludes there is no sufficient basis for a prosecution under this Statute and decides not to file and indictment, the Prosecutor shall so

> inform the Presidency giving details of the nature and basis of the complaint and the reasons for not filing an indictment."

In contrast, the Prosecutor of the Yugoslavia and Rwanda Tribunals has identified strict guidelines for making such decisions.[43] He recognized that

> "in principle international criminal justice should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others (for example, by refraining from prosecuting an accomplice in return for the testimony of the accomplice against another offender)",

but noted that "it has long been recognised that in some cases this course may be appropriate in the interests of justice", provided that "the evidence that the accomplice can give is considered necessary to secure the conviction of the suspect, and that evidence is not available from other sources", "the accomplice can reasonably be regarded as significantly less culpable than the suspect" and certain other restrictive criteria were present.[44]

A decision by the prosecution not to prosecute an accomplice on any charge in return for testimony against a principal suspect will be subject to review by the appropriate chamber (see Section II.B.3 below). A decision by the prosecutor not to prosecute an accomplice on one or more charges in return for a plea of guilty on other or lesser charges or, in addition, for testimony against a principal suspect will also require the trial chamber to determine whether the plea was knowing and voluntary (see Section IV.C.1.n below concerning compelled testimony and coerced confessions).

Although plea bargaining concerning the charge or the sentence as practised in the United States is not universally accepted, there is an increasing acceptance of the concept that a reduction in the seriousness of the charge or the severity of the sentence may be appropriate in explicit or implicit recognition of an acknowledgement of criminal responsibility or of cooperation by an accomplice in providing evidence against an accused.[45] This prosecution tool, when carefully and sparingly used in accordance with strictly impartial criteria and the basic principle of no impunity for grave human rights violations, can be extremely effective in bringing to justice leaders who plan crimes or order others to commit crimes. This tool is increasingly being used in both common law and civil law jurisdictions.[46] The Yugoslavia and Rwanda Rules require the Trial Chamber in determining the sentence to take into account "any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction".[47]

There is no need to spell out the details of such criteria in the statute, but the statute should not preclude the prosecutor from exercising the discretion not to prosecute in certain cases, provided that the criteria are clear, objective and insulate the prosecutor from political pressure. The prosecutor should identify the criteria in the regulations of the office of the prosecutor which are as strict as those in Regulation No. 1 of the Prosecutor of theYugoslavia and Rwanda Tribunals.

> 3. Ensuring prosecutorial independence in the review of a decision not to investigate or prosecute

Judicial review of a decision not to investigate or to prosecute must not impair the independence and impartiality of the prosecutor. 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." 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 permanent international criminal court.[48] There should be some method for seeking a judicial review of a decision not to proceed with an investigation or a prosecution which protects the independence and impartiality of the prosecutor 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 investigate or prosecute.[49] In conducting such a review, the court should use the same criteria as the prosecutor uses in deciding whether to initiate an investigation or a prosecution and these criteria should be clearly spelled out (see Section II. B.2 above).

Article 26 (5) of the ILC 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.[50] This provision helps to protect the prosecutor's independence and impartiality. It is a major improvement over the 1993 ILC draft statute, which permitted the court to direct the prosecutor to commence a prosecution. As the International Law Commission explained in its commentary to Article 26, "for the Presidency to direct a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties given that responsibility for the conduct of the prosecution is a matter for the Prosecutor". Nevertheless, the current ILC draft statute does not give victims the right to seek a review of a decision not to investigate or 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. Article 6 (b) of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that the needs of victims should be facilitated by "[a]llowing 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 and consistent with the relevant national criminal justice system". Other ways in which the rights of victims and their families may be effectively protected during proceedings are discussed below in Part III.A. The statute should require that victims be informed of decisions not to investigate or to prosecute and permit their views to be considered in any review of decisions not to investigate or prosecute.

C. Establishing effective and independent chambers of the court

> "An independent judicial system is the constitutional guarantee of all human rights. The right to such a system is the right that protects all other human rights."
>
> Param Cumaraswamy, UN Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/1997/32, 18 February 1997, para. 195

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 in an open procedure with the widest possible consultation. The statute should reinforce the protection of the independence and impartiality of the judges in the ILC draft statute, and fill in some of the gaps identified below, by incorporating applicable guarantees in the UN Basic Principles on the

Independence of the Judiciary, at least by reference, possibly in the Preamble, and by ensuring that adequate guarantees of judicial independence exist throughout the statute. The statute should also provide for a preliminary chamber to take over many of the functions now assigned to the presidency before the appointment of a trial chamber, to the trial chamber or to the indictment chamber.

1. Independence of the judges

Article 10 of the Universal Declaration guarantees everyone the right to a fair and public trial by "an independent and impartial tribunal" and Article 14 (1) of the ICCPR guarantees that persons facing a criminal charge are entitled to a fair and public trial "by a competent, independent and impartial tribunal established by law". The UN Basic Principles on the Independence of the Judiciary sets out a framework of 20 basic principles which are designed to assist UN member states "in their task of securing and promoting the independence of the judiciary" (Preamble), and necessarily have equal application to judges of international courts established by states.

Basic formal guarantee. The ILC draft statute provides several guarantees of their independence or impartiality, but falls short in some respects. These shortcomings should be addressed either in the statute or in the rules. Article 10 (2) of the ILC draft statute provides 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". These guarantees will be particularly important in the initial period of the court's existence when the court is likely to operate on a part-time basis pending a decision by the states parties pursuant to Article 10 (4) of the ILC draft statute that the workload requires the judges to operate on a full-time basis.

Immunities. Principle 4 of the UN Basic Principles on the Independence of the Judiciary provides in part that "[t]here shall not be any inappropriate or un warranted interference with the judicial process". More specifically, Principle 15 protects the judges from being compelled to testify about their deliberations[51] and Principle 16 gives judges immunity from civil suit in connection with the exercise of their judicial functions.[52] Article 19 of the Statute of the International Court of Justice, Article 30 of the Yugoslavia Statute and Article 29 of the Rwanda Statute give the judges diplomatic immunity.[53]

Article 16 (1) of the ILC draft statute provides that the judges of the court "shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961". To the extent that other international courts afford their judges greater protection, consideration should be given to affording the judges of the court the same degree of protection. Article 16 (4) of the ILC draft statute permits the waiver of a privilege, but not an immunity for an act or omission of a judge. This provision appears to be consistent with the requirements of independence.

Adequate and secure remuneration. Principle 11 of the UN Basic Principles on the Independence of the Judiciary provides that "adequate remuneration . . . shall be adequately secured by law." Article 32 (5) of the Statute of the International Court of Justice provides that salaries, allowances and compensation fixed by the General Assembly "may not be decreased during the term of office". In determining an adequate salary and benefits, the states parties will need to set the salary at a high enough level to attract the best possible talent, but not so high that it makes the court too costly to be an effective complement to national courts. The level may not need to be as high as the levels currently set for international courts. Since the level cannot be reduced for serving judges

once set, the initial level will have to be determined with care. It can always be increased if it is determined that the level is insufficient.

Article 17 of the ILC draft statute provides for daily allowances for part-time judges in the initial stages of the court's existence and for a salary for full-time judges after a decision by a majority of states parties to make the court a full-time institution. However, the statute fails to protect judges against a reduction in their remuneration. The statute should guarantee that the states parties cannot reduce the salary and benefits during the term of office of a judge.

Tenure. The permanent international criminal court will be trying some of the most politically sensitive criminal cases in the world, where the suspects and accused may well be high government officials. Therefore, providing that the judges have a relatively long term of office which is non-renewable would help to protect their independence and impartiality from political pressures.[54]

Article 6 (6) of the ILC draft statute helps to insulate the judges from such pressures by providing that judges are to hold office for seven years and are not eligible for re-election, except in the cases of the judges initially appointed for shorter terms pursuant to Article 6 (7), to provide a staggered system of election of judges, or fill a judicial vacancy pursuant to Article 7 (2) where the term remaining is less than five years. The International Law Commission, in reaffirming its view that judges should not be eligible for re-election, stated in its commentary on Article 6 that "[t]he special nature of an international criminal jurisdiction militates in favour of that principle", although "it is necessary to provide limited exceptions to this principle to cope with transitional cases and casual vacancies".

Disqualification. Principle 2 of the UN Basic Principles on the Independence of the Judiciary provides that "[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[55] Article 11 (2) of the ILC draft statute partially incorporates this principle by providing: "Judges shall not participate in any case in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest." According to the ILC commentary, this provision is "intended to cover, for example, the judge's participation in the same case as prosecutor or defence lawyer". Article 11 (3) permits either the prosecutor or the accused to request the disqualification of a judge on the grounds listed in Article 11 (2), but does not expressly authorize the suspect to do so. The suspect, who might spend an extended period in detention under provisional arrest, should be permitted to make such a challenge. Article 9 (7) provides for automatic disqualification of a judge who is a national of a complainant state or of a state of which the accused is a national.

Problems with transfers between chambers. The system of transfer of judges between chambers in the ILC draft statute undermines the appearance of independence and impartiality of the judges in a small court. Moreover, because of the limited number of judges, such transfers would inevitably limit the number of cases in which transferred judges could preside because of prior involvement. In contrast to Article 14 (3) of the Yugoslavia Statute and Article 13 (2) of the Rwanda Statute, which make clear that judges of the Trial and Appeal Chambers may sit only on the Chamber

to which they are originally assigned, Article 9 (4) of the ILC draft statute permits judges not members of the appeals chamber to act as substitute members of the appeals chamber and appears to permit members of the appeals chamber after their three-year term has ended to be eligible for membership in a trial chamber. The approach of the Yugoslavia and Rwanda Statutes is preferable because it assures the necessary impartiality and independence of the chambers absent in the ILC draft statute where colleagues could sit in judgment of each other's performance. However, the need for flexibility in assignment of judges between trial chambers was demonstrated after the creation of the Rwanda Tribunal, which shares the Appeals Chamber with the Yugoslavia Tribunal. It is impossible under Article 14 (3) of the Yugoslavia Statute and the similarly worded Article 13 (2) of the Rwanda Statute to transfer trial judges between the two Tribunals to adjust to differing trial workloads. To ensure the appearance of impartiality and the effectiveness of a small court, consideration should be given to prohibiting the rotation of judges between the chambers to which they have been originally appointed or assigned, except between trial chambers.

Removal from office. International standards require that discipline, suspension and removal of judges be consistent with the independence of the judiciary. The UN Basic Principles on the Independence of the Judiciary provide strong guarantees in such cases.[56]

Article 15 of the ILC draft statute concerning loss of office partly guarantees the independence of the judiciary in removal proceedings. Article 15 (1) provides that "[a] judge . . . who is found to have committed misconduct or a serious breach of this Statute, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office." Article 15 (2) provides that a decision as to loss of office under this paragraph shall be made by a secret ballot by a two-thirds majority of the judges. Article 15 (3) states that the judge "whose conduct or fitness for office is impugned shall have full opportunity to present evidence and to make submissions but shall not otherwise participate in the discussion of the question".

Article 15 (3) fails to provide that the initial stages of the examination of a charge or complaint should be kept confidential unless the judge concerned decides otherwise or that the proceedings "be determined in accordance with established standards of judicial conduct", although these matters could be provided for in the rules. The decision to remove the judge is by a two-thirds majority, not by a unanimous decision of all the other judges.[57] Consideration could be given to leaving the decision to judges of the chambers other than those on which the judge sits to assure a greater appearance of impartiality and to requiring a higher number of judges, such as two-thirds of the relevant judges, for a decision to assure a greater protection of the independence of the judges.

2. Qualifications and selection of the judges

Judges selected for the court should be persons of high moral character, impartiality, integrity and independence, with experience in criminal law or international law, including humanitarian and human rights law. Efforts should be made to ensure that candidates are sought from all regions and legal systems of the world and to aim for a balanced representation of women and men. To the extent that the roles of the appeals chamber and the other chambers are different, this should be taken into account in determining the qualifications of judges for each chamber. The process of nomination and selection should be as open as possible to ensure that the best candidates are nominated and elected. Principle 10 of the UN Basic Principles on the Independence of the Judiciary outlines some of the fundamental requirements concerning judicial qualifications and selection procedures:

> "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."

Qualifications. The criteria and considerations that have been used for other judicial bodies and for treaty monitoring bodies include:

- high moral character or standing;[58]

- impartiality;[59]

- integrity;[60]

- independence;[61]

- competence;[62]

- consideration of equitable geographic distribution and different forms of civilization;[63]

- consideration of representation of the principal legal systems;[64] and

- facilitating the nomination and appointment of women with a view to achieving gender balance.[65]

Article 6 (1) of the ILC draft statute establishes a complicated system of qualifications. Ten of the judges selected must have criminal trial experience and eight must have recognized competence in international law. The ILC 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. Amnesty International recommends that the statute provide that in the composition of each chamber court efforts should be made to ensure that the some of the judges selected have experience in criminal law and others in international law, including humanitarian law and human rights law, but that this selection should not follow any rigid formula. Some judges may have backgrounds in both fields. Article 13 (1) of the Yugoslavia Statute, Article 12 (1) of the Rwanda Statute and Article 6 of the 1993 ILC draft statute both have such a requirement. Article 6 (1) should also be amended to require that candidates be independent and that consideration be given to selecting judges from different geographical regions and legal systems and who are women, with a view to achieving a gender balance between men and women.

Although the Yugoslavia and Rwanda Statutes require the judges to "possess the qualifications required in their respective countries for appointment to the highest judicial offices",[66] a

similar requirement in the statute of the permanent international criminal court could seriously limit the pool of candidates and seems to be an inappropriate criterion for appointment to the trial chamber, the indictment chamber and the proposed new preliminary chamber. Article 6 (1) of the ILC draft statute, which contains the same requirement, should be amended to provide that judges serving in such chambers should have extensive experience in pre-trial and trial proceedings and that at least some of the judges serving in the appeals chamber should have appellate experience. Amendment of Article 6 (1) to Article 6 (3), Article 6 (8) and Article 9 (1) to end the rigid system for selecting persons according to whether the candidate had criminal law or international law experience and leave this allocation to the judgement of the states parties could be considered.

Selection procedures. It is essential to devise a method for selecting the judges which will ensure the selection of the best possible candidates satisfying the proposed qualifications based on merit and be perceived to do so. The procedure should be as open as possible and, as suggested above in Section II.B.1.a concerning selection of the prosecutor, involve the broadest possible public consultation at the national level in the relevant state before making the nomination. States could consider making nominations from lists of candidates submitted by a national judicial, rather than an executive, body. At a minimum, the statute should provide that in making such nominations and in selecting the judges, states should do so only after consultation in an open process with their highest courts, law faculties, bar associations and other non-governmental organizations concerned with criminal justice and human rights, including women's rights.[67]

The statute should also ensure that the states parties establish a similarly open procedure and careful review of qualifications of candidates at the international level, perhaps through an independent review committee, with ultimate selection by an outside body, such as the International Court of Justice, to ensure selection primarily based on merit rather than political considerations.[68] Such an open and thorough examination of nomination and selection at the national and international level could assure states that the judges would act independently and impartially on the basis of professional ethics rather than on the basis of political views.

Article 6 (2) of the ILC 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 ILC draft statute, which limited candidates to nationals of states parties, and is consistent with international practice.[69] 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. These advantages appear to outweigh the incentive for states to ratify the treaty establishing the court in order to ensure the possibility that one of their nationals could be elected as a judge if the candidates were limited to nationals of states parties.

The current system for selecting judges and appointing them to chambers established in the ILC draft statute seems unduly rigid and complicated, particularly for a small court. Article 6 (3) provides for 18 judges to be elected, 10 with criminal trial experience and eight who have "recognized competence in international law" and Article 6 (8) requires that each be replaced by persons with the same qualifications. Article 9 (5) provides that the presidency is to appoint three judges with criminal experience to each five-judge trial chamber, but it is silent concerning the appointment of judges to the indictment or other chambers. This rigid system could lead to problems in the case of death, illness or other disability or an increase in of the number of judges to meet an increase in the case load of the court.

3. Flexibility in the size of the chambers

The international criminal court would be a permanent body with eighteen judges (Article 6 (3)), but in its initial stages it would only sit when hearing a case. The ILC draft statute, however, 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 court for investigation and how many of them will lead to prosecutions. Although the 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 trial chambers, single-judge preliminary chambers and a smaller appeals chamber. Individual judges of the Yugoslavia and Rwanda Tribunal Trial Chambers confirm indictments, one of the functions which could be performed by the proposed preliminary chamber.[70] Single-judge courts in a number of countries have been able to conduct lengthy, complex criminal trials involving antitrust, embezzlement, stock market fraud, drug trafficking and hijacking trials involving many defendants and, in some cases, threats to the judge, prosecutor, defence lawyers, victims and witnesses. Many of the cases likely to be heard by the permanent international criminal court will involve fewer problems than such cases and, as international criminal jurisprudence is rapidly developing, fewer and fewer complex issues of international law.

4. The proposed preliminary chamber

As a result of widespread criticism of the broad powers of the presidency in the ILC draft statute, there appears to be general agreement that the role of the presidency would be significantly reduced, possibly to performing a largely administrative role, and that many of its powers would be transferred to a new preliminary chamber or to the trial chambers.[71] Under Article 8 of the ILC draft statute, the presidency is composed of the president of the court, a first and second vice-president and two alternate vice-presidents elected by an absolute majority of the judges, who would serve a term of three years or until the end of their term of office, which ever was earlier.[72] It would be responsible for the administration of the court and pre-trial and other procedural functions before a trial chamber is seized of the matter, including approving the indictment, deciding whether a suspect should be provisionally arrested, whether the suspect should be detained, whether the detention of an accused was unlawful and, if so, ordering release and possible compensation. In addition, the presidency may delegate the exercise of the following powers to one or more judges:

- issuing subpoenas and warrants required for the prosecutor's investigation, including a warrant under Article 28 (1) for the provisional arrest of a suspect;[73]

- making orders required for the conduct of the trial, including orders concerning the languages to be used, disclosure to the accused of evidence available to the prosecutor, exchange of information between the prosecutor and the accused and protection of the accused, victims, witnesses and confidential information;[74]

- issuing provisional arrest warrants for suspects and warrants for the arrest and transfer of the accused to the court;[75]

- deciding whether to release pending trial a suspect who has been provisionally arrested and whether an arrest or detention is lawful or unlawful, and, if unlawful, ordering release of the accused and deciding whether to award compensation;[76]

- deciding on what method should be adopted to inform the accused of an indictment when it has not been possible to serve the accused.[77]

Common elements in the various proposals for a preliminary chamber are that it would perform most of the pre-trial functions which now would be performed by the presidency before the establishment of a trial chamber or by the trial chamber and that it would have some degree of supervision over the prosecutor's investigation of the case in order to ensure that the rights of suspects and accused were fully respected, particularly the right to an equal opportunity to present their case (equality of arms). The scope of that supervision, as well as the role of suspects and accused, will have to be carefully considered to balance the need not to undermine a continuing investigation, particularly of other suspects, or endanger witnesses, with the rights of suspects and accused.

Individual judges of the preliminary trial chamber could also perform the functions of the indictment chamber under Article 37 (4) of the ILC draft statute (see discussion below in Section IV.C.2 concerning trials in absentia), thus reducing the number of judges required for the court. One advantage of such a preliminary chamber would be that it would minimize the problems of a trial chamber taking a decision on whether a person should be provisonally arrested or indicted, questions which would require a determination of matters closely related to questions of guilt or innocence. As explained below, it would be inappropriate for a judge serving in a trial chamber to conduct a trial in a case in which the judge had made one of these preliminary determinations related to the question of guilt or innocence.

The preliminary chamber could also perform two other important functions which are now left either to the presidency before a trial chamber is constituted or to the trial chamber: hearing and deciding challenges to jurisdiction under Article 34 and admissibility under Article 35. The preliminary chamber could also perform other functions which might not be appropriate to assign to the trial chamber or which would divert resources of the trial chamber from the trial of core crimes. For example, the preliminary chamber could consider matters concerning freezing assets and the seizure of property; award restitution, compensation and rehabilitation (see Section III.C below); and conduct trials for perjury and contempt which had been committed before the trial chamber.

A range of views exists among government experts concerning the degree of supervision over the prosecutorial investigation that such a preliminary chamber should have, but in most legal systems, including the Yugoslavia and Rwanda Tribunals, the judiciary does exercise some supervision over investigation or prosecution to protect the rights of suspects and the accused[78] and it seems likely that the Preparatory Committee will recommend that the preliminary chamber should have some oversight role in these matters. It is unlikely that the preliminary chamber would be similar to a juge d'instruction in some legal systems in which the magistrate takes over the investigation, but it might have a role in ensuring that during certain types of investigations where the evidence would be destroyed or altered during an examination, particularly when the investigation had not yet identified a suspect or an accused, there would be effective independent examinations. For example, the statute

could establish an independent forensic body within the court which could serve both the prosecution and the defence. In developing such an oversight role for the preliminary chamber, it will be essential to ensure that it does not restrict the independence of the prosecutor, as guaranteed in such internationally recognized standards as the UN Guidelines on the Role of Prosecutors.

The statute should provide that any preliminary chamber have the duty to assure that the rights of suspects are protected before trial. This would address the problem of Article 38 (1), which assigns this duty to the trial chamber only at the commencement of the trial, too late to prevent violations of the rights of suspects or accused.

5. Indictment, trial and appeals chambers

The ILC draft statute provides for three other types of chambers, the indictment chamber (Article 37 (4)), the trial chambers (Article 9 (5)) and the appeals chamber (Article 9 (1) to Article 9 (4)).

Indictment chamber. Yugoslavia Rule 61 provides that when a warrant of arrest of an accused has not been executed within a reasonable time, the trial chamber can, after reviewing the indictment and evidence, issue an international arrest warrant to be transmitted to all states and an order to freeze assets. Article 37 (4) of the ILC draft statute provides that an indictment chamber can be constituted in accordance with the rules, but gives no further guidance on its membership. For discussion of this procedure, see Section IV.C.2 below concerning trials in absentia. If this chamber is retained, it will be important to ensure that judges who serve on it do not serve on the trial chamber or appeals chamber. It would minimize the complexity of the procedure and avoid problems of an appearance of a lack of impartiality (which the difficulties in finding sufficient judges for a trial chamber) if the functions of the indictment chamber were assigned to any preliminary chamber which is established.

Trial chambers. The Yugoslavia Tribunal has two trial chambers (Article 11 (a)) with three judges (Article 12 (a)).[79] The trial chambers reach decisions, including questions of guilt or innocence, on the basis of majority verdicts.[80]

In contrast, Article 9 (5) of the ILC draft statute provides for the presidency to nominate in accordance with the rules five judges to be members of a trial chamber for a case, three of whom are to have the criminal trial experience required by Article 6 (1) (a). Article 45 (1) provides that at least four members of the trial chamber must be present at each stage of the trial, and Article 9 (6) states that "[t]he Rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial", thus permitting judges who were absent from part of the proceedings to participate in the deliberations and judgment even though they had not personally heard the evidence and observed the demeanour of the witnesses. Article 45 (2) permits decisions by a majority of three judges, including questions of guilt or innocence. Article 45 (3) provides that if the chamber which has been reduced to four judges unable to reach a decision (apparently on a verdict), it may order a retrial. Deliberations are to remain secret (Article 45 (4)) and the judgment is to be "in writing and shall contain a full and reasoned statement of the findings and conclusions", but no dissenting or separate opinions will be permitted (Article 45 (5)).

Trial chambers of five judges appear to be too large and costly for a small permanent international criminal court. As indicated above in Section II.C.3, trial chambers of one judge would be adequate to ensure due process; would permit the eleven judges who are not members of the appeals chamber to constitute up to 11 trial chambers (depending on whether a preliminary chamber is established), thus, radically reducing the cost and increasing the effectiveness of the court. Whether decisions of guilt or innocence by a majority of three out of five judges are appropriate when the standard is proof beyond a reasonable doubt is a matter of some debate. Nevertheless, if majority verdicts are permitted, dissenting opinions should be allowed, as in the Yugoslavia and Rwanda Statutes,[81] where they have assisted the Appeals Chamber in reviewing decisions of the Trial Chamber. The provisions permitting judges who have not heard the evidence and seen the witnesses testifying are not compatible with the right to a fair and public trial and repeat the flaws of the International Military Tribunal at Tokyo, where some judges who participated in the judgment were not present at all sessions. The statute should provide that no judge who has not participated in all sessions may participate in the judgment. The problem of rotation between trial and appeals chambers has been addressed above in Section II.C.1.

Appeals chamber. In contrast to the International Military Tribunals at Nuremberg and Tokyo, which had no appeals chamber, the Yugoslavia and Rwanda Tribunals provide for appeals chambers of five judges.[82] Article 14 (3) of the Yugoslavia Statute provides that, after consultation with the other judges, the President shall assign judges to the Trial and Appeals Chambers and that a judge may serve only in the chamber to which he or she was originally assigned.

In contrast, Article 9 (1) of the ILC draft statute provides for a larger appeals chamber of seven judges and Article 9 (4) permits judges who are members of the trial or other chambers to act as a substitute member of the appeals chamber in the event that a member of that chamber is unavailable or disqualified. A seven-judge appeals chamber for a small court seems to be too large and costly. A five- or three-judge appeals chamber would appear to be as able to review the issues on appeal as thoroughly as a larger body and would be much less expensive. The problems of rotation between chambers has been considered above in Section II.C.1. The scope of the right to appeal, including the need to provide for interlocutory appeals, and the procedure on appeal are addressed in Section IV.E below.

D. Establishing an effective and independent registry

The statute should provide for an independent registry to provided administrative services for the judicial chambers and the prosecutor. These services should include assisting victims and witnesses, providing legal counsel and investigative support to suspects and accused and administering pre-trial detention units. Many of the details of the registry should be left to the rules to permit flexibility to adjust to changing circumstances. However, the experience of the two tribunals demonstrates the importance of carefully defining the relationship of the registry to the other two branches of the court to ensure smooth and effective functioning of the court. Article 11 (C) of the Yugoslavia Statute provides that the Registry is one of the organs of the tribunal, with responsibility for "servicing both the Chambers and the Prosecutor",[83] and Article 17 (1) provides that "[t]he Registry shall be responsible for the administration and servicing of the International Tribunal".[84] Article 17 (2) provides that the Registry shall consist of a Registrar and such other staff as may be required".[85] The Registrar is appointed by the Secretary-General for a four-year term and the Secretary-General appoints the staff of the Registry on the recommendation of the Registrar.[86] The Yugoslavia Rules spell out the functions of the Registrar in more detail. Rule 33 of the Yugoslavia Rules provides that

> "[t]he Registrar shall assist the Chambers, the plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication."[87]

In addition to its court management functions, the Registry

> "manages a legal aid system of assigning defence counsel to indigent accused, superintends a Detention Unit and maintains diplomatic contacts with States and embassies. It thus combines elements of the diverse roles played in a national system by a prisons service, legal aid board, court registry and diplomatic corps."[88]

These functions include running the Victims and Witnesses Unit[89] and keeping records of the tribunal.[90]

Article 13 of the ILC draft statute provides that the judges will elect a registrar nominated by the presidency by absolute majority, "who shall be the principal administrative officer of the Court", for a renewable term of five years, that the presidency may appoint or authorize the registrar to appoint registry staff and that the registry staff are to be subject to staff regulations drawn up by the registrar. The Registrar should be a person of high moral character, impartiality, integrity and independence, preferably with demonstrated experience in the efficient administration of a large criminal court. The experience of the two tribunals demonstrates taht it will be essential to ensure that the registrar and staff are aware of the potential of the latest technology and able and willing to use it creatively, particularly in the area of communications, data processing, security and systems management. Efforts should be made to ensure that candidates are sought for the registry from all regions and legal systems of the world and that women as well as men are considered with a view to achieving gender balance (see discussion of the qualifications of the prosecutor in Section II.B.1.a and of the judges in Section II.C.2 above).

The ILC commentary states that "[t]he registrar has important functions under the Statute as a depositary of notifications and a channel for communications with States". The role as depositary of notifications of acceptance of jurisdiction pursuant to Article 21 would be unnecessary if the court were to have inherent jurisdiction over all core crimes. The role as a channel for communications with states should not exclude direct contacts between the office of the prosecutor and states.

It would be more appropriate to spell out most of the functions of the registry in the rules rather than in the statute to ensure that the registry is able to adapt easily to changes, although the statute could clarify the role and the reporting relationships of the registrar to the prosecutor and judicial chambers so that their independence is fully recognized and guaranteed.[91] Among the functions which the registry could perform are to establish a unit to protect defence witnesses, establish a legal aid or public defenders office and assist defence counsel with legal materials and investigative resources, establish and operate a detention centre for pre-trial detainees and persons convicted by the tribunal pending final appellate review and transfer to a state party for imprisonment. In drafting the rules for the registry, the court should consider the relevant recommendations of the UN Office of Internal Oversight Services, which suggested that the Registry of the Yugoslavia Tribunal could serve as a useful model for making changes in the Registry of the Rwanda Tribunal.[92]

For example, as indicated below in Section III.A., it recommended that it may be more appropriate for the prosecutor to establish and operate a victims and prosecution witness unit.[93]

III. PROTECTING 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 at all stages of the proceedings and to ensure that they, their families and witnesses on their behalf are properly protected. International standards require that such participation must at all times be consistent with the defendant's right to a fair trial.

It has already been recommended in Section II.B.1.c that the statute provide that victims and their families be permitted to submit information to the prosecutor and that the prosecutor give due consideration to their views and concerns. It has also been suggested in Section II.B.3 that victims and their families should have the right to seek reconsideration by the prosecutor of a decision not to investigate or 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 (UN Declaration on Victims) provides in Principle 6 (b) that the judicial process should allow "the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused . . ." The UN 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" (Principle 6 (a)).

The ILC draft statute fails to do this, but the statute and rules could the address the needs of victims and their families in a variety of ways. For example, consideration could be given to permitting victims to be represented at all stages of the proceedings, as an amicus curiae or as a partie civile, provided that such representation does not prejudice the right of defendants to a fair trial. The Yugoslavia and Rwanda Rules permit a state, organization or a person to appear as an amicus curiae,[94] but these appearances have generally been limited to a single issue. Certain civil law countries permit the victim or victim's family to appear as a partie civile throughout the proceedings, allowing the victim or the victim's family to be heard and to receive restitution and compensation in the criminal trial, without the necessity of a separate civil proceeding.[95]

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, without prejudicing the rights of suspects and the accused to a fair

trial. 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.[96] 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 UN Declaration on Victims emphasises that "victims should be treated with compassion and respect for their dignity" (Principle 4). It also provides in Principle 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". Principle 6 (b) states in part that "[t]he responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: . . . 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".

Article 22 of the Yugoslavia Statute and Article 21 of the Rwanda Statute both required that the rules of procedure and evidence provide for the protection of victims and witnesses. Both tribunals established a Victims and Witnesses Unit in their Registries. The UN Advisory Committee on Administrative and Budgetary Questions (ACABQ)[97] and the UN Office of Internal Oversight Services[98] have both recommended that the Victims and Witnesses Unit in the Rwanda Tribunal be transferred from the Registry to the Office of the Prosecutor, to "be run by experienced personnel with the necessary training in this specialized area" and that "[t]he needs of defence witnesses which could not appropriately be handled by the OTP [Office of the Prosecutor] could be delegated to the official in the Registry who administers all defence related matters and who could then call on the experience of the OTP Witness Protection Unit as appropriate". Whether this approach will be more effective in protecting victims and witnesses for both the prosecution and the defence in a manner consistent with the principle of equality of arms remains to be seen and the differing views on this question suggest that the statute should simply state that the rules of the court must provide for the prompt establishment of a unit or units to protect victims and witnesses. This would ensure the necessary flexibility to adopt the most effective and fair program to protect witnesses, yet still establish the importance of the principle.

Article 43 of the ILC draft statute requires the trial 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" (for a discussion of the limited exceptions to the right to a public trial, see Section IV.C.1.f below). The ILC commentary indicates that this article was intended to provide better safeguards for the right of the defendant to a fair trial than Article 22 of the Yugoslavia Statute and Article 21 of the Rwanda Statute, which do not require the court to give primacy to the right of the defendant to a fair trial.[99] The commentary to Article 43 of the ILC 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" (for a discussion of the right of the accused to examine witnesses, see Section IV.C.1.k below). Although the ILC draft statute

appears to strike an appropriate balance between the rights of victims, their families and witnesses and the rights of the accused, it will be up to the permanent international criminal court to devise practical ways to do this through effective witness protection and support programs.[100]

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 ILC 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. The crime of perjury and the appropriate punishment should be defined in the statute and the court should try cases of perjury committed before it (although it should be heard in a chamber other than the one where it occurred). It will be better placed than national courts to do so as it will have all the evidence and possibly custody of the witness. Delegation of the responsibility for prosecution of cases of perjury in all cases to national authorities may undermine the authority of the court; in many cases the court in the state where the witness is a national will be inappropriate, because its courts are unable or unwilling to act and in some cases, the witness may be stateless. If this responsibility is delegated to national courts, the permanent international criminal court 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 IN THOSE INVOLVING CHILDREN

The statute and rules of the court should take into account the special circumstances of cases involving violence against women and the special, but different circumstances of those involving children.

Violence against women. 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. 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 in a sensitive manner.[101] The court should hire investigators and prosecutorial staff with this type of experience and sensitivity if cases involving rape, sexual abuse and forced prostitution of women 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. As recognized by the Secretary-General when establishing the Yugoslavia Tribunal, female investigators and prosecutorial staff with the necessary expertise should be available for these cases.[102] The Office of the Prosecutor of the Yugoslavia and Rwanda Tribunals has appointed a legal adviser for gender-related crimes to address sexual assault allegations. The adviser, who reports directly to the Prosecutor and the two Deputy Prosecutors

> "has three major areas of responsibility: to provide advice on gender-related crimes and women's policy issues, including internal gender issues such as hiring and promotion; to work with the Prosecution Section to formulate the legal strategy and the development of

international criminal law jurisprudence for sexual assaults; and to assist the Investigations Unit in developing an investigative strategy to pursue evidence of sexual assaults."[103]

If the ILC draft statute is amended to give trial judges a more investigative role similar to the practice in some civil law jurisdictions, it will be essential for female judges to be involved in these cases. All judges, as well as staff of the office of the prosecutor and the registry, should receive adequate training in how to address cases involving violence against women.

Violence against children. Special efforts may also be needed to investigate the different challenges posed by the separate category of cases of violence against children or to address the particular problems faced by some children who have witnessed violence.[104] All judges, as well as staff of the office of the prosecutor and the registry, should receive adequate training in how to address cases involving violence against children.

The ILC draft statute and the commentary are silent on these issues. Although many of these matters will necessarily have to be addressed in the rules and 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 RESTITUTION, COMPENSATION AND REHABILITATION

The statute of the court or some other mechanism should ensure that victims and their families should be able to obtain redress in the form of 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 1997/29, adopted on 11 April 1997, that "pursuant to internationally proclaimed human rights and humanitarian law principles, victims of grave violations of human rights should receive, in appropriate cases, restitution, compensation and rehabilitation". Among the relevant international standards recognizing the right to an effective remedy are Article 8 of the Universal Declaration of Human Rights and Article 2 (3) (a) of the ICCPR.[105] The UN Declaration on Victims states that victims and their families have a right to restitution, compensation and assistance.[106] Article 14 (1) of the UN Convention against Torture requires states to ensure victims of torture obtain redress and have "an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible" and, in the event of the death of the victim as a result of torture, compensation to the dependants.[107] Principle 20 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that "the families and dependants of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable time. 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.[108] The Yugoslavia and Rwanda Rules provide for restitution and facilitate compensation by national courts.[109]

The ILC draft statute fails to provide for restitution[110] or an effective means for victims and their families to obtain compensation and rehabilitation. The statute should require court to make a finding in a judgment of conviction whether the convicted person unlawfully took property and to conduct a hearing with the purpose of ordering restitution, as provided in the Yugoslavia and Rwanda Rules. In addition, the statute should provide that the permanent international criminal court or some other body affords fair and adequate compensation to victims and their families. The only possibility left open under the ILC draft statute for compensation to victims is in Article 47 (3), which provides that fines received may be transferred by court order to the registry to defray the costs of the trial, to the state of the victim's nationality or to a trust fund established by the Secretary-General for the benefit of crime victims. Since it is unlikely that fines will be included in the statute as appropriate penalties for core crimes (although it is possible that they might be imposed in the cases of perjury or contempt), this is not likely to be an adequate source of funds for redress. Moreover, neither the second nor the third options would guarantee the victims or the crime or their families would receive the fines.

The most economical way to ensure that victims or their families receive restitution of property and compensation would be for the court to decide such questions during the course of the criminal trial in which the victim or victim's family was represented as an amicus curiae or as a partie civile.[111] Such a procedure would avoid the need for a second proceeding involving many of the same issues and possibly subjecting the witnesses to the trauma of repeating much of their testimony.

If the ILC draft statute is not amended to permit the trial chamber, preliminary chamber or other chamber to award restitution, compensation and rehabilitation, an international civil court or claims commission should be established to do so. This international civil court or claims commission could process claims against individuals as well as states, drawing on the experience of international claims commissions, such as the United Nations Compensation Commission. 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. To minimize hardship on victims or their families, awards could be paid directly from an international voluntary trust fund established by the states parties and administered by the UN Secretary-General, with the international civil court or claims commission undertaking to seek recovery from the convicted person or a responsible state. The statute should expressly provide that the facts established during the criminal trial are deemed to be proved for the purposes of subsequent civil proceedings at the international or national level, as provided in the Yugoslavia and Rwanda Rules. Subsequent civil proceedings could then focus on assessing the injury and determining appropriate remedies. Subsequent civil proceedings in national courts may not be feasible, however, as the prosecution would have taken place before the permanent international criminal court because states were unable or unwilling to bring the person responsible to justice.

IV. GUARANTEEING THE RIGHT TO A FAIR TRIAL

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

The preamble of 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.

Despite the high hopes of Justice Jackson, he later conceded that "many mistakes have been made and many inadequacies must be confessed. I am consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future."[112] The fairness of the procedure before both the International Military Tribunal at Nuremberg (Nuremberg Tribunal)[113] and the International Military Tribunal for the Far East at Tokyo[114] have been criticized. In particular, the Nuremberg Tribunal has been criticized because the tribunal had been established solely by the victorious Allies and did not include neutral or German judges; counsel for the accused had limited access to the information in the possession of the prosecution; the prosecution used affidavit evidence extensively; the German counsel for the accused, who were not trained or experienced in cross-examination, faced difficulties in a largely adversarial system; one accused was tried in absentia; and those convicted were denied the right to appeal.

In contrast, the Yugoslavia and Rwanda Statutes and Rules, as well as its jurisprudence and practice, are largely consistent with current international law and standards concerning the right to fair trial. Indeed, in many respects they advance and strengthen international law and standards. Nevertheless, some aspects could be improved. Some of Amnesty International's concerns about the procedural guarantees of the Yugoslavia and Rwanda Tribunals are discussed below in this section.

A. INTERNATIONAL STANDARDS

Article 10

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary to his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

Universal Declaration of Human Rights

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, if the statute is to be an advance on the Yugoslavia and Rwanda Statutes and Rules, and if the court is to serve as a model of fairness and effectiveness for national courts in all legal systems, 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), as suggested by the ILC commentary, but also in the broad framework of internationally recognized standards adopted or welcomed by the UN General Assembly, most of them during the three decades since the ICCPR was opened for signature on 16 December 1966.[115] Although the ILC draft statute contains some important safeguards for suspects and accused, in many ways it is sadly lacking.

International standards concerning the right to fair trial should be incorporated directly or by reference in the body of the statute, including in Article 33 defining the applicable law, and the statute and rules should be consistent with these standards. They should be recalled in the Preamble and the Preamble should declare that one of the purposes of the statute is to ensure that all proceedings satisfied international standards for fair trial and state that the statute is intended to strengthen further the standards recognized in the Yugoslavia and Rwanda Statutes and Rules. These standards include Articles 9, 10 and 11 of the Universal Declaration of Human Rights, Articles 9, 14 and 15 of the ICCPR, the UN Standard Minimum Rules for the Treatment of Prisoners (UN Standard Minimum Rules), the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles), 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.[116] The ILC draft statute also fails to mention the important fair trial guarantees in the Geneva Conventions of August 12, 1949, and Additional Protocols I and II, some of which provide greater protection for the rights of defendants than those in the ILC draft statute.[117] These treaty provisions, some of which now reflect customary law, are non-derogable in any circumstances, even during armed conflict, the supreme emergency facing a nation. They expressly guarantee the right of fair trial in all circumstances to persons charged with violations of some of the core crimes within the jurisdiction of the court.[118] The statute should also contain a statement similar to the broad statement in the Secretary-General's report on the Yugoslavia Statute making clear that any enumeration of rights in the statute does not exclude any

other internationally recognized rights so that the international criminal court can take into account evolving concepts of fairness.[119]

To the extent that it is decided not to incorporate these standards in the statute, Amnesty International believes that they should be incorporated in the rules. As discussed below, many of the issues related to suspects and the accused should be addressed in the statute itself.

B. PRE-TRIAL INVESTIGATION

The rights of the individual under the statute and international law and standards with respect to the permanent international criminal court will depend on whether that person is a witness, suspect or an accused.[120] It would be helpful if the statute defined these categories. The statute or rules should state that a witness or other person becomes a suspect when the prosecutor suspects or should suspect based on the information available that the witness or other person may have committed a crime within the jurisdiction of the court.[121] The statute or rules should also clarify whether a suspect becomes an accused when the prosecutor submits the indictment, the indictment is confirmed, the notice of confirmation is sent or when that notice is received.[122]

The rights will also necessarily vary depending on whether the person is at liberty or in detention. Thus, suspects who have not been detained, but are being questioned by the authorities, have certain rights, and even accused who have not yet been detained have the right under the ILC draft statute not to be tried in absentia except in certain narrowly defined circumstances. All persons who are under any form of detention have certain rights. Under the ILC draft statute, suspects under provisional arrest are permitted fewer rights than accused in detention. Moreover, the ILC draft statute appears to afford only limited protection of rights of suspects and accused with respect to questioning or detention by national authorities, in contrast to the rights guaranteed to suspects and accused with respect to questioning by the prosecutor of the permanent international criminal court or detention by the court.

The following discussion identifies the relevant rights under international law and standards in each of these situations and indicates whether the ILC draft statute guarantees those rights adequately. Where the ILC draft statute does not do so, Amnesty International recommends how it should be amended or supplemented by the rules. In contrast to this section (Section IV.B), which focuses on the rights of persons primarily related to questioning and pre-trial custody, Section IV.C which follows focuses on the rights of suspects and accused which are primarily related to preparation for trial and of the accused at the trial. Of course, there is considerable overlap between the rights applicable to different persons and situations, but the organization of the discussion in this position paper may be a more helpful approach in considering amendment of the ILC draft statute than an article by article analysis.

1. Rights of suspects being questioned

> "[T]he rights of the accused would have little meaning in the absence of respect for the rights of the suspect during the investigation, for example the right not to be compelled to confess to a crime."
>
> ILC commentary to Article 26

The statute should fully protect the internationally recognized rights of suspects when they are questioned, whether by national authorities or by the prosecutor, and whether they are at liberty or in detention. This is consistent with the scope of Article 14 of the ICCPR guaranteeing the right to fair trial, which applies from the moment the actions of the authorities substantially affect the suspect.[123] Although the ILC draft statute contains a number of important protections for suspects before indictment, and the ILC commentary recognized the importance of protecting the rights of the suspect, the draft statute omits others and fails expressly to state that these rights apply to suspects questioned by national authorities, regardless whether they are in detention or at liberty (other rights of suspects are discussed in the following section concerning pre-trial detention).[124] Article 44 (5) strengthens existing guarantees for suspects by providing that evidence obtained by serious violation of the statute is inadmissible (see discussion below in Section IV.C.1.m concerning rules of evidence).

Although the following discussion addresses provisions concerning the rights of suspects when they are being questioned - whether at liberty or in detention - which the statute and the rules should continue to guarantee after a suspect has been charged and becomes an accused.

a. The right of suspects to be informed before questioning of their rights

The right to be informed before questioning of one's rights is an important safeguard of the right to a fair trial. The Yugoslavia and Rwanda Rules require that the suspect shall be informed of the rights to legal counsel or free legal assistance, to free interpretation and to remain silent, in a language the suspect understands, before questioning by the Prosecutor.[125] The right to be informed of other rights is not expressly mentioned. Moreover, these rules contain detailed provisions requiring the recording of any questioning by the Prosecutor.[126]

Article 26 (6) of the ILC draft statute, which applies to any suspect, whether at liberty or under provisional arrest, requires that "[a] person suspected of a crime under this Statute shall: (a) prior to being questioned, be informed that the person is a suspect" and of four rights: to silence, to legal counsel or free legal assistance, not to be compelled to testify or confess and to have translation and interpretation (discussed below). The wording of Article 26 (6) is such that it would apply to questioning by anyone, and therefore would apply to questioning by national authorities, at least as soon as the person is, or should have been, suspected by the prosecutor of the international criminal court of a crime within the court's jurisdiction. Nevertheless, to avoid the possibility that it could be read narrowly to apply only to questioning by the prosecutor, it would be better to state that this article applies to questioning by the national authorities as well. Article 26 (6) 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 rights in that article (this was mentioned only in the ILC commentary). Article 30 (1) (c) provides greater protection for suspects who have been provisionally arrested. They are entitled to be informed of all their rights under the statute, but Amnesty International believes that this requirement should also applied to suspects being questioned by the prosecutor who are not in detention. Moreover, the statute should make clear that these rights continue to apply after the suspect becomes

an accused. The rules should contain at least as effective safeguards concerning the recording of questioning by the prosecutors and by national authorities.

b. The right not to be compelled to testify against oneself or confess guilt

A fundamental aspect of the right to fair trial and a court's integrity is the right not to be compelled to testify against oneself or to confess guilt. Article 14 (3) (g) of the ICCPR guarantees the right of everyone charged with a criminal offence "in full equality" "[n]ot to be compelled to testify against himself or to confess guilt". Article 21 (4) (g) of the Yugoslavia Statute and Article 20 (4) (g) of the Rwanda Statute contain similar guarantees, but omit the important requirement that the right be applied "in full equality" (see Section IV.C.1 below)..

Article 26 (6) (b) of the ILC draft statute provides that the suspect has the right "[n]ot to be compelled to testify or to confess guilt", but omits the guarantee that the right be applied in full equality. It should be amended to ensure that this right applies in full equality with other suspects. This is not only of value in itself, but also to ensure the appearance of justice. Article 41 (1) (g), which contains the same guarantee with respect to an accused, is similarly flawed by failing to provide that the right applies in full equality.

c. The right to silence - without such silence being a consideration in the determination of guilt or innocence - before any investigation by the prosecutor

The right to silence is an inherent component of the presumption of innocence (discussed below in Section IV.C.1.g) and the right of a defendant not to be compelled to testify or confess guilt (see Section IV.B.1.b above and Section IV.C.1.n below). The Yugoslavia and Rwanda Rules require the Prosecutor to inform suspects of their right to silence before questioning. Rule 42 (A) (iii) of the Yugoslavia Rules provides that a suspect who is to be questioned by the Prosecutor has "the right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence".[127]

Article 26 (6) (a) (i) of the ILC draft statute provides that a person suspected of crimes under the statute has the right "to remain silent, without such silence being a consideration in the determination of guilt or innocence". This article affords greater protection of the right to silence than the Yugoslavia and Rwanda Rules by expressly stating that exercise of that right may not be a consideration in determining guilt or innocence, but it does not expressly require the warning called for in the Yugoslavia and Rwanda Rules. The statute or the rules should require such a warning before questioning by the national authorities or the prosecutor. The statute should also make clear that the right to silence applies at all subsequent stages of the proceedings.[128]

d. The right to assistance of counsel of the suspect's choice or assigned counsel before and during any questioning

As recognized in the Yugoslavia and Rwanda Statutes, if the right of a suspect to counsel is to be meaningful, the suspect must be able to consult a lawyer when subjected to questioning. Article 18 (3) of the Yugoslavia Statute provides:

> "If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands."[129]

This right is reinforced by the Yugoslavia and Rwanda Rules, which also prohibit questioning of a suspect in the absence of counsel unless that right is voluntarily waived.[130] These provisions are generally consistent with the right recognized under Article 14 (3) (d) of the ICCPR of persons charged with an offence to counsel or assigned legal assistance, but omit the additional right to have counsel assigned "where the interests of justice so require" even if the suspect is not indigent. This right is an important guarantee in cases where an unpopular suspect is unable to find a competent counsel or any counsel at all (see also Section IV.C.1.j below).[131] These provisions, however, fail to guarantee the right of the suspect who is assigned counsel some choice from among the counsel willing to be assigned. The suspect who is indigent or unable to locate counsel easily because of his or her unpopularity should not on that account lose all choice over the assignment of counsel in a case where his or her liberty is at stake. Although the Yugoslavia Rules provide that the Registrar assigns counsel to suspects, in practice the Registrar has generally agreed to assign counsel the suspect or accused has chosen.[132]

Article 26 (6) (a) (ii) of the ILC draft statute provides that a person suspected of a crime under the statute has the right "to have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the court", but omits the right to have counsel assigned in cases "where the interests of justice so require". This provision should be strengthened or supplemented by a rule to make clear that, as in the Yugoslavia and Rwanda Statutes and Rules, all suspects have the right to have counsel present and able to assist them during questioning. It should also guarantee the right to have counsel assigned when the interests of justice so require, as well as when the suspect is indigent, and to ensure that the suspect will be able to choose from lawyers willing and able to serve as assigned counsel. The statute or rules should provide that if the suspect who has waived the right to counsel subsequently expresses the desire to have counsel, questioning shall cease until the counsel arrives. These rights should apply with respect to both the national authorities and the prosecutor.

e. The right to competent interpretation services and translation of documents on which the suspect is to be questioned

Questioning of a suspect without competent interpretation of oral statements and translation of any relevant documents needed could seriously undermine the effectiveness of the proceeding in determining guilt or innocence and deny the suspect the right to a fair trial if the suspect is subsequently indicted. Article 18 (3) of the Yugoslavia Statute provides that a suspect who is questioned has the right "to necessary translation into and from a language he speaks and understands".[133] Rule 42 (A) (ii) of the Yugoslavia Rules supplements this guarantee by providing that a suspect to be questioned by the Prosecutor has "the right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning".[134] The guarantee of the right of suspects to translation and interpretation is consistent with the interpretation of the European Convention on Human Rights.[135] This provision should apply with respect to both the national authorities and the prosecutor.

Article 26 (6) (c) of the ILC draft statute provides that a person suspected of a crime under the statute has the right, "if questioned in a language other than a language the suspect understands

and speaks [to] be provided with competent interpretation services and with a translation of any document on which the suspect is to be questioned". This provision affords more effective safeguards than the equivalent guarantees in Article 14 (3) (f) of the ICCPR, Article 18 (3) of the Yugoslavia Statute and Article 17 (3) of the Rwanda Statute for persons charged with a crime in that it requires interpretation to be competent and is consistent with jurisprudence under the European Convention on Human Rights.[136]

f. Rights of suspects which are not expressly protected by the statute

The clarification in the ILC draft statute and the ILC commentary that certain rights, which in Article 14 of the ICCPR expressly apply to persons charged with a crime, also apply to suspects is welcome, and is consistent with the trend to interpret many of the rights in that article as necessarily applying to persons even before a criminal charge. Nevertheless, there are a number of other rights identified in Article 41 which expressly apply to the accused which, in keeping with contemporary jurisprudence and interpretation of international law and standards, apply to suspects, such as the presumption of innocence and the right to adequate time and facilities for a defence. The statute should make clear that these rights apply to suspects and that they apply with respect to both the national authorities and the prosecutor.

g. Rights of suspects questioned or detained by national authorities

As stated above, Article 26 (6) of the ILC draft statute is broadly worded and should be read to apply to questioning of suspects by the prosecutor and by national authorities, at least as soon as the individual becomes a suspect. However, Article 26 (6) could be read restrictively to apply only to the suspect vis-à-vis the prosecutor. Neither the ILC draft statute nor the ILC 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 is a logical interpretation of the ILC draft statute since the prosecutor will be dependent on national authorities in carrying out certain of the tasks of the investigation, such as provisional arrest and seizure of evidence.[137] Moreover, the ILC draft statute does not address the problem which exists when national authorities of states parties have denied suspects these rights before they received requests for assistance from the prosecutor. It also does not address the problem when non-states parties cooperating with the permanent international criminal court have detained a suspect. Hence, under a restrictive interpretation, Article 26 (6) 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. Article 44 (5) may have to be amended to address this possible problem (See Section IV.C.1.m below).

2. Rights of suspects and accused during 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, whether they are witnesses, suspects under provisional arrest or accused and whether they are in national custody or in the custody of the court. In a welcome improvement over the ILC commentary to the 1993 ILC draft statute, the ILC commentary to Article 28 and Article 29 of the ILC 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 ILC 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 (most of the rights directly related to their preparation for trial are discussed below in the section concerning the trial).

However, as shown below, the ILC draft statute does not appear to fulfil the drafters' intent to be consistent with Article 9 of the ICCPR with respect to the provisional arrest of suspects and it also does not address the question of witnesses in custody.[138] Suspects under provisional arrest have no rights expressly stated under the ILC draft statute to prompt access to a national judge - or to the international criminal court - before whom 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 for suspects in detention, combined with the absence of other rights, is a major flaw in the ILC draft statute which could lead to the indefinite pre-trial detention of suspects without charge or trial.[139] Moreover, there are a number of other important internationally recognized guarantees applicable to all persons in detention, whether witnesses, suspects or 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 standards of fairness. The court will have to develop rules of detention for persons in the custody of the host state,[140] but it should also ensure that the temporary pre-trial detention of suspects, accused and witnesses pending prompt surrender or transfer the court satisfies these standards.

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,[141] are discussed below.

a. The right to be informed, at the time of provisional arrest or arrest, of the reasons for the arrest and to be promptly informed of any charges

Article 9 (2) of the ICCPR declares that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Principle 10 of the UN Body of Principles contains the same guarantee.[142] These rights are independent of the right of anyone charged with a criminal offence under Article 14 (3) (a) of the ICCPR "[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him", which is discussed in more detail in Section IV.C.1.h below.

Although Article 28 (4) of the ILC draft statute now requires that an accused who has been arrested "shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges" (see Section IV.C.1.h below), Article 30 (1) (a) provides that suspects under provisional arrest are entitled only to be informed of "the grounds for arrest" until the indictment is confirmed, which appears to be less informative than "the reasons for the arrest". Moreover, Article 30 (1) (a) does not require that this information be given "at the time of arrest"; it simply provides that the prosecutor shall ensure that a statement of the grounds be served as soon as possible after the person has been taken into custody, which could lead to the person provisionally arrested waiting for a significant amount of time after the provisional arrest. Article 28 (4) and Article 30 (1) (a) should be amended to ensure the information required by Article 9 (2) of the ICCPR and Principle 10 of the UN Body of Principles is provided to suspects under provisional arrest as well as to accused under arrest.

In addition, the court in its rules and practice should devise more effective ways to guarantee these rights than the Yugoslavia Tribunal has done. The Memorandum of Understanding between the International Criminal Tribunal for the Former Yugoslavia and the Supreme Headquarters Allied Powers Europe Concerning Practical Arrangements for the Detention and Transfer of Persons Indicted for War Crimes by the Tribunal (Memorandum of Understanding), dated 9 May 1996, which governs the procedures for arrest of persons indicted by the Yugoslavia Tribunal and, apparently, the provisional arrest of suspects by personnel of the multilateral Stabilization Force (SFOR), requires initial and secondary cautions. The contents and timing of the initial caution are not known, as the Memorandum of Understanding is still confidential, but the secondary caution reportedly informs the detained person: "you are detained as a person believed to be indicted for war crimes by the International Criminal Tribunal for the Former Yugoslavia", thus going part way towards fulfilling the obligation to inform the detained person at the time of arrest (or provisional arrest) of the reasons for the arrest (or provisional arrest).[143]

The second obligation in Article 9 (2) of the ICCPR, to "be promptly informed of any charges" appears to be inadequately protected by the remainder of the secondary caution required by the Memorandum of Understanding. It reportedly states: "The Tribunal has been informed of your detention, and members of the Prosecutor's Office will meet you as soon as possible. They will give you full details of the charges against you when they arrive."[144] The arrival of members of the Office of the Prosecutor could be considerably delayed and it should be possible to inform the detainee in most cases of the charges by radio, telephone, telex, fax or e-mail before the members of this office arrive. Therefore the statute or rules of the permanent international criminal court should require the fastest possible notice of the charges to the person detained. For the contents of such notice, see Section IV.C.1.h below. To be fully consistent with other provisions concerning the right to interpretation and translation, the statute or rules should require that this notice be interpreted or translated into the language of the suspect or accused. See discussion in Sections IV.B.1.e above and IV.C.1.o below.

b. The right to be informed of one's rights at the time of arrest or provisional arrest

It is axiomatic that to be able to exercise one's rights effectively one must know that these rights exist. Principle 13 of the UN Body of Principles requires immediate notification to a person at the time he or she is arrested of that person's rights:

> "Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information and an explanation of his rights and how to avail himself of such rights."

In particular, the person arrested must receive notice of the right to counsel and to free legal assistance. Principle 5 of the UN Basic Principles on the Role of Lawyers requires governments to "ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their choice upon arrest or detention or when charged with a criminal offence". Principle 17 (1) of the UN Body of Principles contains a similar requirement.[145] The

Yugoslavia and Rwanda Rules implicitly require that suspects be informed of their rights if they are provisionally detained.[146]

Article 30 (1) (c) of the ILC draft statute requires the prosecutor to "ensure that a person who has been arrested is personally served, as soon as possible after being taken into custody" with a certified copy in a language the person understands of "a statement of the accused's rights under this Statute". Although this provision requires notice to the accused of his or her rights, it is silent concerning notice to a suspect under provisional arrest. The statute should require immediate notice to anyone detained on the authority of the court, whether a witness, suspect under provisional arrest or an accused under arrest, of his or her rights.

c. The right to access to the outside world

As discussed in greater detail below, all persons under any form of detention have the right to prompt access to the outside world - families and friends, lawyers and independent medical attention. Moreover, they have the right to prompt access to a court and to judicial review of the lawfulness of their detention and to release if their detention is unlawful. Such access is not only a safeguard against torture and ill-treatment, but a safeguard of the right to a fair trial and the integrity of the court. As Amnesty International has documented, denial of such access is a pre-condition for torture.[147] Indeed, the UN Special Rapporteur on torture has found that "[t]orture is most frequently practised during incommunicado detention" and has declared that "[i]ncommunicado detention should be made illegal and persons held in incommunicado should be released without delay."[148]

d. The right to have one's family immediately notified of the detention and to prompt access to the family

All persons who are detained have the right to have their families immediately notified of their detention and to have prompt access to their families. Rule 92 of the UN Standard Minimum Rules provides:

> "An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of justice and the security and good order of the institution."

Principle 16 of the UN Body of Principles provides that detainees are entitled to notify members of their families promptly after they are placed in custody. Principles 15 and 16 (4) of the Body of Principles make clear that even in exceptional circumstances communication with one's family may not be delayed for more than a matter of days. Principle 19 requires the authorities to provide reasonable access to one's family. If the detainee is not a citizen of the state holding him or her in custody, the detainee has the right to prompt communication with a consular post or diplomatic mission of the state of which he or she is a national. If the detainee is a refugee in that state or stateless, he or she has the right to prompt communication with the appropriate international organization.[149] The Yugoslavia and Rwanda Detention Rules guarantee access of all persons detained at the seat of the tribunal to families and diplomatic or consular representatives.[150]

Speedy notice and access is necessary to enable the family and friends of the person under arrest to help prepare the defence by locating counsel and witnesses. Moreover, these rights are important safeguards against torture and ill-treatment.

The ILC draft statute is silent on the right to immediate notice to families and friends and to prompt access to them. The statute should provide that all persons detained in connection with an investigation or prosecution by the court, whether in the custody of national authorities or the court and whether witnesses, suspects under provisional arrest or accused, should be able to inform their families immediately of their detention and should have prompt access to their families and friends. The statute should also provide that persons who are not citizens of the state where they are detained should have the right to prompt access to a diplomatic consul of the state of which he or she is a national and that such persons, if a refugee or stateless, should have access to the appropriate international organization. The details of how these guarantees should be implemented could be spelled out in the rules.

e. The right of prompt access to a lawyer

All persons provisionally arrested or arrested, whether in the custody of national authorities or the court, have the right of access to counsel without delay. In addition, persons in custody should not be questioned by the prosecutor or others in the absence of a lawyer.

Prompt access. Access by a detained person to counsel must be without delay. Principle 7 of the UN Basic Principles on the Role of Lawyers states that the authorities must "ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention" and Principle 8 states:

> "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

Principle 18 (3) of the UN Body of Principles states that a detainee has the right "to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel".[151] Even in exceptional cases, however, "communication of the detained or imprisoned person with the outside world, and in particular his . . . counsel, shall not be denied for more than a matter of days".[152] The right of prompt access to a lawyer is a important safeguard against torture and ill-treatment, as well as essential to the preparation of a defence. Indeed, the UN Special Rapporteur on torture has stated that "[l]egal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention."[153]

Prohibition of questioning in the absence of a lawyer. Neither the suspect provisionally arrested nor the accused under arrest may be questioned in the absence of counsel, unless that right is waived. Indeed, it is when a person is in the coercive environment of being in custody and facing interrogation by a prosecutor that he or she is most in need of counsel. Article 18 (3) of the Yugoslavia Statute provides:

> "If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any

> such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands."

Article 17 (3) of the Rwanda Statute is similarly worded. Rule 42 (B) of the Yugoslavia Rules provides in part that "[q]uestioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel." Rule 42 (B) of the Rwanda Rules contains the same requirement. Rule 63 (A) of the Yugoslavia Rules states in part: "Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present." Rule 63 of the Rwanda Rules, which applies after the initial appearance of the accused, provides in part:

> "After the initial appearance of the accused the Prosecutor shall not question him unless his counsel is present and the questioning is audio-recorded or video recorded in accordance with the procedure provided for in Rule 43 [recording the questioning of suspects]."

In the case of waiver of the right to counsel, if the suspect or accused later expresses the desire to have counsel present, questioning must cease until the counsel is present.[154] The Yugoslavia and Rwanda Detention Rules also provide for access by persons detained at the seat of the tribunals to lawyers.[155]

As stated above, Article 26 (6) (a) (ii) of the ILC draft statute provides that suspects have the right to be informed of their right to have a lawyer before they are questioned regardless whether they are at liberty or under provisional arrest, but this article does not require prompt access to a lawyer. A suspect could be detained for a considerable time before he or she was questioned and the right to access to a lawyer under the statute triggered. Moreover, Article 41 (1) (b) (guaranteeing adequate time and facilities for a defence) and Article 41 (1) (d) (concerning the rights of defence) do not expressly provide that either suspects or the accused have a right to prompt access to a lawyer. To avoid the danger of a restrictive reading of the ILC draft statute leading to significant delays in access to counsel, the statute should guarantee that all persons who have been detained, whether in the custody of national authorities or the court and whether witnesses, suspects under provisional arrest or accused, have the right to access to legal counsel without delay. In addition, the statute and rules of the permanent international criminal court should provide at least as strong guarantees as the Yugoslavia and Rwanda Statutes and Rules prohibiting questioning of suspects and accused in custody in the absence of counsel and make clear that they apply both to the prosecutor and to the national authorities.

f. The right to prompt access to medical attention and access to independent medical attention

All persons under any form of detention or imprisonment are entitled to prompt medical attention. Rule 24 of the UN Standard Minimum Rules provides that the detention facility's "medical officer shall see and examine every prisoner promptly after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures". Principle 24 of the UN Body of Principles contains a similar guarantee.[156] Moreover, all detainees are entitled to access to independent medical attention. Rule 91 of the UN Standard Minimum Rules states: "An untried prisoner shall be allowed to be visited and treated by his own doctor or dentist if there is reasonable ground for his application and he is able to pay any expense incurred". The Yugoslavia and Rwanda Detention Rules contain important guarantees of the rights of

all persons detained at the seat of the tribunals to medical attention.[157] These rights are important safeguards against torture and ill-treatment, as well as the health of the detainee.

The ILC draft statute fails to provide expressly for prompt access to independent medical attention. The statute should guarantee prompt access of all persons in detention, whether in the custody of national courts or the court, to independent medical attention. The details of the implementation of this right could be addressed in the rules.

g. The right to prompt access to the court

All persons charged with a criminal offence must be brought promptly before a judge. Article 9 (3) of the ICCPR guarantees that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power." Principle 37 of the UN Body of Principles contains similar guarantees.[158] The right to be brought promptly before a judge attaches well before a formal indictment or accusation, however. Indeed, Principle 11 (1) of the UN Body of Principles makes clear that all detainees, whether formally charged or not, are entitled to be brought before a judge promptly after apprehension.[159] Rule 62 of the Yugoslavia Rules provides that "[u]pon his transfer to the seat of the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged."[160]

Article 29 (1) of the ILC 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".

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Article 29 (1) is severely flawed in a number of respects. The ILC 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". Amnesty International and numerous other independent observers, however, regularly document that criminal procedure codes and practices in many states fail to satisfy fundamental standards of fairness.[161] Moreover, there are a number of examples of states failing to cooperate or cooperate promptly with the Yugoslavia and Rwanda Tribunals.[162] 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.[163] Also of concern, 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.

The statute should provide that all persons detained on the authority of the permanent international criminal court, whether witnesses, suspects who have been provisionally arrested or accused, should be brought promptly before a national court. The national court should be required not only to determine "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", but that the rights of the detainee under the statute and international law and standards have been respected. Nevertheless, since the detainee will be in detention under the ultimate authority of the international criminal court,

the statute should require the international criminal court to supervise the detention in national custody from the moment of detention. Moreover, in the event national law or practice is inconsistent with the statute or rules of the court, the statute or rules should prevail. In any event, detainee should be surrendered or transferred to custody and direct supervision of the international criminal court as promptly as possible.

h. The right of anyone in detention to judicial determination without delay on the lawfulness of the detention and release if the detention is unlawful

Article 9 (4) of the ICCPR states that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a court may decide without delay on the lawfulness of his detention and order his release if the detention is unlawful". Principles 32 and 37 of the UN Body of Principles contain similar guarantees.[164] The right to prompt judicial review of the lawfulness of one's detention and to release if that detention is unlawful is fundamental to the right to fair trial and the rule of law. After a five-year study, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Special Rapporteurs on the Right to a Fair Trial concluded that although habeas corpus and related procedures for challenging detention were not made expressly non-derogable under Article 4 of the ICCPR, they "should now be seen as non-derogable. Without the ability to challenge the legality of one's detention, especially in times of public emergency, one will never be guaranteed of receiving a fair trial".[165]

Article 29 (3) of the ILC 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 it authorizes the presidency to release an accused - as opposed to a suspect.[166] Hence, 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.[167] Article 29 (3) also fails to require that the court decide the question "without delay".

Article 9 (5) of the ICCPR provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Although Article 29 (3) permits the presidency to award compensation if the arrest or detention was unlawful, it does not provide that the victim of unlawful arrest or detention has an enforceable right to compensation as required by Article 9 (5) of the ICCPR.

The statute should guarantee the right of that any person detained on the authority of the international criminal court, whether in the custody of national authorities or the court and whether a witness, suspect under provisional arrest or accused, to apply at any time to the presidency or the proposed preliminary chamber for a review without delay of the lawfulness of the detention and to be released and compensated if that detention is determined to be unlawful.

i. The right to bail, subject to guarantees to appear at trial

Article 9 (3) of the ICCPR 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."[168]

Principle 39 of the UN Body of Principles contains a similar requirement.[169] The Human Rights Committee has stated that "[p]re-trial detention should be an exception."[170] Thus, a blanket rule that permitted detention solely because the crime was serious, without more, would be impermissible. Therefore, in Bolaños v. Ecuador, the Human Rights Committee held that the detention of an individual solely because he was suspected of murder where there had been no judicial finding that he posed a threat of absconding was a violation of Article 9 (1) and (3) of the ICCPR.[171] The Human Rights Committee has also stated that "[p]re-trial detention should be . . . as short as possible."[172] The guarantees to appear need not be financial.[173]

In contrast to the 1993 ILC 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, contrary to Article 9 (3) of the ICCPR and Principle 39 of the UN Body of Principles, which provide for a general right to release pending trial, subject to strictly limited exceptions, Article 29 (2) provides that detention is the general rule, subject to a discretionary review by the presidency.[174] Moreover, this discretionary review appears to be limited to the accused; it does not expressly apply to a suspect provisionally arrested pursuant to Article 28 (1). It places the burden on the accused to apply for bail rather than on the prosecutor to justify the denial of bail or other security.

The statute should provide that all persons detained on the authority of the international criminal court whether witnesses, suspects or accused should be entitled to release as a general rule, subject to limited exceptions, provided that there are adequate guarantees to appear at trial or another stage of the proceedings. Although in most cases it is likely that persons who have been provisionally arrested will have been detained because of the likelihood of flight or fears that they may intimidate witnesses, as explained below in Section IV.B.1.j, Article 28 (2) permits indefinite detention of suspects under provisional arrest and international law and standards require individualized determinations of all deprivations of liberty. The prosecutor should have the burden to demonstrate the need to deny bail or other security.

j. The right to trial within a reasonable time or to release

Article 9 (3) of the ICCPR states in part: "Anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release". Principle 38 of the UN Body of Principles contains a similar guarantee.[175] The Human Rights Committee has stated that pre-trial detention should be "as short as possible".[176]

The right of an accused to trial without undue delay is guaranteed by Article 41 (1) (c) of the ILC draft statute, but this provision does not expressly state that it includes the right of a suspect under provisional arrest or an accused to release if the trial has been unduly delayed. The statute should provide that suspects under provisional arrest and accused are entitled to a trial within a reasonable time or to release.

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 ILC draft statute suggests a time limit for detention of suspects by the national authorities, or the permanent international criminal court, 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.C.1.b of Article 41 (1) (c)). Indeed, the prolonged detention of persons without charge by national authorities suspected of crimes under international law in the former Yugoslavia and Rwanda has been a matter of concern.

k. The right not to be tortured or subjected to other cruel, inhuman or degrading treatment or punishment

Torture and other cruel, inhuman or degrading treatment and punishment are prohibited in numerous treaties and other international standards.[177] The ILC draft statute fails to incorporate this prohibition and thus does not ensure that all persons in custody, whether suspects or accused and whether in the custody of national authorities or the court, are protected, although the ILC commentary to Article 59 makes clear that the terms and conditions of imprisonment in national prisons "should be in accordance with international standards", but this applies to persons who have been convicted, not to persons in pre-trial detention.[178] The statute should expressly incorporate the fundamental right to be free from torture and ill-treatment and provide the same judicial supervision by the court over pre-trial detainees, whether suspects provisionally arrested or accused and whether in national or court custody, as the ILC commentary states that it does over convicted persons serving sentences in national courts.

l. Other rights applicable to suspects or accused in pre-trial custody

Among the rights which the statute does not expressly state are applicable to suspects being questioned is the presumption of innocence, a right which necessarily applies at all stages of the proceedings, at least until the judgment (see Section IV.C.1.g below).

For the above reasons, Amnesty International believes that the current ILC draft statute should be amended to provide more effective protection of the rights of pre-trial detainees than contained in the Yugoslavia and Rwanda Statutes and Rules by expressly including or incorporating by reference contemporary international pre-trial detention standards. 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. In some cases, these matters could be addressed in the rules.

3. The right to challenge the indictment, jurisdiction and admissibility

At the initial appearance of the accused before the court he or she should have the right to challenge the sufficiency of the indictment after it has been issued, the jurisdiction of the court and admissibility. Similarly, a suspect under provisional arrest should have the right to challenge the jurisdiction of the court. However, permitting suspects not under provisional arrest or released on security and accused who had not made an initial appearance before the court to challenge the jurisdiction of the court could frustrate the effectiveness of the court. Suspects under provisional arrest, accused after their initial appearance before the court and states should be permitted only one challenge to jurisdiction, unless new facts warrant a review.

The ILC 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 role is likely to be assigned to the proposed preliminary chamber. The standard of review is an improvement over the 1993 ILC draft. The ILC 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". However, Article 27 (2) would permit the trial chamber to perform the dual and possibly 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.[179]

a. Challenges to the indictment

The accused should have the right to challenge the sufficiency of the indictment at a preliminary 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 relevant to the limited scope of 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 III.A above). The accused may be able to challenge the sufficiency of the indictment under Article 41 (1) (a) of the ILC 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 rules.

b. Challenges to jurisdiction and admissibility

Defendants - whether simply suspects under provisional arrest or accused at or after an initial appearance before the permanent international criminal court - should have the right to challenge the jurisdiction of the court before the commencement of the trial or after the trial has begun. Once the relevant chamber has determined that it has jurisdiction, however, that decision should be final pending appeal, unless there are new facts brought to the court's attention warranting a review of that jurisdictional determination. The statute will have to balance the competing interests of the suspect under provisional arrest and the accused in a prompt determination of this question and the needs of judicial economy to entertain state challenges to jurisdiction in the same hearing, which may require some time to provide states with an opportunity to be heard on this question. In the interests of efficiency, it will be essential to avoid repeated challenges by states to the jurisdiction of the court at the time the prosecutor receives a state complaint or information from any source, if the prosecutor is given the power to initiate investigations on his or her own motion; at the time the prosecutor formally decides to initiate an investigation; at the time the prosecutor seeks to have the indictment confirmed (in some cases, the prosecutor will need to seek a sealed indictment to ensure that the accused is arrested); at the initial appearance of a provisionally arrested suspect or an accused before the national court; at the initial appearance of the accused before the permanennt international criminal court; and at the commencement of the trial. Such successive challenges could undermine the effectiveness of the court, particularly if the court were to stay proceedings pending the resolution of this question.

Article 34 of the ILC draft statute is an improvement over the 1993 ILC 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 also be permitted to challenge the jurisdiction of the court. The statute should provide that states may not challenge the jurisdiction of the court more than once, unless there are new facts which justify reconsideration, and that such challenges by states should heard at one time in the same hearing where the suspect under provisional arrest or the accused is challenging the jurisdiction of the court. In the interests of judicial economy, it may be appropriate to consolidate a hearing on the question of admissibility with the hearing on jurisdiction or to require that motions concerning both issues be filed by the same date. The statute should provide for interlocutory appeals of decisions on jurisdiction and admissibility (see Section IV.E below). The timing and scope of other preliminary motions could be addressed in the rules.[180]

C. PREPARATION FOR TRIAL AND THE TRIAL

> "The history of liberty has largely been the history of observance of procedural safeguards."
>
> Justice Felix Frankfurter, McNabb v. United States, 318 U.S. 332, 347 (1943)

1. Fair trial guarantees

The statute of the court should expressly include or incorporate by reference all relevant internationally recognized rights applicable to an accused preparing for trial and at trial (see Section IV.A above for a list of these standards). The ILC draft statute contains a number of important safeguards for accused 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 and key rights recognized in Article 14 are omitted entirely. The ILC draft statute also omits a wide range of internationally recognized human rights standards concerning fair trial found in instruments other than the ICCPR. It is essential that these fundamental guarantees be included in the statute or the rules of the international criminal court, whether expressly or by reference, to ensure that it is just, fair and effective. Moreover, the statute should make clear that rights of the accused are in addition to the rights the person had as a suspect and that some of the rights which in the ILC draft statute now apply expressly to the accused necessarily apply at an earlier stage, such as the right to presumption of innocence.

The discussion below outlines the rights of the accused primarily related to the preparation for trial and the trial which are expressly spelled out in the ILC draft statute, notes which provisions are consistent with international standards or provide greater protection, identifies rights which are omitted and recommends improvements.

a. Supervisory duty of the court

A fundamental duty of the judiciary is to ensure that the trial is fair. Principle 5 of the UN Basic Principles on the Independence of the Judiciary provides: "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected." Article 20 (3) of the Yugoslavia Statute and Article 19

(3) of the Rwanda Statute require the Trial Chambers to satisfy themselves at the initial appearance of the accused that the accused's rights have been respected.

An important safeguard in the ILC draft statute is that 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 Article 37 (concerning proceedings in absentia) and Article 38 of the draft statute, but it does not expressly arise until at the time the trial begins, long after the provisional arrest of a suspect or the arrest of an accused.

The ILC 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 Article 27 (5) (b) (concerning disclosure of evidence) and Article 30 (concerning notification of the indictment) have been respected "within a sufficient time before the trial to enable the 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)).[181] 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".

The statute should make clear that this duty applies to the presidency or the proposed preliminary chamber and to the indictment chamber, as well. 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 its commentary does not contain the language in its 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. The statute should also make clear that the relevant chambers have the duty at all stages of the proceedings to ensure that the rights of both suspects and accused are respected.

b. Right to be tried without undue delay

Article 14 (3) (c) of the ICCPR provides that everyone charged with a criminal offence is entitled "in full equality . . . To be tried without undue delay". Article 21 (4) (c) of the Yugoslavia Statute and Article 20 (4) (c) of the Rwanda Statute contain the same guarantee.[182]

Article 41 (1) (c) of the ILC draft statute has the same requirement as Article 14 (3) (c) of the ICCPR, Article 21 (4) (c) of the Yugoslavia Statute and Article 20 (4) (c) of the Rwanda Statute, apart from the requirement that it be accorded in full equality. 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 (see Section IV.B.2.j above), and to apply in full equality with other suspects and accused.[183]

c. Fair hearing

Article 14 (3) of the ICCPR provides that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality" and then lists a series

of important guarantees. Article 21 (4) of the Yugoslavia Statute and Article 20 (4) of the Rwanda Statute contain almost identical provisions.

Article 41 (1) of the ILC draft statute 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 (3) of the ICCPR, Article 21 (4) of the Yugoslavia Statute and Article 20 (4) of the Rwanda Statute, apart from the requirement that these minimum guarantees be accorded "in full equality". It will be essential for the court to interpret the right to fair trial as including other guarantees not expressly included in the statute.[184] In view of the significant number of internationally recognized rights of defendants at all stages of the proceedings which are not expressly mentioned in the ILC draft statute, it would be better to incorporate these rights 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.

The permanent international criminal court should have the flexibility to conduct trials in places other than the seat of the court, subject to safeguards for defendants. Article 22 (1) of the Statute of the International Court of Justice, which states that the seat of the court shall be at The Hague, adds, that this "shall not prevent the Court from sitting and exercising its functions elsewhere whenever it considers it desirable". Rule 4 of the Yugoslavia Rules and Rule 4 of the Rwanda Rules permit the tribunals to conduct trials at places other than the seat. Article 32 of the ILC draft statute, like these instruments, gives the international criminal court flexibility to conduct trials in places other than its seat, and Article 3 (3) provides that "[t]he Court may exercise its powers and functions on the territory of any State party and, by special agreement, on the territory of any other State.". The ILC commentary to Article 32 indicates that the drafters intended this provision to have more effective safeguards for defendants than those which are found in the Yugoslavia and Rwanda Rules. In some cases, trials should be conducted near the place where the crime occurred for ease of access by victims, their families and witnesses. Trials taking place near the location of the crime would ensure the powerful symbolic presence of the international criminal court and publicity could help to deter crime. Nonetheless, the court will have to balance these considerations with the right of the accused to a fair trial and cost.

The commentary to Article 32 of the ILC draft statute recognizes 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". Therefore, trials may take place in states other than the seat of the court "only when it is both practicable and consistent with the interests of justice to do so". Article 32 should be retained and the principle in the commentary incorporated in the rules.

d. Equality of defendants before the court

Article 14 (1) of the ICCPR provides that "[a]ll persons shall be equal before the courts and tribunals." Article 21 (1) of the Yugoslavia Statute and Article 20 (1) of the Rwanda Statute contain similar guarantees of equality.

Article 41 of the ILC draft statute omits this important safeguard of the right to a fair trial. This important general principle of the rule of law "goes beyond equality before the law, referring to the specific application of laws by the judiciary".[185] The right to equality before the courts and tribunals means that all persons must be granted equal access to a court without distinction of any kind

such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[186] Article 41 (1) also fails to state that the accused is entitled to the minimum guarantees of that Article "in full equality", as required in Article 14 (3) of the ICCPR. In contrast, Article 42 of the 1993 ILC draft Statute included the right of all persons to "enjoy equality before the Tribunal". These rights should be guaranteed by the statute.

e. Equality of arms and the prosecutor's duty to disclose information

A leading commentator on the ICCPR has stated: "The most important criterion of a fair trial is the principle of 'equality of arms' between the plaintiff and respondent or the prosecutor and defendant ('audiatur et altera pars')".[187] The fundamental principle of equality of arms applies to all aspects of the proceedings, including facilities for defence and legal representation, not just disclosure of evidence, and on appeal or other post-conviction review.[188] This section addresses one aspect of the equality of arms: the scope of the duty of the prosecutor to disclose information to suspects and accused. The problems of reciprocal disclosure by the prosecution and defence are addressed below in Section IV.C.1.g. The specific problems of limiting disclosure to the defence to protect victims and witnesses are discussed in Section IV.C.1.k below. Other aspects of the right to equality of arms, such as the right to adequate time and facilities to prepare a defence (discussed in Section IV.C.1.i below), are discussed elsewhere.

An essential component of the principle of equality of arms is that "procedural rights, such as inspection of records or submission of evidence, must be dealt with in a manner equal for both parties".[189] Principle 21 of the UN Basic Principles on the Role of Lawyers 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."

The Yugoslavia Rules provide that "[t]he Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence."[190]

Article 27 (5) (b) of the ILC 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", but does not state that the accused has a right to such disclosure. Article 27 (5) (b) does not limit the evidence which the court could require the prosecutor to disclose, although it may have to be read together with Article 41 (2), which provides for a right to disclosure simply 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."

The statute should clarify this potential ambiguity, ensure that there are reasonable limits to the disclosure which could be required, consistent with the right of the accused to due process;[191] and make clear that the defence is entitled as of right to both exculpatory evidence and evidence relevant to the question of mitigation of punishment, as required by the Yugoslavia and Rwanda Rules. Defining the appropriate balance will be a complex issue.[192] Moreover, the statute should either expressly state that the duty to disclose is a continuing one applicable to all aspects of the proceedings, not just prior to the conclusion of the trial . Thus, if the prosecutor were to become aware after the conclusion of the trial of exculpatory or mitigating evidence, the prosecutor should disclose it to the relevant chamber (see also the discussion of revision in Section IV.F below).

f. Public trial

Articles 10 and 11 of the Universal Declaration of Human Rights guarantee the right to a public trial. Article 14 (1) of the ICCPR guarantees this right, subject to narrow limitations. That provision states in relevant part:

> "In the determination of any criminal charge against him, . . .everyone shall be entitled to a fair and public hearing . . . . The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case . . . shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

Article 21 (2) of the Yugoslavia Statute guarantees the right to a public hearing, subject to Article 22 of the statute.[193] Article 22 of the Yugoslavia Statute permits the court to take measures to protect victims and witnesses which include, but are not limited to, conducting in camera hearings and protecting the victim's identity.[194] The specific problems with measures which prevent the accused from learning the identity of his or her accusers - as opposed to protecting the privacy of the victim from the general public - are addressed below in Section IV.C.1.k, concerning the right of the accused to cross-examine prosecution witnesses. Rule 75 of the Yugoslavia Rules provides for a range of possible measures to protect the privacy of the victims and witnesses, which must be "consistent with the rights of the accused".[195] Rule 79 of the Yugoslavia Rules provides that these measures include ordering that "the press or the public be excluded from all or part of the proceedings".[196] The grounds listed in Rule 79 for excluding the press or public do not contain the limitations required in Article 14 (1) of the ICCPR, however. Rule 79 permits excluding the public for reason of public order or morality, without the important qualification "in a democratic society". Equally troubling is the failure to require a finding that exclusion of the press or public for reasons of "safety, security or non-disclosure of the identity of a victim or witness" and "the protection of the interests of justice" be only "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". It is essential that any restrictions on the right to a public trial in the statute or the rules of the permanent international criminal court be strictly necessary in accordance with Article 14 (1) of the ICCPR.

The right to a public trial in the ILC draft statute is spelled out in Article 38 (4), Article 41 (1) and Article 43. Article 41 (1) of the ILC draft statute, guaranteeing the right to a "public hearing", subject to the restrictions in Article 43, is more restrictive in some respects than 14 (1) of the ICCPR, but it does not contain all the limitations in that provision. Moreover, it does not expressly state that

the right to a public trial applies to all stages of the proceedings, not just the trial itself. Article 38 (4) of the ILC 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 supports creative measures to protect and support victims, their families and witnesses, including closing part of a trial to the public where the court determines that it is necessary to protect them, and welcomes the statement in the commentary to this article that "[w]hile the Court is required to have due regard for the protection of victims and witnesses, this must not interfere with full respect for the right of the accused to a fair trial." Nevertheless, this critical caveat should be expressly stated in the statute and made applicable to the measures taken under Article 38 (4) to protect confidential or sensitive information to be given in evidence so that the right of the accused to a fair trial will be fully respected at the same time that measures are taken to protect victims, witnesses and confidential or sensitive information.[197] Moreover, the statute and rules should be consistent with Article 14 (1) of the ICCPR. For further discussion of the rights of victims and witnesses, see Section III above.

g. Presumption of innocence

Article 14 (2) of the ICCPR provides: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The Yugoslavia and Rwanda Statutes contain a similar guarantee.[198] 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."[199] Principle 36 (1) of the UN Body of Principles makes clear that this right applies from the moment a person is suspected of an offence:

> "A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

Article 40 of the ILC 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. The ILC commentary, however, 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'".[200] Since the ILC draft statute falls short of international standards of fairness in a number of respects, as indicated in this position paper, these shortcomings would have to be remedied to ensure that this provision is an adequate guarantee of the presumption of innocence. Article 40 should be amended to be consistent with Article 14 (2) of the ICCPR.

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 to 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. A temporary recess could address any problems caused by an unanticipated defence. Any order to disclose evidence must be consistent with the rights of defendants, including their rights to consult with counsel and to silence. The statute should incorporate guarantees of the presumption of innocence which are fully consistent with international law. For a more extensive discussion of the requirements of the presumption of innocence, see Amnesty International, The international criminal court: Making the right choices - Part I (AI Index: IOR 40/01/97), pp. 62-63.

h. 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". Article 21 (4) (a) of the Yugoslavia Statute and Article 20 (4) (a) of the Rwanda Statute contain identically worded guarantees. The duty to provide information concerning the charge is "more precise and comprehensive" than the duty in Article 9 (2) of the ICCPR.[201] It reinforces the duty in that article and in Principle 10 of the UN Body of Principles, which requires that all persons who have been arrested be informed promptly of the charges against them (see Section IV.B.2.a above) by requiring detailed information, in a language the accused understands, concerning the nature and cause of the charge. The Human Rights Committee has stated that Article 14 (3) (a) of the ICCPR requires that all persons facing a criminal charge be informed of the charges, not just those who have been detained.[202] Presumably, however, there will be situations when it is permissible to delay informing persons of the charges who are at liberty when it would be essential to conceal the first stages of a preliminary inquiry focusing on an individual suspect to protect victims or witnesses or to prevent flight before the person could be provisionally arrested or arrested. Indeed, the Yugoslavia and Rwanda Rules permit sealing indictments until service on the accused [203] and the tribunals have issued sealed indictments on the latter ground. On 30 June 1997, the Prosecutor of the Yugoslavia and Rwanda Tribunals announced after an arrest several days before in Croatia of a person indicted by the Yugoslavia Tribunal that she would use sealed indictments as a method to arrest accused "for as long as I believe it will be a successful strategy for providing us with the accused".[204]

The notice must contain three elements. The person must be informed of both the nature of the charge, that is the offence,[205] and the cause, that is the facts,[206] in detail.[207] The Yugoslavia Tribunal Trial Chamber in the Tadi*f* stated with respect to one count in the indictment that it did not

> "provide the accused with any specific, albeit concise, statement of the facts of the case and of the crimes with which he is charged. [The indictment says] nothing specific about the accuser's conduct, about what was the nature and extent of this participation in the several courses of conduct which are alleged over the months in question."[208]

The same Trial Chamber stated in the Celebici case that the indictment "should articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner in order sufficiently to inform the accused of the charges against which he has to defend himself".[209]

The right of the accused to such information is somewhat patchily protected under the ILC draft statute. Article 28 (4) provides that "[a] person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges," but it does not require that this notice be in a language the person understands. This guarantee only appears in Article 30 (1) (b) and Article 30 (2), which requires that the person who has been arrested be personally served as

soon as possible after being taken into custody with a certified copy in a language understood by the accused of the indictment. Article 41 (1) (a) contains the same wording as Article 14 (3) (a) of the ICCPR. The statute or rules should require that the translation should be competent. See Section IV.C.1.o below. The current wording of these articles would appear to permit the relevant chamber to confirm a sealed indictment to facilitate the arrest of an accused, but it might be better to make this clear in the statute or the rules.

i. Right to adequate time and facilities for a defence

Article 14 (3) (b) of the ICCPR, Article 21 (4) (b) of the Yugoslavia Statute and Article 20 (4) (b) of the Rwanda Statute provide that all persons who have been charged with a criminal offence have the right to adequate time and facilities for a defence. This right includes the right to communicate confidentially with one's lawyer, recognized in such standards as Rule 93 of the UN Standard Minimum Rules; Principles 15, 17 and 18 of the UN Body of Principles; the UN Basic Principles on the Role of Lawyers and the above-mentioned articles of the Yugoslavia and Rwanda Statutes.[210] Indeed, the Yugoslavia and Rwanda Rules consider such communications as privileged from disclosure.[211]

As part of the right to equality of arms, the suspect and the accused need adequate facilities to conduct investigations and to obtain compulsory process, such as the attendance of witnesses and the seizure of evidence, as well as the same power to conduct on-site investigations as the prosecutor, particularly if the procedure is largely adversarial. The Yugoslavia and Rwanda Tribunals have sought to redress the imbalance between the investigative resources and powers of the prosecutor to seek cooperation from states and individuals. It will be essential for the statute and the rules to ensure the defence has access to adequate resources and compulsory process. The preliminary chamber could help ensure a balance in investigative resources by supervising directly, or indirectly through independent forensic experts, certain forensic examinations where the evidence would be destroyed or transformed during the investigation, such as exhumation of graves. The statute or the rules could establish an independent forensic unit within the registry to assist the defence, but the defence should be able to challenge the results of any examinations conducted by the unit.

Article 44 (1) (c) of the ILC draft statute is as broad as the provisions in the ICCPR and the Yugoslavia and Rwanda Statutes, but it does not include all of the extensive internationally recognized rights related to adequate time and facilities for the conduct of one's defence, such as the right to communicate in confidence with one's counsel. The right to adequate time and facilities must apply at all stages of the proceedings, although many of these aspects could be addressed in the rules. To the extent that counsel will be expected to play an adversarial role, counsel should have the same power as the prosecutor has under Article 26 (2) of the ILC draft statute.

j. Right to conduct a defence

The Universal Declaration of Human Rights recognizes the right of every defendant to have "all the guarantees necessary for his defence". This right to conduct a defence has at least eight elements, in addition to the right to adequate time and facilities described above, which apply in full equality. These elements include:

(1) the right to be tried in one's presence;

(2) the right to defend oneself in person;

(3) the right to defend oneself through legal assistance;

(4) the right to chose one's counsel;

(5) the right to be informed, if one does not have legal assistance, of the right to such assistance;

(6) the right to assignment of counsel in any case where the interests of justice so require;

(7) the right to assignment of counsel without payment if one is indigent; and

(8) the right to competent counsel and effective representation.

Article 14 (3) (d) of the ICCPR expressly guarantees most of these rights. It states that everyone charged with a criminal offence is entitled "in full equality":

> "(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it."

Article 21 (4) (d) of the Yugoslavia Statute and Article 20 (4) (d) of the Rwanda Statutes contain similar guarantees. Principle 5 of the UN Basic Principles on the Role of Lawyers provides that the right to be assisted by a lawyer of one's choice attaches upon arrest or when charged with a criminal offence.[212]

The right to counsel would be meaningless if it did not include the right to competent counsel and effective representation. The Human Rights Committee has stated with respect to assigned counsel that "measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice".[213] Principle 6 of the UN Basic Principles on the Role of Lawyers provides that any persons charged with a criminal offence

> "who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services".

Unfortunately, Article 41 (1) (d) of the ILC draft statute, although stating that the accused has the right to be present, subjects it to exceptions which seriously undermine this right (see Section IV.C.2 below). This article protects most of the other aspects of the right to conduct a defence recognized in Article 14 (3) (d) of the ICCPR, Article 21 (4) (d) of the Yugoslavia Statute and Article 20 (4) (d) of the Rwanda Statute. It states that the accused has the right "to conduct the defence in person or 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". In contrast to Article 14 (3) (d) of

the ICCPR, however, it does not provide that the accused has the right to have counsel assigned "where the interests of justice so require" (see Section IV.B.1.d above).

Article 41 (1) (d) of the ILC draft statute should be strengthened to guarantee the right to be tried in one's presence, the right to have counsel assigned in the interests of justice even if the accused is not indigent and the right to competent counsel and effective representation. Moreover, in the 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 statute should provide for a legal assistance program similar to the program of the Yugoslavia Tribunal and for an independent public defender's office.[214]

k. Rights associated with examination of witnesses

> "While the Court is required to have due regard for the protection of victims and witnesses, this must not interfere with full respect for the right of the accused to a fair trial."
>
> International Law Commission, Commentary on Article 43 of the ILC draft statute

Amnesty International believes that if those responsible for genocide, crimes against humanity and serious violations of humanitarian law, particularly in cases of rape, sexual assault and forced prostitution, are to be brought to justice, effective programs to protect victims, their families and witnesses will have to be developed. The statute and rules must facilitate the attendance of victims, their families and witnesses and the court must take effective measures to protect them from reprisals and unnecessary anguish. States parties must assist the permanent international criminal court in protecting victims, their families and witnesses. Such measures, however must never be at the expense of the right to a fair trial. The right of the accused, as recognized in Article 14 (3) (e) of the ICCPR, "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", is an essential aspect of the right to a fair trial.

The right to examine, or have examined, the witnesses against one is not simply a matter of equality of arms, but a fundamental component of the right to a fair trial. The accused must have an opportunity to conduct an in-depth examination of the background of prosecution witnesses to test the veracity of the testimony of the witness and to identify potential bias. This is particularly important with respect to the core crimes within the jurisdiction of the court. In many cases, the objectivity of the prosecution witnesses will have to be thoroughly examined by counsel for the accused in close consultation with the accused, such as former neighbours who may have quarrelled in the past with the accused, members of different ethnic or religious groups or persons now occupying the home of the accused.[215] In such highly charged situations, some may even perjure themselves.[216] The use of written statements of witnesses as a substitute for live testimony at trial when the defence has not had an opportunity to cross-examine the witness before or during the trial may be inconsistent with this right.[217]

The court should be able to take certain measures to protect victims, their families and witnesses from unnecessary anguish to which they might be exposed in a public trial, such as closing

part of the proceedings to the public when strictly necessary in the interests of justice (see Section IV.C.1.f above). In addition, the court, in close cooperation with states parties, must take effective security measures to protect victims, their families and witnesses from reprisals. These measures should encompass protection before, during and after the trial until the security threat ends. In developing an effective protection program, the court and states parties should draw upon the successful witness protection programs in states, such as Australia, Italy and the United States. The Australian witness protection program permits long-term protection of witnesses who are foreign citizens.[218] The Italian witness protection program has been successful in protecting witnesses in cases involving organized crime.[219] The United States Justice Department has a witness protection program which has successfully protected all of the more than 15,000 witnesses, potential witnesses and immediate family members of witnesses and potential witnesses over more than a quarter of a century.[220] To ensure that an international victim, family and witness protection program is effective, all states parties, not just the court and the host state, will have to share the burden of protecting persons in the program by affording temporary residence until the security threat ends. By sharing the burden equally and by affording victims, families and witnesses protection anywhere in the world, the court could have in place a more effective witness protection program than the programs of the Yugoslavia and Rwanda Tribunals, which are largely limited to protection in the host state and at the tribunals.

The use of secret witnesses is prohibited by the ICCPR and the American Convention on Human Rights. The Human Rights Committee has stated that the "faceless judges system" in Colombia, in which the names of judges and witnesses in regional public order courts that try cases involving drug trafficking, terrorism, rebellion, rioting and illegal possession of weapons are concealed from the defence, "does not comply with article 14 of the Covenant, particularly paragraph 3 (b) and (e), and the Committee's General Comment 13 (21)", and it recommended that the regional judicial system be abolished. Similarly, the Inter-American Commission on Human Rights has strongly criticized the "faceless judges system" in Colombia, saying that it was "disturbed that this was still a part of Colombian law".[221]

The European Court of Human Rights has not interpreted the 1950 European Convention on Human Rights as providing as effective protection of the right to cross-examine witnesses as the ICCPR or the American Convention on Human Rights, but it has strictly restricted the use of anonymous witnesses. Recently, in the Van Mechelen case, it found that, under the circumstances, the use of anonymous police witnesses violated Article 6 (1) and (3) (d) of the European Convention on Human Rights, stating that:

> "Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied."[222]

Article 21 (4) (e) of the Yugoslavia Statute and Article 20 (4) (e) of the Rwanda Statute contain the same unqualified guarantees concerning the examination of witnesses as in Article 14 (3) (e) of the ICCPR. The Rwanda Tribunal has issued orders to protect the identity of victims and prosecution witnesses until they are brought within the tribunal's protection, but, subject to that requirement, it has ordered the Prosecutor "to disclose to the defence the identity of the said protected victims and witnesses as well as their unredacted statements within 30 days prior to the trial to allow the Defence sufficient time to prepare".[223] In contrast, although the Trial Chambers of the Yugoslavia Tribunals have usually issued similar protection orders requiring disclosure to the accused prior to the trial, subject to the witness being within the effective protection of the tribunal, in the Tadi*f* case the Trial

Chamber issued an order denying the accused the right to know the identity of several witnesses against him.[224] Judge Stephen dissented.[225] In the Blaški*f* case, another Trial Chamber found that the Prosecutor had failed to demonstrate the necessity of the "extreme measure of the anonymity of the witnesses" under the facts of the case.[226] The Trial Chamber explained:

> "The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media. . . . How can one conceive of the accused being afforded an equitable trial, adequate time for preparation of his defence, and intelligent cross-examination of the Prosecution witnesses if he does not know from where and by whom he is accused?"[227]

Article 44 (1) (d) of the ILC draft statute includes all the rights associated with examination of witnesses recognized in Article 14 (3) (e) of the ICCPR, but Article 43 should be strengthened to incorporate the principle in the ILC commentary to that article that witness protection "must not interfere with full respect for the right of the accused". The statute and rules should ensure that the identity of prosecution witnesses be made known to the accused sufficiently in advance of the trial to permit an effective cross-examination and after effective measures have been taken to protect the safety of witnesses. The statute and rules should also require states parties to cooperate in developing and implementing on an equitable basis an effective international victim and witness protection and support program.

l. 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. As the Preparatory Committee has recognized, instead of leaving all of these issues for the court to determine based on general principles of law, the statute or rules should spell out the essential principles and permissible defences. For Amnesty International's position on these general principles and defences, see The international criminal court: Making the right choices - Part I (AI Index: IOR 40/01/97), pp. 60-91.

m. Rules of evidence

In general, it would be better to let the court, which will be a hybrid institution, combining aspects of civil law, common law and other criminal justice systems, develop most of the rules of evidence, rather than attempt to incorporate detailed rules of evidence in the statute. Nevertheless, certain evidence by its very nature, should be excluded by the statute to protect the integrity of the court and to ensure that justice not only is done, but is seen to be done.

General rules of evidence. Given the hybrid nature of the court and the widely different approaches to rules of evidence in national criminal justice systems, most of the rules of evidence

should be in the rules developed by the court, subject to approval by the states parties, rather than the statute. Nevertheless, it might be appropriate to include certain important matters of principle in the statute in addition to the exclusion of evidence which would undermine the integrity of the court. The Yugoslavia and Rwanda Tribunal Rules provide a good foundation for the development of rules concerning evidence, whether these rules appear in the statute or in the rules, although these rules have certain flaws. It might be appropriate for the statute to provide:

- that chambers "shall not be bound by national rules of evidence";[228]

- that each chamber "shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law";[229]

- that a chamber must exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial;[230]

- that a witness can be compelled to testify about a matter which might tend to incriminate the witness, provided, however, that such compelled testimony could not be used by the court against the witness except in a prosecution of the witness for perjury.[231]

Other matters of equal importance might be more appropriately incorporated in the rules to allow for the evolution of international standards, to avoid complexity or because they address particular aspects of a general rule. These topics include: confessions,[232] consistent patterns of conduct,[233] judicial notice,[234] sexual assault[235] and privileges.[236] With regard to cases of sexual assault, a framework which excludes evidence of prior sexual conduct is vital.[237] In addressing the question of privileges, it will be necessary to address the problems of states or military officials asserting national or military security or state sovereignty in response to a request to produce documents or other information.[238] Legitimate concerns of states can be addressed by permitting certain information to be provided to the prosecutor to assist in the investigation in discovering admissible evidence[239] and by considering certain evidence in camera. The experience of the Yugoslavia and Rwanda Tribunals demonstrates that an international criminal court can treat sensitive information with the necessary degree of confidentiality. Moreover, in many cases, the crimes which will fall within the jurisdiction of the permanent international criminal court are likely to have been committed by soldiers and a national or military security exception in such cases could in effect give such persons immunity from prosecution.

Exclusion of evidence which would undermine the integrity of the court. Evidence which is obtained unlawfully or in a serious violation of the human rights of the suspect or accused, such as through the use of torture or ill-treatment, must be excluded at trial, whether obtained by the national authorities or by the prosecutor. Guideline 16 of the UN Guidelines on the Role of Prosecutors provides:

"When prosecutors come into possession of evidence against suspects which they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice."

Article 15 of the UN Convention against Torture provides that "any statement which is established to have been made as a result of torture shall not be invoke as evidence in any proceedings, except against a person accused of torture as evidence the statement was made". Article 12 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Declaration against Torture) prohibits the use of statements made as the result of torture or ill-treatment as evidence.

Article 44 of the ILC draft statute sets forth certain rules of evidence, leaving others, according to the commentary, to be established in the rules of the court. The judicial notice provision in Article 44 (4) of the ILC draft statute is the same as in the Yugoslavia and Rwanda Rules and appears to be sufficiently circumscribed to ensure due process for the accused. Article 44 (5) provides that "[e]vidence 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, it would provide an accused with more protection than a similar provision in the 1993 ILC draft statute, which did not include violations of the statute.[240] Article 44 (5) would afford greater protection than the exclusionary rules in Articles 12 of the Declaration against Torture 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 and Article 12 of the UN Declaration against Torture requires the exclusion of statements made as the result of ill-treatment as well as torture. The International Law Commission intended the term "other rules of international law" to include, but not be limited to "internationally protected human rights".[241]

Article 44 (5) must be interpreted by the court as providing at least as effective protection as Guideline 16, Article 15 of the UN Convention against Torture and Article 12 of the UN Declaration against Torture. The wording of Article 44 (5) is not limited to evidence obtained by the prosecutor, although it might be better to clarify that it also applies to evidence obtained by national authorities in violation of internationally protected human rights. A failure to comply with a requirement of national procedure would not necessarily amount to a violation of an internationally protected right and it should be up to the permanent international criminal court to make that determination. Indeed, in some cases, national law and practice is inconsistent with international human rights standards.

n. Prohibition of compelled testimony and coerced confessions

The prohibition of compelled testimony and coerced confessions is an essential guarantee of the right to fair trial, which goes to the very heart of the integrity of the proceedings and the court itself. The court will have to review pleas of guilty or acknowledgements of criminal responsibility to ensure that they do not violate this fundamental principle.

Compelled testimony and coerced confessions. Article 14 (3) (g) of the ICCPR provides that every person charged with a criminal offence has the right "in full equality . . . Not to be compelled to testify against himself or to confess guilt.". Article 21 (4) (g) of the Yugoslavia Statute and Article 20 (4) (g) of the Rwanda Statute contain similar guarantees.

Article 41 (1) (g) of the ILC draft Statute provides that the accused has the right "[n]ot to be compelled to testify against himself or herself or to confess guilt". This guarantee is essentially the same as that in Article 14 (3) (g) of the ICCPR, except that it omits the requirement that this right be applied "in full equality". Article 41 (1) (g) should be amended to incorporate this essential guarantee.

Acknowledgement of criminal responsibility. A plea of guilty or an acknowledgement of criminal responsibility is not prohibited under international law. Article 20 (3) of the Yugoslavia Statute requires the Trial Chamber at the initial appearance of the accused to instruct the accused to enter a plea and Article 19 (3) of the Rwanda Statute contains a similar requirement. Rule 62 (iii) of the Yugoslavia Rules requires the Trial Chamber to "call upon the accused to enter a plea of guilty or not guilty [and] should the accused fail to do so, enter a plea of not guilty on his behalf".[242] Thus, the accused is not compelled to enter such a plea. Such a plea has been accepted by the Yugoslavia Tribunal Trial Chamber in the Erdemovi*f* case.[243] In that case, the Trial Chamber conducted an extensive hearing to determine whether the acknowledgement of criminal responsibility was voluntary and reliable.

Article 38 (1) of the ILC draft statute provides that at the commencement of the trial - not at the initial appearance of the accused, as in the Yugoslavia and Rwanda Rules - the trial chamber shall "allow the accused to enter a plea of guilty or not guilty". The ILC commentary to this article states that "[i]n the absence of a plea the accused will be presumed not guilty". Although the ILC draft statute is silent on the question, the ILC commentary states that a guilty plea

> "will not mean a summary end to the trial or an automatic conviction. It will be a matter for the Chamber, subject to the Rules, to decide how to proceed. It must at a minimum, hear an account from the Prosecutor of the case against the accused and ensure for itself that the guilty plea was freely entered and is reliable. In many cases it may be prudent to hear the whole of the prosecution case; in others, only the key witnesses may need to be called upon to give evidence, or the material before the Court combined with the confession will themselves be certain proof of guilt. If the accused elects not to be legally represented, it will usually be prudent to ignore the plea and to conduct the proceedings as far as possible in the same way as if they were being vigorously defended."

It would be better if these choices were spelled out in the statute or the rules to clarify that when the accused wishes to acknowledge criminal responsibility the trial chamber has the duty to determine whether the plea was voluntary and reliable. In determining the scope of the hearing on this question, the views of the victims or their families should be considered. The trial chamber will have to balance competing considerations, such as the desire of some victims or their families to testify concerning the crimes which occurred and the need for the truth about the crime to be known, on the one hand, and, on the other, the desire of other victims or their families not to go through the trauma of testifying and the savings of judicial and prosecutorial resources which could be devoted to contested cases by a shorter hearing. The trial chamber should have the option to ask for the submission of additional evidence or to refuse to accept the guilty plea or acknowledgement of guilt and order a full trial in the interests of justice.

Similarly, plea bargaining, which is known in various forms in many legal systems, is not prohibited by international law. See discussion above in Section II.B.2. Nevertheless, the burden to demonstrate that a confession or plea of guilty is knowing and voluntary rests on the prosecutor.[244]

o. Interpretation and translation

Competent interpretation of oral statements and translation of documents is essential if a suspect or an accused who does not understand the language of the court is to understand and participate effectively in the proceedings.[245] All documents which are relevant to the trial should be translated.[246] Interpretation and translation must be without cost to the suspect or accused. Article 14 (3) (f) of the ICCPR provides that every person charged with a criminal offence is entitled "in full equality . . . To have the free assistance of an interpreter if he cannot understand or speak the language of the court".

Article 21 (4) (f) of the Yugoslavia Statute and Article 20 (4) (f) of the Rwanda Statute have similar guarantees. As a further safeguard for the accused, the Yugoslavia and Rwanda Rules expressly permit the accused to use his or her own language.[247] The Trial Chamber of the Yugoslavia Tribunal in the Celebici case has made clear in the context of documents which must be disclosed to the defence the broad range of documents which must be translated into the language of the accused.[248] As the Yugoslavia and Rwanda Rules implicitly recognize, interpretation and translation must be competent.[249]

Article 41 (1) (f) of the ILC 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 more effective guarantees than in Article 14 (3) (f) of the ICCPR, Article 21 (4) (f) of the Yugoslavia Statute and Article 20 (4) (f) of the Rwanda Statute, particularly because they make clear that interpretation should be competent.[250] The commentary to Article 18 of the ILC draft statute states that the court can provide that the trial be conducted concurrently in the language of the accused and witnesses.

p. Prohibition of double jeopardy (non bis in idem)

Article 14 (7) of the ICCPR provides that "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and procedure of each country."

Article 42, like Article 10 of the Yugoslavia Statute and Article 9 of the Rwanda Statute, prohibits any other court from trying a person who has been tried by the permanent international criminal court. It also permits the international criminal 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,[251] Article 42 appears to be consistent with international standards, but it should also prohibit the court itself from retrying a person after it has issued a final judgment of acquittal or conviction concerning the same crime.

Since Article 42 applies only in cases where a person has been tried by another court,[252] pre-judgment amnesties, pardons or similar measures which 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, cannot prevent the permanent international criminal court from trying an accused for a crime under international law. For a more extensive discussion of this principle, see Amnesty International, The international criminal court: Making the right choices - Part I (AI Index: IOR 40/01/97), pp. 63 to 64.

2. Trials in absentia

There should be no trials in absentia. Amnesty International believes that trials in absentia of an accused, except in the case of an accused who has deliberately absented himself or herself after the trial has begun, or for as long as an accused continues to disrupt the proceedings, 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".[253] Moreover, even if the a court were to grant a de novo trial after an accused convicted in absentia was subsequently arrested - which is not provided for in the ILC draft statute - such a de novo trial before the same court which convicted the accused is not likely to be seen to be fair and completely impartial. In some civil law jurisdictions permitting trials in absentia, the court trying the case de novo may consist of the same judges and use the evidence submitted at the previous trial which was not subjected to vigorous cross-examination by or on behalf of the accused. 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 before them at the first trial. A de novo trial will not only be costly in terms of judicial and prosecutorial resources and result in advance disclosure of prosecution evidence, but could be a serious hardship on victims and witnesses who would have to repeat the traumatic experience of testifying and expose them to threats of reprisals. Key witnesses might decline to testify twice. Indeed, this appears to be the reason that the Office of the Prosecutor has rarely sought Rule 61 hearings to obtain international arrest warrants after it has proved impossible to serve the accused and has only presented the minimum amount of evidence (see discussion below in this section of these hearings).[254] Some states would find it difficult or impossible to become a party to a statute permitting trials in absentia.

Article 37 (1) of the ILC 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: (1) on grounds of ill-health or security risks to the accused (not security risks to victims or witnesses) where the accused is in custody or has been released pending trial; (2) the accused continues to disrupt the trial; and (3) 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. If the accused is ill, the trial could be postponed. Security risks to an accused normally are addressed by other measures, such as searching 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 ILC 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 ILC commentary suggests 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.[255] 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,[256] 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)). Therefore, 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.

Rule 61 of the Rules of Procedure and Evidence of the Yugoslavia Tribunal and Rule 61 of the Rules of Procedure of the Rwanda Tribunal establish a different procedure for submission of evidence to the trial chamber with the indictment when an accused cannot be located. If the trial chamber is satisfied that the evidence shows that "there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment" it shall issue an international arrest warrant which shall be transmitted to all states and, if the failure to effect personal service of the warrant is due in whole or in part to a failure or refusal of a state to cooperate with the Tribunal, it will inform the Security Council. In contrast to the procedure for the indictment chamber, however, Rule 61 does not provide that this evidence is admissible at a subsequent trial, and the Prosecutor does not appear to have used such hearings for this purpose.

Amnesty International recommends that the statute prohibit trials in the absence of the accused unless the accused, 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.[257] 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. A hearing modelled on Rule 61 with safeguards should be included. These recommendations would be consistent with the Yugoslavia and Rwanda Statutes and Rules. The report of the Secretary-General concerning the Yugoslavia Tribunal makes clear that trials before that court "should not commence until the accused is physically

present",[258] Article 21 (4) (d) of the Yugoslavia Statute and Article 20 (4) (d) of the Rwanda Statute expressly state that the accused is entitled "to be tried in his presence".

D. PENALTIES

The statute of the permanent international criminal court must exclude the death penalty and clearly define appropriate penalties. Amnesty International's position on the question of penalties is explained in The international criminal court: Making the right choices - Part I (AI Index: IOR 40/01/97), pp. 91-93. If the court has jurisdiction over perjury and contempt, the penalties for these offences will have to be included in the statute.

E. RIGHT TO APPEAL

The full right to appeal to a higher tribunal for review of both a conviction and a sentence must be assured. In addition, the statute should provide for interlocutory appeals. Article 14 (5) of the ICCPR provides: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Article 25 of the Yugoslavia Statute and Article 24 of the Rwanda Statute address one of the main procedural flaws of the International Military Tribunals at Nuremberg and Tokyo by providing for appeals of convictions and, implicitly, sentences.[259] As this right is an integral part of the right to a fair trial, other aspects of that right continue to apply, such as the right to a public hearing before a competent, independent and impartial tribunal, the right to equality of arms and the right to counsel. If the conviction is reversed on grounds which amount to a finding of a miscarriage of justice, the person concerned should have a right to coompensation (see discussion below in Section IV.F).

Article 48 of the ILC 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 aricle is an improvement over Article 25 of the Yugoslavia Statute and Article 24 of the Rwanda Statute, which do not expressly authorize a challenge to sentences. Nevertheless, the possibility of an appeal by the prosecutor of an acquittal seems to be inconsistent with the principle of non bis in idem (see Section IV.C.1.p above). It would be more consistent with this principle to limit the prosecutor to an appeal on points of law only, with the remedy of the appeals chamber limited to issuing an opinion correcting the legal error for future cases, but having no affect on the acquittal.[260] The interests of the prosecutor could also be addressed more fairly and efficiently in the statute or the rules by expressly permitting interlocutory appeals, as in the Yugoslavia and Rwanda Rules.[261]

Article 49 (2) (b) of the ILC draft statute limits the appeal chamber in the case of a prosecutor appealing an acquittal to ordering a new trial, which at least avoids the problem in the Yugoslavia and Rwanda Statutes where the Appeals Chamber could reverse or revise a judgment of acquittal, thus denying the newly convicted person the right to appeal the conviction. Nevertheless, the possibility that the prosecutor could seek a series of retrials until a conviction was secured could undermine the credibility of the court and suggest it valued a conviction more than justice.[262] Article 48 (2) states that "[u]nless the Trial 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 (see Section IV.B.2.i above).

F. REVISION AND COMPENSATION FOR MISCARRIAGES OF JUSTICE

The statute should include an effective procedure to review convictions and sentences in the light of newly discovered evidence which was not available at an earlier stage of the proceedings and to obtain compensation for miscarriages of justice. Article 26 of the Yugoslavia Statute provides:

> "Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgment."[263]

Article 14 (6) of the ICCPR provides:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

Article 50 of the ILC draft statute 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. The standard "not available to the applicant" imposes a duty on lawyers to investigate which is more a part of the method of advocacy of lawyers trained in the adversarial than the civil law system and the court will have to ensure that adequate training or assistance is provided to lawyers from civil law systems, for the court to play a greater role or for the standard to be changed, perhaps along the lines of the Yugoslavia and Rwanda Statutes.[264] As part of the prosecutor's duty to protect the public interest under Guidelines 13 (a) and 14 of the UN Guidelines on the Role of Prosecutor requiring prosecutors to make every effort to stay proceedings when an impartial investigation shows the charge to be unfounded, Article 50 should require the prosecutor to seek revision of convictions in the circumstances contemplated by that article. In the light of the probable changes in the role of the presidency, it may be more appropriate to assign the responsibility of hearing and deciding on an application for revision to a trial chamber which did not hear the original case, with a possibility of an appeal of a denial of the application.[265] It might also be appropriate to permit a member of the convicted person's family or someone else acting on his or her behalf to apply for revision.

Unfortunately, however, the ILC draft statute fails to provide for compensation for miscarriages of justice. Although Article 29 (3) of the ILC draft statute 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. Given that the core crimes within the jurisdiction of the court - genocide, other crimes against humanity and serious violations of humanitarian law - are the worst possible crimes imaginable, the opprobrium suffered by a person who has been unjustly convicted will be immense and the statute should include fair and adequate compensation for the injustice in addition to a reversal of the conviction or a pardon.

V. SUPERVISION OF SENTENCES

The statute of the permanent international criminal court must ensure that internationally recognized safeguards apply to the imprisonment of convicted persons. Rule 103 of the Yugoslavia Rules provides that imprisonment shall be served in a state designated by the tribunal from a list of states which have expressed their willingness to accept imprisoned persons and Rule 104 provides that "[a]ll sentences of imprisonment shall be supervised by the Tribunal or a body designated by it."[266] The Trial Chamber of the Yugoslavia Tribunal in the Erdemovi*f* case has developed strict standards of supervision which should be used by the permanent international criminal court as the basis for developing an effective system of supervision.[267] Article 59 (1) of the ILC 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 ILC 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".[268] These safeguards are a major improvement over the 1993 ILC 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, but the statute should expressly include such safeguards.

The statute of the permanent international criminal court should ensure that pardons and commutations of sentences for crimes under international law are an international responsibility. Neither of the two methods in Article 60 of the ILC draft statute for administering pardon, parole and commutation of sentences provide as effective international control over these matters as Article 28 of the Yugoslavia Statute and Article 27 of the Rwanda Statute do.[269] Both methods provide that states - not the permanent international criminal court - determine when prisoners held in that state can seek a decision on pardon or commutation. Under Article 60 (1) and Article 60 (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 "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.

1. Robert Badinter, *"Contre les crimes les plus atroces de tous - Le glaive permanent", Nouvel Observateur, 26 juin 1997.*

2. Amnesty International has also published a summary of this paper, *The quest for international justice: Defining the crimes and defences for the international criminal court* (AI Index: IOR 40/06/97).

3. The NGO Coalition for an International Criminal Court is an informal coalition of hundreds of non-governmental organizations working to establish a permanent international criminal court before the end of this century. Amnesty International is a member of its Steering Committee. The NGO Coalition helps its members to coordinate lobbying and distributes information concerning the efforts inside and outside the UN to establish the court. It operates an Internet web site containing most of the UN documents related to the court: http://www.igc.apc.org/icc. Anyone with an e-mail address can subscribe to the NGO Coalition e-mail distribution list by sending the message "subscribe icc-info" to majordomo@igc.apc.org. Users of an APC-affiliated network (IGC, GreenNet, Web) can access the NGO Coalition "un.icc" computer conference. The NGO Coalition also produces a newsletter, the *Monitor.*

4. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996) and Vol. II (Compilation of proposals), 51 GAOR (Supp.) No. 22A, UN Doc. A/51/22, 1996.

5. Based on the extensive discussion of Articles 26 to 30, 34 to 38, 40 to 45 and 47 to 50 of the ILC draft statute, participants prepared suggestions for eliminating duplication in proposals concerning most of these articles, reorganizing compiled proposals in a more coherent fashion and deciding which proposals might better be reflected in the rules. To assist this process, government experts from states which had made proposals modified some of them to eliminate duplication or indicated that they could be included in the rules. It is expected that the recommendations from this informal meeting will be presented to all states in advance of the August session for their reference as they prepare for that session.

6. This workshop included comparative law experts, judges, prosecutors and defence lawyers from six continents, as well as representatives from the NGO Coalition for an International Criminal Court, including Amnesty International. Participants discussed ways in which the drafters of the statute of the international criminal court could benefit from the experience of the four international criminal tribunals and from national criminal justice systems in improving the organization of the court and criminal procedure of the ILC draft statute to ensure that it was fair and effective. Topics included: initiating an investigation and prosecution, pre-trial investigation, guilty pleas, plea bargaining, fair trial guarantees, trials *in absentia* and appeals. It is expected that the papers and proceedings will be made available to the Preparatory Committee in English, French and Spanish.

7. Rules of Procedure and Evidence (adopted on 11 February 1994, as amended through 3 December 1996), UN Doc. IT/32/Rev. 10.

8. Rules of Procedure and Evidence, adopted on 29 June 1995, as amended at the third plenary session in June 1996, UN Doc. ICTR/3/L.5. Further amendments to these rules were adopted at the fourth plenary session in June 1997, but these rules were not publicly available as of 17 June 1997.

9. Such rules should not take too long for the court to draft. The judges of the Yugoslavia Tribunal took a little over two months to draft the rules of procedure and evidence of that tribunal between the end of the first plenary session of the tribunal, 17 to 30 November 1993 (see Decisions adopted at the first plenary session of the International Tribunal, UN Doc. IT/6/Rev. 2, 1 September 1994), and their promulgation at the close of the second session, 17 January to 11 February 1994 (see Statement by the President made at a briefing to members of

diplomatic missions, UN Doc. IT/29, 11 February 1994). These rules have remained in large part essentially unchanged, although there have been a number of technical amendments and several significant changes of substance in the light of experience. The original rules, with most of the same amendments, have been used by the Rwanda Tribunal. See Rwanda Statute, Article 14. Most of these rules could be adapted with relatively minor changes for the most part for use by the permanent international criminal court, as has been done in the Draft set of rules of procedure and evidence for the Court: working paper submitted by Australia and the Netherlands, UN Doc. A/AC.249/L.2 (1996).

10. Although one member of the International Law Commission considered that "the adoption of rules of evidence was too complex and might involve the enactment of substantive law" which would be inappropriate for the court, "[o]ther members believed that it would be cumbersome and inflexible to contain all the rules of procedure and evidence in the Statute itself, and that this was a matter which should be left to the judges, acting with the approval of the States parties". ILC commentary to Article 19.

11. Article 14 of the Rwanda Rules provides:

> "The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary."

12. For reasons of space, this position paper does not address the method of creating the court or its links with the UN. Amnesty International's position on these issues is set out in its paper, *Establishing a just, fair and effective international criminal court* (AI Index: IOR 40/05/94), pp. 22 to 24.

13. If the crime of aggression is included as one of the core crimes, a state party could not bring a complaint concerning this crime unless the Security Council had first determined that a state had committed the act of aggression which was the subject of the complaint (Article 23 (3)).

14. *The international criminal court: Making the right choices - Part I* (AI Index: IOR 40/01/97), pp. 94-98.

15. The second Prosecutor of the Yugoslavia and Rwanda Tribunals to take up the post was Louise Arbour of Canada.

16. Guideline 2 requires states to ensure that:

> "(a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status . . ." [and]
>
> (b) Prosecutors have appropriate education and training and should be made aware of the ideas and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law."

17. Virginia Morris & Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1995) p. 160.

18. *Id*.

19. Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1983) (Report of the Secretary-General), UN Doc. S/25704, 3 May 1993, and Corrigendum, UN Doc. S/25704/Corr.1, 30 July 1993, para. 88.

20. The 1993 World Conference on Human Rights urged "regional and international organizations to facilitate the access of women to decision-making posts and their greater participation in the decision-making process", encouraged "further steps within the United Nations Secretariat to appoint and promote women staff members in accordance with the Charter of the United Nations" and encouraged "other principal and subsidiary organs of the United Nations to guarantee the participation of women under conditions of equality". Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, Section II.B., para. 43. In 1995, the Fourth UN World Conference on Women in Beijing called upon all relevant organs, bodies and agencies of the UN to ensure the implementation of the World Conference on Human Rights recommendation for the full integration of the human rights of women and, in particular, called for the improvement of the status of women in the UN Secretariat and to "continue to accord priority to the recruitment and promotion of women in posts subject to geographical distribution, particularly in senior policy-level and decision-making posts, in order to achieve the goals set out in General Assembly resolutions". Fourth UN World Conference on Women, Platform for Action, paras 231 (b), 331, *reprinted in* Report of the Fourth World Conference on Women, UN Doc. A/CONF.177/20, 17 20.October 1995, Annex II. See also Beijing Platform for Action, para. 142 (b) (calling for governments and international intergovernmental institutions to "aim for gender balance when nominating or promoting candidates for judicial and other positions in all relevant international bodies, such as the United Nations International Tribunals for the former Yugoslavia and for Rwanda"). In 1996, the General Assembly called upon Member States "to commit themselves to gender balance, *inter alia*, through the creation of special mechanisms, in all government-appointed committees, boards and other relevant official bodies, as appropriate, as well as in all international bodies, institutions and organizations, notably by presenting and promoting more women candidates". GA Res. 51/96, adopted 12 December 1996.

21. The 1993 report of the Secretary-General on the Yugoslavia Statute made clear that it was intended that due consideration to the employment of qualified women be given with respect to the staff of the Office of the Prosecutor: "Given the nature of the crimes committed and the sensitivities of victims of rape and sexual assault, due consideration should be given in the appointment of staff to the employment of women." Report of the Secretary-General, *supra*, n. 19, para. 88. The team of experts sent by the UN to investigate allegations of rape in the former Yugoslavia from 12 to 23 January 1993 noted that "the presence of female human rights monitors would be essential to obtain first-hand evidence with regard to rape". Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, UN Doc. E/CN.4/1993/50, 10 February 1993, Annex II, para. 70. Such a recommendation is highly pertinent to the staff of the office of the prosecutor of the permanent international criminal court. For a discussion of some of the other factors which need to be addressed in investigating such cases, see Section III.B below.

22. See Morris & Scharf, *supra*, n. 17, pp.161-163.

23. Indeed, both persons to serve as Prosecutor cited, in the context of a review of the Rwanda Tribunal, "the length of time the UN recruitment process requires" as one of the reasons it had been difficult to attract highly qualified candidates for the Office of the Prosecutor. Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, UN Doc. A/51/789, 6 February 1997, para. 52.

24. Article 15 (2) of the Rwanda Statute contains the same guarantee.

25. The ILC commentary to Article 15 noted that this change was to emphasize the importance of the independence of the office of the prosecutor.

26. This would provide greater protection than the approach suggested in the ILC commentary to this article, which "envisaged that procedures ensuring due process to . . . the officer in question should be established in the Rules, subject to paragraph 3 [of Article 15]".

27. Although the UN Guidelines on the Role of Prosecutors do not expressly require that prosecutors be given security of tenure and be given non-renewable terms and a number of states permit popular election and re-election of judges, an international prosecutor who is expected "to act as a representative of the international community as a whole" should not be seen as subject to the slightest hint of political pressure from states. The suggestion that the prosecutor might be engaged in soliciting votes from states, whose nationals the prosecutor might be investigating, in a campaign for re-election would appear unseemly.

28. Guideline 13 provides that prosecutors shall:

> "(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
>
> (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
>
> (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
>
> (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power."

29. In addition, Guideline 15 requires that "[p]rosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences."

30. *Id*., Guideline 17. In exercising such discretionary functions, prosecutors should give due consideration to alternatives to prosecution. *Id*., Guidelines 18 and 19.

31. *Id*., Guideline 20.

32. *Id*., Guidelines 21 and 22.

33. Article 16 (1) of the Yugoslavia Statute states: "The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991". Article 15 (1) of the Rwanda Statute provides: "The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."

34. Rule 8 of the Yugoslavia Rules provides:

> "Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 29 of the Statute."

Rule 8 of the Rwanda Rules is virtually identical.

35. Rule 9 of the Yugoslavia Rules states:

> "Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:
>
> (i) the act being investigated or which is subject of those proceedings is characterized as an ordinary crime;
>
> (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
>
> (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,
>
> the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal."

Rule 9 of the Rwanda Rules is identical. Rule 10 of the Yugoslavia Rules authorizes the Trial Chamber to issue a formal request for deferral to the state concerned. Rule 10 of the Rwanda Rules is similar.

36. Rule 39 of the Yugoslavia Rules provides that "[i]n the conduct of an investigation, the Prosecutor may:

> (i) summon and question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations;
>
> (ii) undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants;
>
> (iii) seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and
>
> (iv) request such orders as may be necessary from a Trial Chamber or a Judge."

Rule 39 of the Rwanda Rules is identical.

37. Rule 40 of the Yugoslavia Rules provides:

> "In case of urgency, the Prosecutor may request any State:
>
> (i) to arrest a suspect provisionally;
>
> (ii) to seize physical evidence;
>
> (iii) to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The state concerned shall comply forthwith, in accordance with Article 29 of the Statute."

Rule 40 of the Rwanda Rules is identical. Rule 40 *bis* of the Yugoslavia Rules spells out the procedure and criteria for the consideration by a Judge of the Yugoslavia Tribunal of requests for transfer and provisional detention of suspects. Rule 40 *bis* of the Rwanda Rules is similar.

38. Rule 41 of the Yugoslavia Rules provides that "[t]he Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of his investigations." Rule 41 of the Rwanda Rules is identical.

39. Of course, if, as Amnesty International has urged, the court has inherent jurisdiction over all the core crimes, then the obligation of all states parties to cooperate with the prosecutor would be exactly the same. The question of cooperation by states parties and other states with the court (largely found in Part 7 of the ILC draft statute, Articles 51 to 57) is likely to be addressed at the December 1997 session of the Preparatory Committee.

40. In cases in which states make complaints or - if the prosecutor is given this power - the prosecutor independently initiates such an investigation, all states parties should be obliged 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. The question of cooperation by states parties and other states with the court is largely addressed in Part 7 of the ILC draft statute, Article 51 to Article 57. Although the question of state cooperation arises with respect to many other articles of the ILC draft statutes, there is considerable support for addressing most of these matters together in Part 7 of the statute (These questions are to be addressed at the December session of the Preparatory Committee).

41. The French Minister of Justice recently explained the importance of the independence of the prosecutor in the conduct of investigations and prosecutions in politically sensitive cases when she announced that the minister of justice would no longer issue instructions to prosecutors in individual cases:

> *"Dans les 'affaires', le pouvoir politique a donné le sentiment, souvent justifié, qu'il tentait d'intervenir pour étouffer les dossiers. C'est de là que sont nés les soupçons sur l'indépendance de la justice, qui ont été l'un des ferments de la crise du politique. Aujourd'hui, cette crise représente un vrai défi pour la démocratie.*
>
> *La priorité des priorités, c'est donc de restaurer la confiance dans la justice pour les citoyens et dans l'exercice de leur métier pour les magistrats et les personnels qui contribuent à l'oeuvre de justice. C'est aux politiques qu'il revient de le faire en démontrant qu'il n'y a plus d'intervention dans les affaires politico-judiciaires, en inventant de nouvelles relations entre le parquet et la chancellerie et en faisant en sorte que la justice soit un vrai service public."*

Le Monde, 24 juin 1997. A presidential commission subsequently made a similar, though less far-reaching recommendation for strengthening the independence of the prosecutor. See *Les principales propositions, Le Monde, 10 juillet 1997.*

42. The standard as defined in the ILC commentary is different from that in Rule 47 (A) of the Yugoslavia Rules defining a *prima facie* case under Article 19 (1) of the Yugoslavia Statute and that applied by one of the Trial Chambers of the Yugoslavia Tribunal. Rule 47 (A) provides that "[i]f in the course of an investigation the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, he shall prepare and forward to the Registrar an indictment to the Registrar . . ." Rule 47 (A) of the Rwanda Rules and Article 18 (1) of the Rwanda Statute contain the same standard as the corresponding provisions of the Yugoslavia Statute and Rules. This standard, as explained by Judge Sidhwa in his review of the indictment in the *Rajif* case, seems to be unduly

complex and vague:

> " . . . Rule 47 (A) provides guidelines for assessing that expression which appears for the guidance of the Prosecutor. . . The word 'reasonable' is associated with what is fair, moderate, suitable, tolerable; that which is not immoderate or excessive. The expression 'reasonable grounds' therefore, point to such facts and circumstances as would justify a reasonable or ordinarily prudent man to believe that a suspect has committed a crime. To constitute reasonable grounds, facts must be such which are within the possession of the Prosecutor which raise a clear suspicion of the suspect being guilty of the crime. It predicates that all the ingredients of the offence are covered. The evaluation is to be made at the pre-trial stage and not what may turn out subsequently in the light of changing facts. It is sufficient that the Prosecutor has acted with caution, impartiality and diligence as a reasonably prudent Prosecutor would under the circumstances to ascertain the truth of his suspicions. It is not necessary that he has double checked every possible piece of evidence, or investigated the crime personally, or instigated an enquiry into any special matter. . . The evidence, therefore, need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime. . . the expression '*prima facie case*' carries no universal meaning. Rule 47, therefore, neither raises the threshold nor lowers it; it explains the requirements which the Prosecutor has to meet, before filing the indictment, and to that extent can be taken as laying down some guidance for the assessment of that expression."

Prosecutor v. Rajif, Case No. IT-95-12-I, 29 August 1995 (Judge Sidhwa, reviewing indictment), p. 212.

Judge McDonald, however, in reviewing the indictment in *Kordif*, stated that she was "not completely convinced that '*prima facie* case' fits exactly the standard or 'reasonable grounds'" and concluded, based on the ILC draft statute and commentary, that "a *prima facie* case for this purpose 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". *Prosecutor v. Kordif*, Case No. IT-95-14-I, 10 November 1995 (Judge McDonald, reviewing indictment), p.1676.

43. Yugoslavia Tribunal, Office of the Prosecutor, Prosecutor's Policy on *Nolle Prosequi* of Accomplices, Regulation No. 1 of 1994, as amended 17 May 1995. The same policy would necessarily apply to the Rwanda Tribunal.

44. *Id*. "[i]n determining where the balance lies on whether the accomplice should be indicted or not, account is taken of the following matters:

(a) the degree of involvement of the accomplice in the criminal activity in question compared with that of the suspect;

(b) the strength of the prosecution evidence against the suspect without the evidence it is expected the accomplice can give and, if some charges could be established against the suspect without the accomplice's evidence, the extent to which those charges would reflect the suspect's criminality;

(c) the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies - apart from taking into account such matters as the availability of corroborative evidence, and the weight that is likely to be given to the accomplice's testimony, and the likely effect on the prosecution case if the accomplice does not come up to proof;

(d) the likelihood of the weakness in the prosecution case being strengthened other than by relying on the evidence the accomplice can give (for example, the likelihood of further

investigations disclosing sufficient independent evidence to remedy the weakness);

(e) whether there is or likely to be sufficient admissible evidence to substantiate charges against the accomplice[.]"

Id. Any decision by the Prosecutor not to indict, however, is conditioned on the accomplice subsequently giving testimony, unless otherwise excused from doing so by the Prosecutor. *Id*.

45. The drafters of the ICCPR rejected a proposal to prohibit obtaining a confession in return for a promise of a reward or immunity. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, Germany: N.P. Engel, Publisher 1993), p. 264.

46. Mireille Delmas-Marty, ed., *Procédures pénales d'Europe* (*Paris: Thémis 1995*), pp. 562-584; for related developments, see Council of Europe, Committee of Ministers, Rec. (87) 18, 17 September 1987 (encouraging the introduction of the principle of discretionary prosecution founded upon law, equality and the public interest). Guidelines 17 to 18 of the UN Guidelines on the Role of Prosecutors govern the exercise of discretionary prosecutorial decisions.

47. Yugoslavia Rules, Rule 101 (B) (ii); Rwanda Rules, Rule 101 (B) (ii) is identical. A significant factor in the Trial Chamber's determination of the sentence in the *Erdemovif* case was the substantial cooperation of the convicted person with the Prosecutor. *Prosecutor v. Erdemovif*, Case No. IT-22-T, 29 November 1996, paras 99-101 ("[t]he Trial Chamber considers that the accused's co-operation with the Office of the Prosecutor must play significantly in the mitigation of the penalty"). For the rationale of this rule, see Morris & Scharf, *supra*, n. 17, pp. 279-280.

48. As indicated in *The international criminal court: Making the right choices - Part I* (AI Index: IOR 40/01/97), pages 94-99, 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 court bases its decisions to prosecute on reasons of politics or state interest.

49. 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."

The prosecutor is obliged to "[c]onsider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power." UN Guidelines on the Role of Prosecutors, Guideline 13 (d).

50. The power of the presidency to review a decision of the prosecutor not to prosecute may be one of the powers likely to be assigned to the proposed new preliminary chamber. See Section II.B.4 below.

51. Principle 15 provides:

> "The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters."

52. Principle 16 provides:

> "Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions."

53. Article 19 of the Statute of the International Court of Justice provides that "[t]he members of the Court, when engaged on the business of the Court shall enjoy diplomatic privileges and immunities". Article 30 (1) of the Yugoslavia Statute provides in part that "[t]he Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal [and] the judges", and Article 30 (2) provides that the judges "shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law". Article 29 (1) and (2) of the Rwanda Statute contains corresponding provisions.

54. The UN Basic Principles on the Independence of the Judiciary and the statutes of international courts do not, however, expressly prohibit re-election of judges.

55. Rule 15 of the Yugoslavia Rules lays out extensive guidelines concerning disqualification. Rule 15 of the Rwanda Rules is similar.

56. Principles 17 to 20 provide:

> "17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
>
> 18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
>
> 19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
>
> 20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings."

57. Article 18 (1) of the Statute of the International Court of Justice provides that "[n]o member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions."

58. Yugoslavia Statute, Art. 13 (1) ("high moral character"); Rwanda Statute, Art. 12 (1) ("high moral character"); Statute of the International Court of Justice, Art. 2 ("high moral character"); ICCPR, Art. 28; Convention on the Elimination of All Forms of Racial Discrimination (CERD), Art. 8 (1) ("high moral standing"); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art. 17 (1) ("high moral standing"); Convention on the Rights of the Child, Art. 43 (2) ("high moral standing"); European Convention for the

Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Art. 39 (3) (European Court of Human Rights) ("high moral character"); American Convention on Human Rights, Art. 34 (Inter-American Commission on Human Rights) ("high moral character"), Art. 52 (1) (Inter-American Court of Human Rights) ("highest moral authority").

59. Yugoslavia Statute, Art. 13 (1) ("impartiality"); Rwanda Statute, Art. 12 (1) ("impartiality"); CERD, Art. 8 (1) ("acknowledged impartiality").

60. Yugoslavia Statute, Art. 13 (1); Rwanda Statute, Art. 12 (1).

61. Statute of the International Court of Justice, Art. 2.

62. Yugoslavia Statute, Art. 13 (1) ("In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law"); Rwanda Statute, Art. 12 (1) (same); Statute of the International Court of Justice, Art. 2 ("who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juriconsults of recognized competence in international law"); CEDAW, Art. 17 (1) ("competence in the field covered by the Convention"); Convention on the Rights of the Child, Art. 43 (2) ("recognized competence in the field covered by this Convention"); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), Art. 17 ("recognized competence in the field of human rights" and "consideration being given . . . to the usefulness of the participation of some persons having legal experience); European Convention on Human Rights, Art. 39 (3) (European Court of Human Rights) ("either possess the qualifications required for appointment to high judicial office or be juriconsults of recognised competence"); American Convention on Human Rights, Art. 34 (Inter-American Commission on Human Rights) ("recognized competence in the field of human rights"), Art. 52 (1) (Inter-American Court of Human Rights) ("jurists . . . of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates").

63. CERD, Art. 8 (1) ("consideration being given to equitable geographical distribution and to the representation of the different forms of civilization"); CEDAW, Art. 17 (1) ("consideration being given to equitable geographical distribution and to the representation of the different forms of civilization"); Convention on the Rights of the Child, Art. 43 (2) ("consideration being given to equitable geographical distribution"). Recently there has been criticism of the category "different forms of civilization" as unnecessary or inappropriate. See Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/1997/33, 23 December 1996, paras 68 to 72.

64. CERD, Art. 8 (1); CEDAW, Art. 17 (1); Convention on the Rights of the Child, Art. 43 (2).

65. Vienna Declaration and Programme of Action, *supra*, n. 20, Section II.B, para. 43; Beijing Platform for Action, *supra*, n. 20, para. 331. See also Beijing Platform for Action, para. 142 (b) (calling for governments and international intergovernmental institutions to "aim for gender balance when nominating or promoting candidates for judicial and other positions in all relevant international bodies, such as the United Nations International Tribunals for the former Yugoslavia and for Rwanda").

66. Yugoslavia Statute, Art. 13 (1); Rwanda Statute, Art. 12 (1).

67. The proposed mandatory procedure 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. That article provides that before national groups in the Permanent Court of Arbitration make nominations for membership in the International Court of Justice, "each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law".

68. The experience of the system recently devised by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe to gain a better knowledge of the qualifications of candidates for the European Court of Human Rights before their election merits consideration in the development of such a review body:

> ". . . a standardized *curriculum vitae* has been elaborated. This is much shorter than the one often presented by the candidates. It attempts to concentrate on the candidates' judicial experience, both domestically and internationally, and linguistic abilities, but also on any possible political activities including posts held in political parties, their duration and membership of parliament."

Hans Christian Krüger, "Selecting Judges for the New European Court of Human Rights", 17 Hum. Rts L.J. (1997), pp. 401, 402. The Parliamentary Assembly interviews candidates, but this interview is not designed to imitate the procedure used by the United States Senate in reviewing candidates for judicial appointments or to learn

> "about the candidates' attitudes with regard to political, social or economic matters. Rather they should be able to learn a bit more about their legal background, their linguistic abilities, and their availability, including possibly their wish to pursue other activities whilst serving on the Court."

Id. See Parl. Ass. Res. 1082 (1996) of 22 April 1996.

69. 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 Human Rights and Fundamental Freedoms; and Article 52 of the American Convention on Human Rights.

70. Yugoslavia Statute, Article 19 (1); Rwanda Statute, Article 18 (1).

71. There is, as yet, no agreement concerning the name of the proposed chamber. The various names proposed sometimes reflect the primary duties envisaged by those proposing the name, such as "indictment chamber", "preliminary investigations chamber", "indictment and preliminary matters chamber", "supervision chamber", "accusation chamber" or "pre-trial chamber", or a recognition that the functions still have yet to be agreed, such as the "no name chamber" or "the entity to be determined". For the sake of convenience, in this paper the term, "preliminary chamber", is used as a simple and relatively neutral term, although it is not entirely accurate as some have proposed that the chamber perform functions after the commencement of the trial, such as hearing cases of perjury and contempt or seeking the recovery of assets of a person convicted by the court.

72. ILC draft statute, Art. 8 (1).

73. *Id*., Art. 26 (3).

74. *Id*., Art. 27 (5). For a discussion of the duty of the prosecutor to disclose certain evidence see Section II.B, concerning the duties and ethical obligations of the prosecutor, and Section IV.B.1.e, concerning equality of arms. For a discussion of the implications of compelling an accused to exchange information with the prosecutor before trial, see Section IV.B.1.g, concerning the presumption of innocence. For a discussion of the considerations involved in protection orders, see Section IV.B.1.k, concerning examination of witnesses.

75. *Id.*, Art. 28.

76. *Id*., Art. 29.

77. *Id.* Art. 30 (3).

78. For example, even in the common law jurisdictions where judicial supervision is minimal during the police and prosecutorial investigation, which takes place in most cases before a suspect is detained and indicted, in contrast to certain civil law counties where suspects may be detained for significant periods before an indictment, there is some judicial supervision. In the United States Federal courts, searches and arrests must be based on probable cause, in most cases requiring prior judicial approval; prosecutors must obtain prior judicial permission to use wiretap or electronic surveillance; and courts will review indictments to ensure that procedural requirements were satisfied. Judge Jack B. Weinstein and Nicholas R. Turner, "United States' Criminal Justice System", paper submitted to University of Nottingham workshop, pp. 4 to 5. In addition, federal and state courts will entertain pre-trial challenges by the defendant alleging that the police or prosecutor violated constitutional or legal requirements.

79. The Rwanda Statute also provides for two trial chambers (Articles 10 (a)) of three judges each (Article 11 (a)).

80. Yugoslavia Rules, Rule 87 (A); Rwanda Rules, Rule 87 (A).

81. Yugoslavia Statute, Article 23 (2); Rwanda Statute, Article 22 (3).

82. Yugoslavia Statute, Articles 11 (a), 12 (b); Rwanda Statute, Articles 10 (a), 11 (b). Article 12 (2) of the Rwanda Statute provides that the five judges of the Yugoslavia Tribunal will serve on the Appeals Chamber of the Rwanda Tribunal.

83. Article 10 (C) of the Rwanda Statute is virtually the same.

84. Article 16 (1) of the Rwanda Statute is virtually the same.

85. Article 16 (2) of the Rwanda Statute is virtually the same.

86. Yugoslavia Statute, Article 17 (3); Rwanda Statute, Article 16 (3).

87. Rule 33 of the Rwanda Rules is identical.

88. Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, 16 August 1996, UN Doc.A/51/292, S/1996/665, para. 98.

89. Rule 34 of the Yugoslavia Rules provides for setting up a Victims and Witnesses Unit. Rule 34 of the Rwanda Rules is virtually identical. For a discussion of this unit and whether it would be better to place the part dealing with victims and prosecution witnesses in the office of the registrar of the permanent international criminal court in the office of the prosecutor, see Section III.B below.

90. For information concerning the work of the Registry of the Yugoslavia Tribunal, see First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, paras 117-138, UN Doc. A/49/342, 29 August 1994, *reprinted in* Yearbook of the International Criminal Tribunal for the former Yugoslavia 1994 (1994 Yearbook) and 1994 Yearbook, pp. 20-23; Second Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (Second Annual Report of the Yugoslavia Tribunal), paras 76-128, UN Doc. A/50/365, 23 August 1995, *reprinted in* Yearbook of the International Criminal Tribunal for the former Yugoslavia 1995 (1995 Yearbook) and 1995 Yearbook, pp. 18-20; Third Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since

1991, paras 98-165, UN Doc. A/51/292, 16 August 1996.

91. Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, 6 February 1997, UN Doc. A/51/789, para.78.

92. *Id*., para. 77.

93. *Id*., para. 99.

94. Yugoslavia Rules, Rule 74; Rwanda Rules, Rule 74.

95. See, for example, *Code de procédure pénale*, Arts 85-88, 371- 375-2 (*Paris: Editions Litec 1996-1997*) (France).

96. The team of experts sent by the UN to investigate allegations of rape in the former Yugoslavia from 12 to 23 January 1993 reported that "health care providers were concerned about the effects on women of repeatedly recounting their experiences without adequate psychological and social support systems in place". Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission o Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, UN Doc. E/CN.4/1993/50, 10 February 1993, Annex II, para. 52.

97. See Report of ACABQ, 10 March 1995, UN Doc. A/49/7/Add.12.

98. Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, 6 February 1997, UN Doc. A/51/789, para.99.

99. Article 22 of the Yugoslavia Statute states: "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity." Article 21 of the Rwanda Statute is almost identical. These articles and the rules implementing them are discussed in more detail below in Section IV.C.1.f and k in connection with the right to fair trial.

100. Amnesty International made a number of suggestions about how this could be accomplished by the Yugoslavia 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.

101. In the Beijing Platform for Action, *supra*, n. 20, para. 142 (c), the Fourth UN World Conference on Women called upon governments and international intergovernmental institutions to: "Ensure that these bodies are able to address gender issues properly by providing appropriate training to prosecutors, judges and other officials in handling case involving rape, forced pregnancy in situations of armed conflict, indecent assault and other forms of violence against women in armed conflicts, including terrorism, and integrate a gender perspective into their work."

102. As indicated above in Section II.B.1.a, the 1993 report of the Secretary-General on the Yugoslavia Statute made clear that it was intended that due consideration to the employment of qualified women be given with respect to the staff of the Office of the Prosecutor: "Given the nature of the crimes committed and the sensitivities of victims of rape and sexual assault, due consideration should be given in the appointment of staff to the employment of women." Report of the Secretary-General, *supra*, n. 19, para. 88.

103. Second Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, 23 August 1995, UN Doc. A/50/365, S/1995/728, para. 44.

104. In developing rules of evidence in cases of rape, sexual assault and forced pregnancy, the court should draw upon the experience of the Yugoslavia and Rwanda Tribunals. For a discussion of the rules of these tribunals concerning such cases in the context of the right to fair trial, see Section IV.C.1.k below.

105. See also the Convention on the Elimination of All Forms of Racial Discrimination, Article 6; UN Declaration on the Elimination of All Forms of Racial Discrimination, Article 7 (2); UN Declaration on Race and Racial Prejudice, Article 6 (3); Principle 35 (1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

106. Article 4 of the UN Declaration on Victims provides that "victims are entitled to prompt redress". Victims, their families and their dependants should have a right to "fair restitution", including "the return of property or payment for the harm or loss suffered, reimbursement of expenses occurred as a result of victimization, the provision of services and the restoration of rights" (Article 8). "When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to: . . . Victims . . . [and their] family" (Article 12). States should also encourage "[t]he establishment, strengthening and expansion of national funds for compensation to victims" (Article 13). In addition, "[v]ictims should also receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means" (Article 14) and "should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them" (Article 15).

107. Article 11 of the UN Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognizes a right to redress in similar terms.

108. For a discussion of other international standards recognizing the right to restitution, compensation and rehabilitation, see Final Report of the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. Theo van Boven, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, UN Doc. E/CN.4/Sub.2/1993/8, and the Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, UN Doc. E/CN.4/Sub.2/1996/17.

109. Yugoslavia Rule 88 (B) requires that if the Trial Chamber finds that the convicted person unlawfully took property, it should include this finding in the judgment and to conduct a hearing under Rule 105 to determine whether to order restitution. Rule 106 of the Yugoslavia Rules provides for the transmission of the judgment of conviction to the states concerned, authorizes the victim or persons claiming through the victim to bring an action in a national court or other competent body to obtain compensation and states that with respect to such proceedings the judgment is "final and binding as to the criminal responsibility of the convicted person for such injury". Rules 88 (B), 105 and 106 of the Rwanda Rules are identical.

110. Article 53 (3) of the 1993 ILC 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 Yugoslavia Statute also authorizes restitution by authorizing the Yugoslavia Tribunal to order "the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners". Article 23 (3) of the Rwanda Statute is identical.

111. The drafters of the statute and the court in devising its rules could draw upon the extensive experience of civil law jurisdictions, such as France, where the victim or victim's family appearing as a *partie civile* is able to obtain restitution and compensation. See, for example, *Code de procédure pénale*, Arts 373-375-2 (Paris: *Editions Litec* 1996-1997) (France); Gaston Stefani, Georges Levasseur & Bernard Bouloc, *Procédure pénale*

(Paris: *Dalloz* 14th ed. 1990), pp. 913-916 (France). Similar proposals have been made by Redress in its report, *Promoting the Right of Survivors to Torture to Reparation: A Role for a Permanent International Criminal Court* (1997).

112. Report to the President by Mr. Justice Jackson, 7 October 1946, *quoted in* Morris & Scharf, *supra*, n. 17, p. 332.

113. See, for example, Robert E. Connor, *Justice at Nuremberg* (New York: Harper & Row 1983); Ann Tusa & John Tusa, *The Nuremberg Trial* (New York: Atheneum 1983). See also the reassessment in Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf 1992).

114. See, for example, Arnold C. Brackman, *The Other Nuremberg* (New York: Morrow 1987); Robert H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton University Press 1971); B.V.A. Röling & Antonio Cassese, *The Tokyo Trial and Beyond* (Cambridge, Massachusetts: Polity Press 1993).

115. 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, was completed in 1994. *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.

116. If the statute permits the trial of persons for crimes committed when under 18, then it should also include the guarantees recognized in the Convention on the Rights of the Child, *adopted and opened for signature, ratification and accession by* General Assembly Res. 44/25 of 20 November 1989 *and entered into force* 2 September 1990; the UN Rules for the Protection of Juveniles Deprived of their Liberty; *adopted by* General Assembly Res. 45/113 of 14 December 1990 and the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), *adopted by* General Assembly Res. 40/33 of 29 November 1989, or incorporate them by reference.

The Preamble could also refer to the important regional law and standards concerning fair trial, such as the European Convention on Human Rights and its Protocols, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights and African Commission on Human and Peoples' Rights Resolution on the Right to Fair Trial, adopted at its 11th session in March 1992.

117. These standards include those found in the Third Geneva Convention, Arts 129-131; Fourth Geneva Convention, Arts 54, 64-75, 117-126; Additional Protocol I, Art. 75; and Additional Protocol II, Art. 6. For an excellent discussion of the right to fair trial in humanitarian law, see Hans-Peter Gasser, "Respect for fundamental judicial guarantees in time of armed conflict: The part played by ICRC delegates", Int'l Rev. Red Cross (1992), No. 287, pp.121-142.

118. For example, Article 75 (7) of Additional Protocol I states:

> "In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following rules of international law shall apply:
>
> (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol."

119. "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).

120. Rights of victims and witnesses are discussed primarily in Section III, above. In certain limited situations, the Yugoslavia Tribunal permits witnesses who are detained by national authorities to be detained by the tribunal. Rule 56 of the Yugoslavia Rules requires that "[t]he State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 29 of the Statute". See also Rule 90 *bis*. Article 29 (2) (d) of the Yugoslavia Statute requires states to cooperate with any request for assistance or an order issued by a Trial Chamber, including, but not limited to, "the arrest or detention of persons". Article 28 (2) (d) of the Rwanda Statute contains an identical provision, but the Rwanda Rules do not have an express provision concerning arrest or transfer of witnesses. If the statute or rules of international criminal court were to include a provision for the transfer of witnesses, adequate protection of the rights of witnesses would have to be addressed. In addition, if provisions are included permitting the court to detain other persons temporarily, such as persons obstructing proceedings, adequate protections for them should also be included.

121. Rule 2 (A) of the Yugoslavia Rules contains a similarly objective definition of when a witness or other person becomes a suspect: "A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction." Rule 2 (A) of the Rwanda Rules has an identical definition.

122. Rule 2 (A) of the Yugoslavia Rules defines an accused as "[a] person against whom an indictment has been submitted in accordance with Rule 47." Rule 2 (A) of the Rwanda Rules has an identical definition.

123. The right to a fair trial on a criminal charge (*accusation*) "does not arise only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person charged". Nowak, *supra*, n. 45, p. 245. See also Haji N. A. Noor Muhammad, "Due Process of Law for Persons Accused of a Crime", in Louis Henkin, ed., *The International Bill of Rights* (New York: Columbia University Press 1981), pp. 145-146.

124. For a useful compilation of relevant pre-trial detention standards, see United Nations, *Human Rights and Pre-trial Detention: A Handbook of International Standards Relating to Pre-trial Detention* (Centre for Human Rights, Geneva and Crime Prevention and Criminal Justice Branch, Vienna 1994) (Professional Training Series No. 3), UN Doc. HR/P/PT/3, Sales No. E.94.XIV.6.

125. Yugoslavia Rules, Rule 42 (A); Rwanda Rules, Rule 42 (A).

126. Yugoslavia Rules, Rule 43; Rwanda Rules, Rule 43.

127. Rule 42 (A) (iii) of the Rwanda Rules is identical.

128. 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 right to silence is recognized in the European Convention on Human Rights, adopted in 1950, although this regional treaty has been interpreted more restrictively than contemporary international standards, such as the Yugoslavia and Rwanda Rules and the

practice of the Yugoslavia and Rwanda Tribunals. See *Saunders v. United Kingdom*, 23 E.H.R.R. 313, 17 December 1996; *Murray v. United Kingdom*, 22 E.H.R.R. 29, 8 February 1996 (finding that the drawing of adverse inferences from the exercise of the right to silence by a court in Northern Ireland did not, on the facts of the case, violate that treaty). The Human Rights Committee, however, has "noted with concern that the provisions of the Criminal Justice and Public Order Act of 1994, which extended the legislation originally applicable in Northern Ireland, whereby adverse inferences may be drawn from the silence of persons accused of crimes, violates various provisions in article 14 of the Covenant". Comments of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, 27 July 1995, UN Doc. CCPR/C/79/Add.55, para. 17.

129. Article 17 (3) of the Rwanda Statute has an identical guarantee.

130. Rule 42 (A) of the Yugoslavia Rules states that the suspect who is to be questioned by the Prosecutor has "the right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it". Rule 42 (A) of the Rwanda Rules is identical. Moreover, Rule 42 (B) of the Yugoslavia Rules prohibits questioning of a suspect without the presence of counsel unless that right is waived:

> "Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel."

Rule 42 (B) of the Rwanda Rules is identical. Given the extremely serious nature of the crimes and the need of the international community not merely to see that justice is done, but to be seen to be done, it may be advisable to have a judicial review of the decision to waive counsel or to assign counsel in the interests of justice to be available to assist the suspect, if necessary.

131. See David Harris, "The Right to a Fair Trial in Criminal Proceedings as a Human Right", 16 Int'l & Comp. L. Q. (1967), pp. 352, 365.

132. See Rule 45 of the Yugoslavia Rules. Rule 45 of the Rwanda Rules is virtually identical. See also Yugoslavia Tribunal, Directive on Assignment of Defence Counsel (Directive No. 1/94), as amended on 30 January 1995, IT/73/Rev.2, Article 11 (Registrar to choose a name from the Registry list).

133. Article 17 (3) of the Rwanda Statute is identical.

134. Rule 42 (A) (ii) of the Rwanda Rules is identical.

135. See van Dijk, "The Right of the Accused to a Fair Trial under International Law", SIM Special No. 1 (1983), p. 48.

136. Presumably the *translation* of documents on which the suspect is to be questioned, as well as the *interpretation*, must be competent, but it would be better to clarify this aspect of the provision.

137. In states which have collapsed or where the judicial system has ceased to function and an international peace-keeping operation is present, the prosecutor may have to rely on that operation for assistance. The rights of suspects and accused must be respected by any such operation. See Amnesty International, *Peace-keeping and human rights* (AI Index: IOR 40/01/94).

138. Article 28 (1) of the ILC draft statute authorizes the court on the request of the prosecutor to order the provisional arrest of a suspect if "there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court" and "the suspect may not be available to stand trial unless provisionally arrested". For a discussion of some of the issues related to witnesses, see Section III.A below.

139. The ILC commentary to Articles 26 and 27 clearly distinguishes between suspects and accused.

140. Such rules of detention must be consistent with international standards such as the UN Standard Minimum Rules, the UN Body of Principles and the European Prison Rules. The court could draw upon the experience of the Yugoslavia and Rwanda Tribunals with their detention rules.

141. The Yugoslavia and Rwanda Statutes and their Rules do not always expressly or adequately guarantee the rights of persons detained in national or tribunal custody.

142. Principle 10 provides that "[a]nyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him." The term "arrest" in international standards is broader than in the ILC draft statute, where it refers to the detention of an accused, not to the provisional arrest of a suspect, although the draft statute is not always consistent. According to the UN Body of Principles, an arrest "means the act of apprehending a person for the alleged commission of an offence or by the action of an authority". An arrest is defined in Rule 2 of the Yugoslavia Rules to cover both types of detention as "[t]he act of taking a suspect or an accused into custody by a national authority"; however it does not expressly cover an arrest by an international authority, such as a peace-keeping force or the detention of a witness.

143. Memorandum of Understanding, Arts 2.3 and 2.7, cited in David Weissbrodt, "Practice of the International Criminal Tribunal for the former Yugoslavia and International Fair Trial Principles Relevant to Issues Arising in the Establishment of the International Criminal Court", paper submitted to the London workshop, Toward a Procedural Regime for the International Criminal Court, 6 to 7 June 1997. It is not known if the initial caution must be given at the time of arrest (or provisional arrest) and the content of the secondary caution could be misleading in cases where the person has been suspected or indicted for genocide or crimes against humanity rather than war crimes.

144. "Practice of the International Tribunal", *supra*, n. 143, p. 2.

145. Principle 17 (1) provides: "A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it."

146. Rule 40 *bis* (C) of the Yugoslavia Rules provides that an order for the transfer and provisional arrest of a suspect shall "be accompanied by a statement of the rights of the suspect, as specified in this Rule [transfer and provisional arrest of suspects] and in Rules 42 [rights of suspects during investigation] and 43 [recording questioning of suspects]". Rule 40 *bis* of the Rwanda Rules has similar requirements.

147. Amnesty International, *Torture in the Eighties* (AI Index: ACT 04/01/84), pp. 10-11. In its 12-Point Program for the Prevention of Torture, Amnesty International declared: "It is vital that all prisoners be brought before a judicial authority promptly after being taken into custody and that relatives, lawyers and doctors have prompt and regular access to them." *Id.*, p. 249.

148. Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32, UN Doc. E/CN.4/1995/34, 12 January 1995, para. 926 (d). See also Report of the Special Rapporteur, Mr. P. Kooijmans, pursuant to Commission on Human Rights resolution 1991/38, UN Doc. E/CN.4/1992/17, para. 294 ("Since incommunicado detention is highly conducive to torture practices, it should be declared illegal.").

149. Principle 16 (2) of the UN Body of Principles provides:

> "If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is refugee or is otherwise under the protection of an intergovernmental organization."

150. Yugoslavia Detention Rules, Rules 63 and 65. Rwanda Detention Rules, Rules 61 and 63.

151. Principle 18 (3) states that this right "may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order". However, Principle 15 makes clear that "[n]otwithstanding the exceptions contained in . . . principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his . . . counsel, shall not be denied for more than a matter of days".

152. UN Body of Principles, Principle 15.

153. Report of the UN Special Rapporteur on torture, Mr. Nigel S. Rodley, pursuant to Commission on Human Rights resolution 1992/32, UN Doc. E/CN.4/1995/34, 12 January 1995, para. 926 (d).

154. Rule 42 (B) of the Yugoslavia Rules provides in part: "In the case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel." Rule 42 (B) of the Rwanda Rules is identical. Rule 63 (A) of the Yugoslavia Rules provides in part: "If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present." There is no similar rule in the Rwanda Rules.

155. Yugoslavia Detention Rules, Rule 67; Rwanda Detention Rules, Rule 65.

156. Principle 24 provides: "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."

157. Yugoslavia Detention Rules, Rules 29 to 34; Rwanda Detention Rules, Rules 27 to 32.

158. Principle 37 states: "A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him in custody."

159. Principle 11 (1) provides in part: "A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority."

160. Rule 62 of the Rwanda Rules is identical. Although neither the Yugoslavia nor the Rwanda Rules expressly provide for prompt access of a suspect or an accused to a national court judge after a provisional arrest or an arrest, Rule 59 bis of the Yugoslavia Rules requires that the accused be promptly transferred to the

tribunals. There is no similar provision in the Rwanda Rules.

161. See, for example, *Amnesty International Report 1997* (AI Index: POL 10/01/97); *Amnesty International Report 1996* (AI Index: POL 10/02/96); *Amnesty International Report 1995* (AI Index: POL 10/01/95); *Amnesty International Report 1994* (AI Index: POL 10/02/94); *Amnesty International Report 1993* (AI Index: POL 10/01/93); *Amnesty International Report 1992* (AI Index: POL 10/01/97); *Amnesty International Report 1991* (AI Index: POL 10/01/91).

162. See Letter dated 24 April 1996 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 addressed to the President of the Security Council, UN Doc. S/1996/319 (Federal Republic of Yugoslavia (Serbia and Montenegro)); Report by the High Representative, Mr. Carl Bildt to the Florence Mid-Year Review Conference, 12 June 1996, p. 5 (Federation of Bosnia and Herzegovina, Republika Srpska). Security Council deplores Croatia's failure to execute arrest warrants of International Tribunal on former Yugoslavia, Press Release SC/6267, 20 September 1996. In some cases, states which have cooperated have not done so promptly. National procedures led to lengthy delays between the request to Cameroon to transfer persons indicted by the Rwanda Tribunal and their transfer to Arusha.

163. Article 38 (1) (c) of the ILC draft statute 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". Such delayed international scrutiny is inadequate to protect the rights of suspects or accused in pre-trial detention. In contrast, the Yugoslavia and Rwanda Statutes require the Trial Chambers to satisfy themselves at the initial appearance of the accused that the accused's rights have been respected, but this does not address the problems of ensuring that the rights of suspects or accused are respected in national custody pending surrender or transfer. Yugoslavia Statute, Article 20 (3); Rwanda Statute, Article 19 (3). To some extent these problems with Article 38 (1) can be addressed by prompt surrender or transfer to the court.

164. Principle 32 states:

> "1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.
>
> 2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority."

Principle 37 states:

> "A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody."

165. The Right to a fair trial: Current recognition and measures necessary for its strengthening, Final report prepared by Mr. Stanislav Chernichenko and Mr. William Treat, 3 June 1994, UN Doc. E/CN.4/Sub.2/1994/24, para. 159. Courts have repeatedly emphasized the importance of the writ of habeas corpus. For example, the United States Supreme Court has declared:

> "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. . . . Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."

372 U.S. 391, 401 (1963).

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

167. Unfortunately, this right is not guaranteed in the Yugoslavia or Rwanda Statutes either.

168. Unfortunately, this right is omitted from the Yugoslavia and Rwanda Statutes.

169. Principle 39 states:

> "Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review."

170. Human Rights Committee, General Comment 8, para. 3.

171. Communication No. 238/1987, Views adopted 26 July 1989, Report of the Human Rights Committee, 44 GAOR, (Supp.) No. 40, UN Doc. A/44/40, Annex X.I, para. 8 (3).

172. Human Rights Committee, General Comment 8, para. 3.

173. Nowak, *supra*, n. 45, p. 178.

174. The Yugoslavia and Rwanda Statutes, both of which fail to include provisions corresponding to Article 9 (3) of the ICCPR and to Principle 38 of the UN Body of Principles, are similarly flawed and the Yugoslavia and Rwanda Rules, as well as the practice of the Yugoslavia Tribunal are inconsistent with these provisions and the interpretation of Article 9 (3) of the ICCPR by the Human Rights Committee. Thus, Rule 65 (B) of the Yugoslavia Rules shifts the burden to the detainee to demonstrate the existence of three requirements: "Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person." Rule 65 (B) of the Rwanda Rules is identical. The Yugoslavia Tribunal has denied the pre-trial release of one accused who surrendered voluntarily, but it did authorize house arrest as an alternative. See *Prosecutor v. Blaskif*, Order Denying a Motion for Provisional Release, Case No. IT-95-14-T, 20 December 1996 (Judges Jorda (Presiding), Odito Bonito, Riad).

175. Principle 38 states: "A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial."

176. Human Rights Committee, General Comment 8, para. 3.

177. The prohibition of torture and ill-treatment "is one of general international law", Nigel Rodley, *The Treatment of Prisoners under International Law* (Oxford: Clarendon Press 1987), p. 70, which constitutes a norm of *jus cogens*. UN Special Rapporteur on torture, Report, UN Doc. E/CN.4/1986/15, para. 3. A norm of *jus cogens* is a "peremptory norm of general international law" which is "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Vienna Convention on the Law

of Treaties, UN Doc. A/CONF. 39/27, *done at Vienna* 23 May 1969, *entered into force* 27 January 1980, Art. 53. The prohibition is incorporated in numerous international treaties and international standards, including the UN Convention against Torture; the ICCPR, Art. 7; Convention on the Rights of the Child, Art. 37.

178. Regrettably, this safeguard is omitted from the Yugoslavia and Rwanda Statutes as well. Nevertheless, the Preamble of the Yugoslavia 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." The Preamble of the Rwanda Detention Rules states that the Rwanda Tribunal is "*Mindful* of the need to ensure respect for human rights and fundamental freedoms particularly the presumption of innocence".

179. The ILC 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 related to the determination of guilt or innocence are not the same as those involved in the determination whether there was a *prima facie* case. Nevertheless, the issues related to the determination of guilt or innocence are sufficiently similar to those related to the determination whether a *prima facie* case exists as to suggest that the persons performing these functions should be different.

180. Rules 72 and 73 of the Yugoslavia and Rwanda Rules govern preliminary motions, but the time limits for making such motions appear to be unduly rigid in some cases.

181. The chamber should satisfy itself that an accused who pleads guilty understands the effect of the plea. See *X v. United Kingdom*, No. 5076/71, 40 CD (1972), pp. 64, 67 (interpreting Article 6 (1) of the European Convention on Human Rights).

182. Article 14 (3) (c) of the ICCPR provides: "In the determination of any criminal charge against him, everyone shall be entitled to one of the following minimum guarantees, in full equality: . . . To be tried without undue delay." Article 21 (4) (c) of the Yugoslavia Statute and Article 20 (4) (c) of the Rwanda Statute contain the same guarantee.

183. The Human Rights Committee has stated that the right to trial without undue delay applies at "all stages" of criminal proceedings. General Comment 13, para. 10. (UN Doc. HRI/GEN/1). Thus, the right attaches at least as early as the moment a person is detained, even if not yet formally charged. In *Bolaños 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 Muhammad, *supra*, n. 123, pp. 152-153; Nowak, *supra*, n. 45, p. 244.

184. 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). A leading authority has explained that the right to fair trial "is broader than the sum of these individual guarantees" and that "although a criminal trial may fulfil all the requirements of Art. 14 (2) to (7) and Art. 15 [of the ICCPR], it may nevertheless conflict with the precept of fairness in Art. 14 (1)". Nowak, *supra*, n. 45, p. 246. As indicated above, the report of the Secretary-General concerning the Yugoslavia Statute makes clear that the rights of the accused to a fair trial listed in Article 21 are minimum guarantees and not an exclusive list. Report of the Secretary-General, *supra*, n. 19, para. 106). The right to a fair hearing in Article 6 (1) of the European Convention on Human Rights, which is worded similarly to that in Article 14 (1) of the ICCPR, is also to be read as guaranteeing a broader scope of guarantees than those specifically identified in the rest of the article, including the right to an oral hearing in person and to equality of arms. D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights*, (London: Butterworths 1995), p. 202.

185. Nowak, *supra*, n. 45, p. 239.

186. *Id.*

187. Nowak, *supra*, n. 45, p. 246. See also Mohammad, *supra*, n. 123, at 146 (principle of equality of arms "implies that the defendant must be given a full and equal opportunity in the proceedings before a tribunal".).

188. Harris, Boyle & Warbrick, *supra*, n. 184, pp. 207-210.

189. Nowak, *supra*, n. 45, p. 246.

190. Yugoslavia Rules, Rule 68. Rule 68 of the Rwanda Rules is identical.

191. Rule 70 of the Yugoslavia Rules and Rule 70 of the Rwanda Rules provide that certain materials prepared in connection with the case and confidential information supplied to the Prosecutor for the purpose of generating evidence are not subject to disclosure.

192. For example, the Prosecutor has expressed concern that the accused "must show more than mere speculation that the requested evidence is in the possession of the Prosecutor", that the obligation to disclose under Rule 68 of the Yugoslavia Rules does not "make redundant other discovery obligations under the Rules" and that it does not allow the accused "unfettered access to the Prosecutor's files". See *Prosecutor v. Blaškif*, Prosecutor's Response to Defendant's Motion to Compel Discovery, Case No. IT-95-14-T, p. 11.

193. The right to a public trial, guaranteed by Article 20 (2) of the Rwanda Statute is similarly qualified, by reference to Article 21 of that statute.

194. Article 21 of the Rwanda Statute is virtually identical. The 1993 Report of the Secretary-General on the Yugoslavia Statute, *supra*, n. 19, para. 108, explained the reason for Article 22:

> "In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape or sexual assault. Such measures should include, but should not be limited to the conduct of *in camera* proceedings, and the protection of the victim's identity."

195. Rule 75 of the Yugoslavia Rules provides:

> "(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witnesses concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
>
> (B) A Chamber may hold an *in camera* proceeding to determine whether to order:
>
> (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:
>
> (a) expunging names and identifying information from the Chamber's public records;
>
> (b) non-disclosure to the public of any records identifying the victim;
>
> (c) giving of testimony through image- or voice-altering devices or closed

circuit television; and

(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid harassment or intimidation."

Rule 75 of the Rwanda Rules is identical.

196. Rule 79 (A) of the Yugoslavia Rules provides:

"The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

(iii) the protection of the interests of justice."

Rule 79 (A) of the Rwanda Rules is identical.

197. The ILC commentary to Article 38 states that "[t]he overriding obligation of the Trial Chamber is to ensure that every trial is fair and expeditious, and is conducted in accordance with the Statute, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

198. Yugoslavia Statute, Art. 21 (3); Rwanda Statute, Art. 20 (3).

199. Human Rights Committee, General Comment 13, para. 7, UN Doc. HRI/GEN/1.

200. Article 21 (3) of the Yugoslavia Statute also omits this guarantee, replacing "according to law" with "according to the provisions of the present Statute". Article 20 (3) of the Rwanda Statute is similarly flawed.

201. Nowak, *supra*, n.45, p. 255.

202. Human Rights Committee, General Comment 13, para. 8 ("Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention."); Nowak, *supra*, n. 45, p. 255 ("It also applies to persons at liberty.").

203. Rule 52 of the Yugoslavia Rules provides that, "[s]ubject to Rule 53, upon confirmation by a Judge of a Trial Chamber, the indictment shall be made public." Rule 53 (A) provides that "[i]n exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order." Rule 53 (B) provides that "[w]hen confirming an indictment the Judge may, in consultation with the Prosecutor, ordet that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused." However, it is troubling that the wording of Rule 53 (C) would appear to permit concealing parts of the indictment from even the accused:

"A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or

> information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice."

Rules 52 and 53 of the Rwanda Rules are identical. Any concealment of part of the indictment from an accused to protect a victim or witness should not continue any longer than necessary to ensure effective protection and should be revealed to the accused in sufficient time to prepare for trial.

204. Andrew Kelly, "U.N. tribunal to arrest suspects without warning", Reuter, Rtw 06/30 1016, 30 June 1997.

205. Human Rights Committee, General Comment 13, para. 8; Nowak, *supra*, n. 45, p. 255; Harris, Boyle & Warbrick, *supra*, n. 184, p. 251.

206. Human Rights Committee, General Comment 13, para. 8; Nowak, *supra*, n. 45, p. 266; Harris, Boyle & Warbrick, *supra*, n. 184, p. 251.

207. Human Rights Committee, General Comment 13, para. 8; Nowak, *supra*, n. 45, p. 266; Harris, Boyle & Warbrick, *supra*, n. 184, p. 251-252.

208. *Prosecutor v. Tadif*, Decision on the Defence Motion on the Form of the Indictment, Case No. IT-95-1-T, 14 November 1995 (Judges McDonald (Presiding), Stephen and Vorhah), p. 12.

209. *Prosecutor v. Delif*, Decision on Motion by the Accused Hazim Deli*f* based on Defects in the Form of the Indictment, IT-95-21-T, 15 November 1996 (Judges McDonald (Presiding), Stephen and Vohrah), para. 14.

210. Rule 93 of the UN Standard Minimum Rules provides in relevant part:

> "For the purposes of his defence, an untried prisoner shall be allowed . . . to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official."

Principle 8 of the UN Basic Principles on the Role of Lawyers states:

> "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

Principle 18 of the UN Body of Principles provides:

> "1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
>
> 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
>
> 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or

> restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order."
>
> 4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
>
> 5.Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime."

211. Yugoslavia Rules, Rule 97; Rwanda Rules, Rule 97.

212. Principle 5 states: "Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their choice upon arrest or detention or when charged with a criminal offence."

213. *Kelly v. Jamaica*, Communication No. 232/1987, Views adopted 8 April 1991, Report of the Human Rights Committee, 46 GAOR (Supp.) No. 40, UN Doc. A/46/40, para. 5.10.

214. 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.

215. As a leading international law expert has stated,

> "the right to examine or cross-examine an adverse witness cannot be effective without the right to know the identity of adverse witnesses. It is an almost impossible task to cross-examine an adverse witness effectively without knowing that witness's name, background, habitual residence or whereabouts at the time to which he testifies - or, indeed, to prepare to conduct such an examination in a professionally responsible manner."

Monroe Leigh, "The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused", 90 Am. J. Int'l L. (1996), pp. 235, 236.

216. See *Prosecutor v. Tadif*, Decision on Prosecutor's Motion to Withdraw Protective Measures for Witness "L", Case No. IT-94-I-T, 5 December 1996 (Gabrielle Kirk McDonald, Presiding) (ending protective measures for a prosecution witness after an investigation by the defence demonstrated that the witness had lied).

217. The use of affidavits in the place of live testimony at the International Military Tribunals at Nuremberg and Tokyo were widely criticized. Rule 71 (A) of the Yugoslavia Rules provides that "[a]t the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial", but Rule 71 (C) ensures that the other party "shall have the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken". Rules 71 (A) and (C) of the Rwanda Rules are identical.

218. Witness Protection Act 1994, consolidated to 29 April 1997, Section 10. Section 13 of this act permits assistance to allow the witness to establish a new identity; protection of the witness; relocation, accommodation, transport of property and living expenses for the witness and, if appropriate, the witness's family; assistance in obtaining employment and education; and other assistance with a view to ensuring that the witness becomes self-sustaining. The act will have to be amended to accommodate protection requests from an international criminal court.

219. Italian witness protection programs provide economic assistance, security and changes of identity, and they permit the witness to be cross-examined through video conferencing facilities. Professor Guilio Illumati,

"The International Crimnal Court and the Criminal Justice system of Italy", paper submitted to the University of Nottingham workshop, p. 5.

220. See 18 U.S.C.A. section 3521 (witness relocation and protection). Persons in this program may be given suitable documents to establish a new identity or otherwise protect the person, housing, transportation to a new secure location, payment of living expenses, help in obtaining employment or other necessary services to assist the person in becoming self-sustaining. Not a single person who remained in this program has been harmed and an overall conviction rate of 89% has been obtained as a result of protected witness testimony. United States Marshals Service, Fact Sheet: Witness Security, USMS Pub. No. 30, 7 July 1995.

221. Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993, p. 98. The Constitutional Court found this law unconstitutional in part. Under that law, when the judge believed that the identity of a witness should be kept confidential to guarantee their safety, the judge could "order that any measure o[r] mechanism required to ensure their confidentiality and safety be taken when the evidence is submitted and that the cross-examination, requests for clarification of rulings, or any other similar petition be made and processed in writing." *Id.* Amnesty International has stated that "[t]he right to a fair trial is severely undermined by the Regional Justice system" and that "[t]he use of secret witnesses by the prosecution whose accusations cannot be cross-examined adequately by the defence violates the right to examine witnesses". *Colombia: A summary of Amnesty International's concerns related to the Colombian Government's implementation of the ICCPR* (AI Index: AMR 23/17/97), pp. 16 to 17. Amnesty International has criticized the use of secret witnesses in inquests, where the family of the victims were unable to learn the identity of the intelligence, police and military witnesses or observe their demeanour, *United Kingdom: Investigating lethal shootings: The Gibraltar inquest* (AI Index: EUR 45/02/89), p. 22, and the use of secret judges in Peru. See, for example, *Peru: Government persists in retaining unfair trial procedures* (AI Index: AMR 46/25/96), p. 7 (calling for the Human Rights Committee recommendation to abolish the system of secret judges to be implemented).

222. *Van Mechelen v. The Netherlands*, Case No. 55/1996/674/861-864, Judgment, European Court of Human Rights, 23 April 1997, para. 58. The defence was not only unaware of the identity of the police witnesses, but was "prevented from observing their demeanour under direct questioning, and thus from testing their reliability". *Id.* para. 59. The trial court had failed to assess the threat of reprisals and had based its decision exclusively on the seriousness of the crimes committed. The judge, who knew the identity of the witnesses, questioned them and made an assessment of their reliability and credibility. The European Court of Human Rights concluded that these "measures cannot be considered a proper substitute for the possibility of the defence to question the witnesses in their presence and make their own judgment as to their demeanour and reliability". *Id*., para. 62.

223. "Measures granted to the Prosecutor for the protection of witnesses against Elie Ndayambaje", Press Release, UN Doc. ICTR Info 9-2-039, Arusha, 11 March 1997 (listing cases in which it had issued such protection orders).

224. *Prosecutor v. Tadif*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995 (Judges McDonald and Vohrah).

225. *Id*., Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses. The decision has been severely criticized, see Monroe Leigh, "The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused", 90 Am. J. Int'l L. (1996), p. 235, and "Witness Anonymity Is Inconsistent with Due Process", 91 Am. J. Int'l L. (1997), p. 80, and strongly defended. See Christine M. Chinkin, "Due Process and Witness Anonymity", 91 Am. J. Int'l L. (1997), p. 75.

226. *Prosecutor v. Blaškif*, Decision on the Application of the Prosecutor dated 17 October 1996, Requesting Protective Measures for Victims and Witnesses, Case No. IT-95-14-T, 5 November 1996, paras 40, 44.

227. *Id*., paras 24 - 25.

228. See Yugoslavia Rules, Rule 89 (A); Rwanda Rules, Rule 89 (A).

229. See Yugoslavia Rules, Rule 89 (B); Rwanda Rules, Rule 89 (B).

230. See Yugoslavia Rules, Rule 89 (D). There is no equivalent Rwanda Rule. Rule 89 (D) is permissive, rather than mandatory, and would permit the court to admit evidence even where its probative value was substantially outweighed by the need to ensure a fair trial. Such an outcome would be unacceptable. Similarly, Rule 89 (C) of the Yugoslavia Rules and Rule 89 (C) of the Rwanda Rules providing that Trial Chambers "may admit any relevant evidence which they deem to have probative value", which are modelled on Article 19 of the Nuremberg Charter, are too broad and could lead to the use of *ex parte* affidavits against the accused as well as the use of evidence which was inconsistent with the statute and fair trial standards. See Morris & Scharf, *supra*, n. 17, p. 260, n. 680.

231. See Yugoslavia Rules, Rule 90 (E); Rwanda Rules, Rule 90 (E).

232. Rule 92 of the Yugoslavia Rules and Rule 92 of the Rwanda Rules, by presuming that confessions made in accordance with tribunal rules are voluntary are inconsistent with the presumption of innocence. See Section IV.C.1.n above concerning the prohibition of compelled testimony and coerced confessions.

233. Rule 93 of the Yugoslavia Rules and Rule 93 of the Rwanda Rules adopt a standard concerning evidence of a consistent pattern of conduct which will have to be interpreted in a way which is fully consistent with the presumption of innocence and the heavy burden of proof on the prosecution to prove the guilt of the accused beyond a reasonable doubt according to law. The court will have to consider this question carefully in drafting a rule on the circumstances when consistent patterns of conduct may be used. Two leading commentators have sounded a note of caution on the use of such evidence. See Morris & Scharf, *supra*, n. 17, p. 262. The have suggested, however, that "pattern of conduct evidence may be admissible for other purposes, such as to show motive, opportunity or identity" or "to prove an element of the crime". *Id*.

234. See Yugoslavia Rules, Rule 94; Rwanda Rules, Rule 94. These rules permit the tribunals to take notice of obvious facts, such as the date of an eclipse, but are not as broad as Article 21 of the Nuremberg Charter, which permitted judicial notice of government and United Nations reports, including those concerning investigations of war crimes, see Morris & Scharf, *supra*, n. 17, p. 264, or as the practice of the International Court of Justice. See *Prosecutor v. Tadif*, Case No. IT-94-1-AR72, 7 September 1995, transcript of hearing, pp. 107-110 (Appeals Chamber).

235. See Yugoslavia Rules, Rule 96; Rwanda Rules, Rule 96. Rule 96 of the Yugoslavia Rules has been radically changed several times. It may be wise to address the question of evidence in such cases in the rules rather than the statute to permit the permanent international criminal court to take advantage of experience in trials in a rapidly developing area of international law. For the history of these changes, see Morris & Scharf, *supra*, n. 17, pp. 263-264.

236. See Yugoslavia Rules, Rule 97; Rwanda Rules, Rule 97.

237. The latest version of Rule 96 of the Yugoslavia Rules provides:

> "In cases of sexual assault:
>
> (i) no corroboration of the victim's testimony shall be required;

(ii) consent shall not be allowed as a defence if the victim

(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or

(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;

(iv) prior sexual conduct of the victim shall not be admitted in evidence."

238. The duty of states to provide information requested in a subpoena is being addressed by a Trial Chamber of the Yugoslavia Tribunal. See *Prosecutor v. Blaškif*, Order to Bosnia and Herzegovina to Comply with a Subpoena and Order to Croatia to Comply with a Subpoena, Case No. IT-95-14-T, 14 February 1997

239. See Yugoslavia Rules, Rule 70; Rwanda Rules, Rule 70.

240. 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." Rule 95 of the Yugoslavia Rules, entitled "Evidence Obtained by Means Contrary to Internationally Protected Human Rights", was modelled on the 1993 ILC draft statute and provided: "Evidence obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights shall not be admissible." This rule was amended on the basis of proposals by the United Kingdom and the United States to "put parties on notice that although a Trial Chamber is not bound by national rules of evidence, it will refuse to admit evidence - no matter how probative - if it was obtained by improper methods". Second Annual Report of the Yugoslavia Tribunal, UN Doc. A/50/365, para. 26, n. 9.

241. See also Morris & Scharf, *supra*, n. 17, p. 261.

242. Rule 62 (iii) of the Rwanda Rules is identical.

243. *Prosecutor v. Erdemovif*, Sentencing Judgement, Case No. IT-96-22-T (Judges Jorda (Presiding), Odio-Benito and Riad), 29 November 1996, paras 10-20.

244. Rule 92 of the Yugoslavia Rules appears to be inconsistent with the presumption of innocence because it presumes that confessions made in accordance with the Rules are voluntary: "A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 [concerning questioning of the accused] were strictly complied with, be presumed to have been free and voluntary, unless the contrary is proved." Rules 92 and 63 of the Rwanda Rules are the same as the corresponding Yugoslavia Rules. Rule 92 does not address confessions by suspects.

245. For a discussion of the rights of suspects to interpretation and translation, see Section IV.B.1.e above, and the rights of the accused to interpretation or translation at the time of arrest of his or her rights, see Section IV.C.1.o above.

246. The European Court of Human Rights, interpreting Article 6 (3) (e) of the European Convention on Human Rights, which is essentially the same as Article 14 (3) (f) of the ICCPR, has held that the accused has a right to have all documents related to the written trial translated and all oral statements interpreted as the accused must

be able to understand them in order to have a fair trial. See *Luedicke* Case, Series A, No. 29 (1978), para. 48.

247. Rule 3 (B) of the Yugoslavia Rules provides that "[a]n accused shall have the right to use his own language". Rule 3 (B) of the Rwanda Rules is identical. In contrast to others appearing before the tribunals, who may only use their own language if they do "not have sufficient knowledge of either of the two working languages" (English and French), the accused may use his or her own language even if he or she has "sufficient knowledge" of either of these languages. See Yugoslavia Rules, Rule 3 (C); Rwanda Rule, Rule 3 (C). Rule 3 (D) of the Yugoslavia Rules and Rule 3 (D) of the Rwanda Rules provide that the court may authorize counsel or an accused to use a language other than one of the working languages.

248. In that case the Trial Chamber included the following, only some of which had to be translated into the language of the accused:

> "(1) all items of evidence, including the material submitted in support of the indictment, shall be translated by the Registry into the language of the accused;
>
> (2) discovery of documents shall be made in the language in which the item was originally obtained if that is the language of the accused or in one of the working languages of the International Tribunal, and any translation desired shall be the responsibility of the party requesting;
>
> (3) all motions, written arguments and other documents shall be filed in one of the working languages of the International Tribunal;
>
> (4) all correspondence to or from an organ of the International Tribunal, including the Office of the Prosecutor, shall be in one of the working languages;
>
> (5) counsel for the accused may use the language of the accused during all proceedings before the Trial Chamber;
>
> (6) Transcripts of proceedings before the International Tribunal shall be made available in one or both the working languages, on request;
>
> (7) all Orders and Decisions issued by the International Tribunal shall be filed in both working languages and translated by the Registry into the language of the accused".

„elebifi case, Decision on Defence Application for Forwarding the Documents in the Language of the Accused (Delalif), IT-96-21-T (Judges McDonald (Presiding), Stephen and Vohrah), 25 September 1996, pp. 8 to 9. Although audio or video recordings of proceedings would be available to the accused with interpretation, these would not be sufficient to ensure that the accused understood significant parts of the proceedings. The court's rules should ensure the availability of competent translations of all relevant documents.

249. Rule 76 of the Yugoslavia Rules requires that, "[b]efore performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality." Rule 76 of the Rwanda Rules is identical.

250. Presumably, the drafters intended that translations of documents, as well as interpretations of oral statements, should be competent. Nevertheless, it would be better to make it clear that "translations as are necessary to meet the requirements of fairness" also must be competent.

251. 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 Marc J. Bossuyt, *Guide to the "Travaux préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers 1987), pp. 316-318. The Trial Chamber in the *Tadif* case reached the same conclusion:

> "The principle of *non-bis-in-idem*, appears in some form as part of the international legal code of many nations. Whether characterized as *non-bis-in-idem*, double jeopardy or autrefois acquit, autrefois convict, this principle normally protects a person from being tried twice or punished twice for the same acts. This principle has gained a certain international status since it is articulated in Article 14 (7) of the Internatioanal Covenant on Civil and Political Rights as a standard of fair trial, but it is generally applied so as to cover only double prosecution in the same State."

Prosecutor v. Tadif, Decision on Defence Motion on the Principle of *non-bis-in-idem*, IT-94-1-T, 14 November 1995, para. 9.

252. The Trial Chamber in the *Tadif* case held that the fact that a criminal investigation had begun in Germany against the suspect did not mean that the request by the Yugoslavia Tribunal Prosecutor to the German authorities to defer those proceedings implicated the principle: "The deferral which occurred in this case does not raise a genuine issue of *non-bis-in-idem* according to the terms of the Statute, for this principle clearly applies only in cases where a person has already been tried." *Prosecutor v. Tadif*, Decision on Defence Motion on the Principle of *non-bis-in-idem*, IT-94-1-T, 14 November 1995, para. 10.

253. 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, para. 504, UN Doc. A/47/10 (1992).

254. For many of the same reasons, the drafters of the Yugoslavia Statute excluded trials *in absentia*. Morris & Scharf, *supra*, n. 17, p. 215.

255. The ILC 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).

256. The ILC commentary to Article 30 (3) makes clear that the absence of the accused could be considered deliberate if the only notice which the accused received was through a notice in the press or notice to the accused's government, if the accused was in that government's control. Hence, there is no requirement that the accused receive actual notice of the indictment.

257. In the latter situation, the exclusion should continue only for as long as the accused indicates that he or she intends to disrupt the trial and the accused should be able to observe the proceedings through a video link, with an opportunity to communicate with counsel during the proceedings or at other times. Rule 80 (B) of the Yugoslavia and Rwanda Rules provide for trials to continue in the face of such disruption, but without the safeguards suggested.

258. UN Doc. S/25704 (1993), para. 101.

259. Yugoslavia Statute, Article 25; Rwanda Statute, Article 24. See also Yugoslavia Rules, Rules 107 to 118; Rwanda Rules, Rules 107 to 119.

260. A similar procedure exists in the United Kingdom for England and Wales. Section 36 of the Criminal Justice Act 1972 permits the Attorney-General to refer a point of law to the Court of Appeal when a person tried on an indictment has been acquitted. The reference has no effect on the trial or the acquittal and the identity of the acquitted person is not disclosed. The decisions on reference have "strong persuasive force" and provide "authoritative guidance in a number of areas of criminal law". S.H. Bailey & M.J. Gunn, *Smith & Bailey on the Modern English Legal System* (London: Sweet & Maxwell 2d ed. 1991), p. 844.

261. The scope of the decisions which may be appealed under Article 49 (1) of the ILC draft statute is not clear. Yugoslavia Rules, Rule 72 (B). Rule 72 (B) of the Rwanda Rules unduly restricts the scope of interlocutory appeals..

262. Morris & Scharf, *supra*, n. 17, p. 296.

263. Article 25 of the Rwanda Statute has an identical guarantee.

264. Rule 119 of the Yugoslavia Rules and Rule 120 of the Rwanda Rules, however, provide that the new fact "could not have been discovered through the exercise of due dilegence" by the moving party.

265. Rule 121 of the Yugoslavia and Rwanda Rules permits appeal of a judgment of a Trial Chamber on review.

266. Rules 103 and 104 of the Rwanda Rules are similar to the corresponding Yugoslavia Rules.

267. *Prosecutor v. Erdemovif*, Sentencing Judgment, Case No. IT-96-22-T, 29 November 1996, paras 68-75.

268. This is a stronger guarantee than in Article 27 of the Yugoslavia Statute, 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". Rule 26 of the Rwanda Statute has an identical requirement. The Detention Rules of the Yugoslavia Tribunal and of the Rwanda Tribunal have significant - but incomplete - safeguards for detainees. Presumably the category in the Preamble of the Detention Rules of the Yugoslavia Tribunal, "any other person detained on the authority of the Tribunal" is intended to include persons convicted by the Yugoslavia 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 Yugoslavia Tribunal or in the custody of national authorities. The Detention Rules of the Rwanda Tribunal are essentially the same.

269. Although Article 28 of the Yugoslavia Statute and Article 27 of the Rwanda Statute are similarly flawed because *eligibility* for pardon or commutation of sentence depends on national law and notice by the state of imprisonment to the court, it provides that *the decision* will be made "on the basis of the interests of justice and the general principles of law". These provisions are implemented in Rules 123 to 125 of the Yugoslavia and Rwanda Rules.