@The quest for international justice

I. TIME FOR A PERMANENT INTERNATIONAL CRIMINAL COURT

Governments from around the world have a rare opportunity to enhance the system of international justice. They can take decisions at the 50th session of the United Nations (UN) General Assembly (which opens on 19 September 1995) which would lead to the creation of a permanent international criminal court. Nearly half a century ago member states of the newly founded UN pledged themselves to create a new system of international justice. They recognized that an international criminal court was an essential element in building respect for human rights throughout the world, but the court was never set up.

Over the past five years, fuelled by outrage at the atrocities in the former Yugoslavia, there has been renewed progress towards establishing a permanent international criminal court. The International Law Commission (ILC), a body of experts appointed by the UN General Assembly to codify and develop international law, has prepared a revised draft statute for the court. Amnesty International is campaigning for a permanent international criminal court to be established no later than 24 October 1996; this would be a fitting climax to the UN's 50th anniversary year.[1] It requires a decision by the 50th session of the UN General Assembly this year to convene an international conference of states next year to turn the draft statute into a treaty. As soon as enough states have signed and ratified the treaty and it enters into force, the court would be formally established. If this opportunity is rejected, any prospect of setting up the court could be delayed until the 21st century.

An international criminal court would be the living embodiment of the fundamental principles of international criminal law. The court would be able to hold individuals personally responsible if they had planned, ordered or committed gross crimes under international law. It would prosecute them whether the crimes were committed in war or peace and regardless of whether the perpetrators were leaders or subordinates, civilians or members of military, paramilitary or police forces. An international criminal court would complement prosecutions in national courts, acting when states were unwilling or unable to bring perpetrators to justice.

The international criminal court could bring to justice those accused of the most heinous crimes in proceedings which guarantee all the internationally recognized safeguards for fair trials adopted by the international community over the past half century. It would exclude the death penalty. It could therefore serve as an example for courts throughout the world.

1On 24 October 1945, the UN Charter received the required number of ratifications by states in order to enter into force.

As part of its campaign for a permanent international criminal court, Amnesty International has published a report, *Establishing a just, fair and effective international criminal court*, which makes detailed recommendations aimed at ensuring that the court will be independent and its procedures fair and effective.[2] Amnesty International representatives have attended international governmental meetings and have helped to organize meetings of non-governmental organizations about this issue. For those with access to international computer networks, Amnesty International has helped set up a public computer conference which publishes all UN documents on the international criminal court and the two *ad hoc* international tribunals set up by the UN.[3]

Amnesty International believes that the current draft statute goes a long way towards creating a court which will meet the highest standards of justice and fairness. In some aspects, however, the statute needs to be strengthened. Amnesty International's main recommendations are set out in section II below.

The main areas where Amnesty International believes improvements should be made are:

■ the mechanism by which cases are brought to the court should be broader, more independent of states and not subject to Security Council veto:- the Prosecutor should be able to investigate and prosecute cases on his or her own initiative, based on information from any source, including victims;
■ the jurisdiction of the court is too restricted:- the court should have automatic jurisdiction over a common and broad core of crimes, including all crimes against humanity in peace and war and serious violations of humanitarian law in all types of conflict. The court should be able to exercise its jurisdiction over people suspected of crimes under international law, even if other states would also have jurisdiction;
■ the court should ensure that all pre-trial, trial and appeal procedures meet the highest internationally recognized standards. These standards should apply to all suspects and accused, whether they are in custody or not, and should apply to detainees held by national authorities.

Amnesty International's worldwide membership is urging governments, non-governmental organizations and all concerned individuals to support the establishment of the court and to strengthen its draft statute, to ensure that it is a model of justice, fairness and effectiveness.

1. The necessity for a permanent international criminal court

Impunity
Amnesty International believes that perpetrators of human rights violations must be brought to justice in order to prevent further abuses. There is a clear link between continuing human rights violations and impunity -- exemption from punishment.

Impunity often allows sporadic violations of human rights to develop into patterns of abuse. Impunity brings contempt for the law and encourages even more brazen human rights violations by people who feel

2The present paper is a shorter and updated version of the detailed report published by Amnesty International in October 1994, *Establishing a just fair and effective international criminal court*, (AI Index: IOR 40/05/94). Copies of both documents are available at Amnesty International sections throughout the world and through Amnesty International's International Secretariat, 1 Easton Street, London, WC1X 8DJ, UNITED KINGDOM.
3This computer conference is on the APC network, at UN.ICC. For further information, contact: Majordomo-Owner@igc.org.

that they are above the law. By contrast, when the authorities bring perpetrators to justice, they make it plain that violations of human rights will not be tolerated. Sweeping aside the question of responsibility only leads to renewed cycles of violence and impunity, sometimes immediately, sometimes years later.

The failure of national judicial systems

National governments bear the primary responsibility for protecting people from human rights abuses. They must investigate alleged violations of human rights and bring to justice those responsible. Unfortunately, around the world, Amnesty International sees governments allowing perpetrators of human rights violations to evade justice.

The effects of allowing human rights abuses to go unpunished is evident in every region of the world. While the world's focus has been on atrocities in Rwanda, little has been done to bring to justice those responsible for more than 50,000 deliberate and arbitrary killings in neighbouring Burundi following a coup attempt in October 1993. A year and a half later, killings there continue unchecked, and the death toll is rising daily. In Haiti, thousands of women and men, including human rights monitors, trade unionists, journalists and members of popular grassroots and religious groups were victims of widespread and systematic abuses in the years after the 1991 military coup. In Argentina, a presidential pardon and a law allowing "due obedience" to be used as a defence mean that although senior members of the government were tried and sentenced for human rights crimes, those convicted were set free and few of

those responsible for more than 10,000 "disappearances" will ever be held accountable for their crimes. In the Philippines, there have been no effective steps to prosecute those responsible for thousands of "disappearances" and extrajudicial executions in that country over more than two decades. Widespread "disappearances" and extrajudicial executions have taken place in the civil war which began in Tadzhikistan in 1992, but no effective measures have been taken to bring those responsible to justice. In Iraq, Kurds in the north of the country and Shi'a in the south were massacred with impunity by government troops in the aftermath of the Gulf War. Extrajudicial executions have continued since then in government controlled areas.

Many of the atrocities that gain international attention are committed during armed conflicts. Some are international conflicts like the invasion of Kuwait by Iraq. Many more are internal conflicts like those in Algeria, Angola, Colombia, India (Jammu and Kashmir), Liberia, Russia (the Chechen Republic), Peru, Sudan and Turkey. In other countries gross and systematic violations outside the context of armed conflict have gone largely unpunished, like torture in Saudi Arabia, Iran and Myanmar, extrajudicial executions in Burundi and Uganda and "disappearances" in Guatemala, Morocco and Yemen.

When people accused of crimes against humanity or violations of humanitarian law have been tried, they have not always received a fair trial. For example, recent trials in the former Yugoslavia have not met international standards of fairness. In some countries, trials have been no more than shams, designed to acquit the guilty.

Universal jurisdiction

There is an international dimension to the search for justice that goes beyond the laws of individual states. Many human rights violations are so heinous and so shock the conscience of humankind that they are crimes under international law, regardless of whether the acts are criminal under national laws. Crimes under international law include genocide and other crimes against humanity such as systematic torture, "disappearances" and extrajudicial executions, and serious violations of humanitarian law such as hostage-
taking and forced transfer of civilians. Individuals can be held criminally responsible for these acts under international law.

It does not matter how long ago these crimes under international law occurred or to which countries the perpetrators have fled. States who find on their territory people suspected of such crimes have the authority -- according to the principle of universal jurisdiction -- to prosecute them or to extradite them to a country which will do so. In practice, however, states rarely exercise universal jurisdiction or extradite suspects.

Direct enforcement of international criminal law by states acting collectively has been even more exceptional. The Nuremberg and Tokyo war crimes tribunals after the Second World War, and the two *ad hoc* tribunals recently set up by the UN in response to atrocities in former Yugoslavia and Rwanda, have been rare expressions of a collective will to assert the rule of law and minimum standards of humane conduct. However, these temporary tribunals do not offer a solution to a problem which is long-
term and global: the need to bring to justice individuals from anywhere in the world who are responsible for gross violations of international human rights and humanitarian law.

2. A long-standing commitment

The idea of establishing a permanent international criminal court is not new. After the First World War the Treaty of Versailles provided for an international tribunal to try the German Emperor, and this was followed by several more unsuccessful proposals for a permanent international criminal court. The war crimes tribunals at Nuremberg and Tokyo, established to prosecute those who committed atrocities during the Second World War, raised expectations that a permanent international criminal court with stronger guarantees of the right to a fair trial would soon be established. These expectations have not yet been met. Unless the UN General Assembly takes action this year, they may not be fulfilled in this century.

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3. The former Yugoslavia and Rwanda: *ad hoc* responses

Atrocities committed in the former Yugoslavia and mass killings in Rwanda provoked widespread public outrage and prompted international action.

In February 1993 the UN Security Council decided to set up an *ad hoc* tribunal to hear cases involving serious violations of humanitarian law committed in the former Yugoslavia since 1991. Based in the Hague, the International Criminal Tribunal for the former Yugoslavia consists of three independent branches: the judicial branch, with 11 judges, comprising two Trial Chambers and an Appeals Chamber; the Prosecutor; and the Registry, which is responsible for administration. It has jurisdiction to conduct trials for grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, and crimes against humanity, including genocide.

In November 1994 the former Yugoslavia tribunal confirmed an indictment against a guard at the Susica camp in Bosnia-Herzegovina for grave breaches of the Geneva Conventions, other violations of international humanitarian law and crimes against humanity. The tribunal asked Germany to defer proceedings against another guard alleged to have committed similar crimes in Omarska camp. In February 1995 the tribunal indicted 21 people, including the Omarska camp guard, for acts of genocide, other crimes against humanity and violations of the laws and customs of war in the former Yugoslavia. Arrest warrants were issued and one of the accused, the Omarska camp guard, was transferred to the tribunal by Germany. In May 1995 the tribunal asked Bosnia-Herzegovina to transfer legal proceedings against other individuals (including Bosnian Serb leaders and Bosnian Croats) to the tribunal.

In November 1994 the UN Security Council decided to set up an *ad hoc* international tribunal to try people responsible for genocide, crimes against humanity and violations of humanitarian law governing internal conflict committed in Rwanda between 1 January and 31 December 1994. The tribunal's jurisdiction also covers such crimes committed by Rwandese in neighbouring states. The tribunal, based in Arusha, Tanzania, shares its Prosecutor and Appeals Chamber with the tribunal for the former Yugoslavia. In December 1994 the Prosecutor and a small team of investigators and lawyers went to Rwanda to begin investigations. In June 1995, six judges elected by the UN General Assembly were sworn in to hear cases in the two Trial Chambers of the tribunal for Rwanda. However, these judges did not take up their duties full-time. As a result, there may be delays in the international supervision of the pre-trial detention of over 43,000 potential suspects currently in custody in Rwanda.

The powers of these two *ad hoc* tribunals will be of little use unless they receive resources and political support from states and the UN. Both tribunals have been beset by financial problems. On the second anniversary of the establishment of the tribunal for the former Yugoslavia, only eight out of the UN's 185 member states had informed the tribunal that they had adopted laws enabling their authorities to cooperate with it; three told the tribunal no legislation was needed. No state is known to have adopted such legislation yet for the International Tribunal for Rwanda. Without such laws, suspects cannot be handed

over to the court for trial. Germany did not enact legislation permitting the transfer of non-nationals to the custody of the tribunal for the former Yugoslavia until April 1995, which caused a five-month delay in the transfer of a defendant to the custody of the tribunal.

Amnesty International has supported the establishment of these two *ad hoc* tribunals and submitted recommendations aimed at ensuring that they are just, fair and effective.[4] However, these two tribunals are neither permanent in nature nor global in scope. They are not a substitute for a permanent international court able to try people accused of gross violations of humanitarian and human rights law wherever the crimes are committed.

II. THE INTERNATIONAL CRIMINAL COURT MUST BE JUST, FAIR AND EFFECTIVE

The permanent international criminal court should stand as a model for justice throughout the world. It should bring to justice people accused of committing the most heinous crimes in proceedings which guarantee the accused all of the safeguards for fairness adopted by the international community. Amnesty International believes that the international criminal court would be just, fair and effective if some of the provisions in its statute were strengthened or clarified.

Amnesty International envisages a court with a flexible number of appointed judges, some of whom would hear only trials, others only appeals. There should be a separate investigation and prosecution body to carry out investigations, to decide whether to indict and to present the prosecution evidence during trials. A separate public defender's office, able to handle the complex legal matters likely to arise, should be on hand to represent suspects and defendants unable to afford a competent lawyer. A secretariat should provide services, including investigators and forensic experts, to support the court.

1. The crimes covered by the court

The court must be able to try people on a broad range of crimes under international law. These crimes should be clearly defined in the statute of the court and it should also be made clear what defences are allowable.

Article 20 of the draft statute of the permanent international criminal[5] court gives the court competence over:

- genocide[6]
- the crime of aggression[7]

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4 Amnesty International issued two papers making recommendations on the essential elements of an international criminal court which would try human rights and humanitarian law violations in former Yugoslavia, *Memorandum to the United Nations: The question of justice and fairness in the international war crimes tribunal for the former Yugoslavia*, (AI Index: EUR 48/02/93), and *From Nuremberg to the Balkans: Seeking justice and fairness on the international war crimes tribunal for the former Yugoslavia* (AI Index: EUR 48/01/93). The organization's report *Moving forward to set up the war crimes tribunal for the former Yugoslavia* (AI Index: EUR 48/03/93) is a preliminary assessment of the Statute of the *ad hoc* tribunal.

5 The "draft statute" refers to the 1994 final draft statute for a permanent international criminal tribunal prepared by the International Law Commission and submitted to the 1994 UN General Assembly.

6 Genocide is defined as killing or causing serious bodily or mental harm to members of a national, ethnic racial or religious group, or when physical conditions of living are imposed on a group, with the intention of completely or partly destroying the particular group as such.

7 The Charter of the Nuremberg Tribunal provided that "planning, preparation, initiation or waging a war of aggression or a war in violation of international treaties, agreements or assurances" were crimes against humanity. Subsequent efforts to define the crime of aggression have so far been unsuccessful, although in 1974 the UN General Assembly

- serious violations of the laws and customs applicable in armed conflict
- crimes against humanity
- other crimes of international concern defined or identified in treaty provisions listed in an annex to the statute. These crimes include grave breaches of the 1949 Geneva Conventions and torture, as well as certain drug trafficking offences and offences related to terrorism.

Amnesty International believes that the draft statute is too restrictive in setting out the crimes over which the court would have jurisdiction. It should include more comprehensive and clear definitions of the crimes within the court's competence.

The statute should be amended to make clear that the court has jurisdiction over all crimes against humanity whether they are committed in peace or war. The statute should give the court jurisdiction over acts prohibited in both international conflicts and internal armed conflicts. The statute should also make clear that the court has jurisdiction over systematic or widespread torture, "disappearances" and extrajudicial executions.

2. Acceptance of jurisdiction by states

Amnesty International believes that in order to be truly effective, the court must be able to act whenever a state is unable or unwilling to do so. The statute of the court should require that states must automatically accept the court's jurisdiction over a common set of crimes as soon as they ratify or accede to the treaty establishing the court.

At present, under the statute, the international criminal court has inherent jurisdiction only over the crime of genocide. Any state which has ratified the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) *and* has become a party to the court will automatically be able to lodge a complaint in the court alleging the crime of genocide. More than half the member states of the UN have ratified the Genocide Convention.

Under the draft statute, however, states parties may choose which crimes other than genocide they agree to submit to the court's jurisdiction.

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adopted a political definition of aggression. It stated that aggression was "the use of armed force by a State against the sovereignty , territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations".

In addition, under the draft statute, in order for the court to be able to try an individual for a crime other than genocide, **both** the state which has custody of the suspect **and** the state on whose territory the crime occurred must have agreed to the court's jurisdiction over that crime. The very states whose officials are most likely to be responsible for such crimes would therefore be able to veto the court's power to try a suspect for crimes other than genocide.

The statute should be amended to ensure that the court has jurisdiction over a broader set of crimes than genocide alone. This set of core crimes should include crimes against humanity, including extrajudicial executions, "disappearances" and torture, and serious violations of international humanitarian law. The court should also be given jurisdiction over a suspect provided the suspect is in the custody of a state which has consented to the court's jurisdiction. This would be consistent with the principle of universal jurisdiction.

3. Independent mechanism for bringing cases before the court

The Prosecutor should be able to initiate investigations and begin prosecutions at any time. He or she should be able to investigate any alleged crimes over which the court has jurisdiction, based on information from any source, including victims, their families, and non-governmental organizations.

Unfortunately, the draft statute limits the Prosecutor's authority to initiate investigations and proceedings to two situations. The Prosecutor may act only when:
- a state has lodged a complaint; or
- when the UN Security Council has referred a situation involving a threat to peace and security.

Once the state complaint has been lodged or the Security Council has referred a situation to the Prosecutor, it is then up to the Prosecutor to decide whether to seek an indictment.

Amnesty International is concerned that few states are likely to bring complaints against nationals of other states. Such complaints are likely to be seen as politically hostile, and could damage a state's foreign relations. They are also difficult and costly to prepare. Very few states have availed themselves of existing mechanisms for bringing complaints against individuals from other states which exist in various human rights treaties.[8]

The draft statute gives the UN Security Council, a political body, the power to prevent the court from trying two types of cases:
- no state complaints against individuals directly related to an act of aggression by another state may be brought before the court unless the UN Security Council has decided that an act of aggression has been committed;
- no prosecutions may be brought arising from situations which threaten international peace and security and which are being considered by the UN Security Council, unless the UN Security Council so decides.

The decisions of the UN Security Council are political, rather than legal; its power to veto prosecutions relating to acts of aggression and matters it is considering could affect the independence of the court.

Amnesty International believes that the international criminal court must be independent of any political

8No states have used the complaint procedures of the International Covenant on Civil and Political Rights, the American Convention on Human Rights or the African Charter on Human and Peoples' Rights; only a handful of states have used such procedures under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

influence and must have the power to investigate and try all cases in which it has jurisdiction over the crime and the suspect.

The draft statute should be amended to allow the independent Prosecutor to investigate complaints based on information from any source acting on his or her own initiative. The Prosecutor should be able to bring charges in all cases in which the court has jurisdiction over the crime and the suspect. The UN Security Council should not be permitted to prevent the Prosecutor from bringing prosecutions where the court has jurisdiction over the crime and the suspect.

4. An independent and effective Prosecutor

The Prosecutor and investigators must be independent, impartial and suitably qualified.

Investigations -- questioning victims, witnesses and suspects, collecting information and evidence and conducting on-site inquiries -- will be frustrated unless all states provide the Prosecutor with assistance. All states which have accepted the court's jurisdiction should be obliged to cooperate fully with investigations, making sure evidence is not destroyed and delivering suspects to the court.

The Prosecutor should decide whether there is sufficient evidence to bring charges and indict a suspect. The Prosecutor should bring charges if there is probable cause to believe that the suspect committed a crime over which the court has jurisdiction and there is sufficient admissible evidence to warrant prosecution. If the Prosecutor decides not to bring charges, states parties, victims and their families should have the right to have that decision reconsidered. The review of such decisions should be handled by the court, and, so as to ensure the Prosecutor's independence, should be limited to requesting the Prosecutor to reconsider.

The draft statute should be amended as follows:
- **the safeguards in the UN Guidelines on the Role of Prosecutors for securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings should be incorporated expressly or by reference in the statute;**
- **States should be required to cooperate with the Prosecutor in the carrying out of his or her duties;**

5. Court staff and officials

The court's judges, prosecutors, defence lawyers and investigators should enjoy complete independence and be free from any political pressure from states and national or international bodies.

Under the statute, judges should have experience in criminal trials or international law, including human rights and humanitarian law. They should be nationals of different countries all over the world and should reflect the different legal systems of the world (civil law, Islamic law and common law).

To ensure the independence of the Trial and Appeal chambers, some of the appointed judges should hear only trials, others only appeals. The number of judges should be able to be increased if the court's caseload increases. The judges, prosecutors, defence lawyers and investigators should be aware of cultural and religious mores and sensitivities. Some should have expertise in handling cases involving violence against women and children. Women investigators and prosecutors should be available to lead cases, particularly sensitive cases involving violence against women. Special measures should be available for cases involving children.

6. Prompt, public and fair trials

The international criminal court must be unquestionably fair. Any failure to afford all suspects and accused every procedural safeguard ensuring fairness would undermine the system of international justice. Pre-trial, trial and appeal proceedings should be conducted in accordance with the highest international standards, standards which have been accepted by the international community over the past half century.

Protecting the rights of suspects and the accused

The international criminal court must serve as a model of fairness in the protection of the rights of

suspects and those accused in an indictment. Amnesty International believes that the court's statute should incorporate all of the international standards which set out guarantees for fair trial and safeguard the rights and treatment of detainees. These wide-
ranging safeguards should apply from the moment a suspect is questioned with a view to prosecution until the conviction or acquittal is finally confirmed.

i. Rights of suspects being questioned

The rights of a suspect being questioned include:
- the right to be informed fully of his or her rights before questioning;
- the right to be presumed innocent until proved guilty;
- the right not to be compelled to testify against oneself or to confess guilt;
- the right to a competent lawyer (free of charge for those who cannot afford to pay);
- the right to have their lawyer present and able to assist during questioning;
- the right to remain silent and not to have their silence during questioning taken into consideration when determining their guilt or innocence;
- the right to a competent interpreter and translation of relevant documents, free of charge.

Suspects and people who have been indicted should have the right to have a qualified lawyer of their choice present and assisting them at all stages of the proceedings. If they cannot afford to pay for the assistance of a lawyer, a public defender should be appointed automatically.

Most of these rights are included in the draft statute of the international criminal court. Indeed, in some cases, the statute provides stronger guarantees than those set out in international standards.

The statute should make clear that the rights of suspects apply equally to suspects being questioned by the Prosecutor or by national authorities assisting the Prosecutor. They should apply whether or not the suspect is being held in detention. Given the complexity of legal and technical issues likely to arise, a separate, adequately funded public defender's office should be set up to provide experienced defence lawyers.

ii. Rights of suspects held in pre-trial detention

Amnesty International is concerned that the draft statute does not adequately guarantee all the internationally recognized rights of people held in detention before trial. Such detainees include suspects who have not yet been charged (known as people provisionally arrested) and people who have already been charged and are detained awaiting trial.

Under the draft statute, suspects held under provisional arrest are only entitled to be informed of the "grounds" for arrest until the indictment is confirmed. The draft statute permits detention without charge under provisional arrest for 90 days and an indefinite number of extensions may be granted by the President of the court. This could result in such detainees being denied their rights to be promptly notified of the charges against them and to trial without undue delay. The draft statute does not contain a presumption that arrested people will be released on bail pending trial. Arrested people have to apply to the President of the Court for bail and this limited right does not appear to apply to people who are provisionally arrested. The draft statute does not fully safeguard the right to challenge the lawfulness of detention for detainees held under provisional arrest by national authorities. The draft statute does not afford detainees the right to release if they are not brought to trial without undue delay.

The statute should be strengthened to ensure that all detainees, including those arrested by national authorities:

■ are informed immediately of the reasons for their arrest and promptly of the specific charges against them;
■ have their families immediately notified of their detention and are guaranteed prompt access to their families;
■have the right to prompt assistance of a lawyer;
■ are brought promptly before the court;
■ have the right to have the lawfulness of their detention regularly reviewed;
■ have the right to the presumption of release awaiting trial, subject to necessary guarantees to appear before the court;
■ have the right to make complaints before the court about the conditions of their detention;
■ have the right to be tried within a reasonable time or to be released;
■ Have the right to be free from torture and other cruel, inhuman or degrading treatment or punishment.

iii. Rights related to pre-trial preparation and to the trial itself

The court must afford each accused person all of the internationally accepted safeguards related to preparation for trial and those applicable to the trial itself. These rights include:
■ the right to be presumed innocent until proved guilty;
■ the right to be promptly informed of the charges;
■ the right to a public trial (except in certain carefully limited circumstances);
■ the right to a trial without undue delay before a competent and impartial court;
■ the right to be treated equally before the court;
■ the right to the assistance of, access to and confidential communication with, a lawyer;
■ the right to adequate time and facilities to prepare a defence;
■ the defence and the Prosecutor should have an equal right to present evidence and to summon, examine and cross-examine all witnesses;
■ the right to a competent interpreter and to translations of documents free of charge;
■ guarantees against double jeopardy and against the consideration of evidence gained through compulsion, coercion or otherwise illegally;
■ the right to appeal against conviction and sentence to a higher court.

The judges should give their judgments in public and in writing. Appropriate and clearly defined penalties -- excluding the death penalty -- should be imposed on those convicted. Appeals against conviction and sentence should be heard by a separate appeals panel of the court.

The court should have the power to retry a person who has been convicted or acquitted in a trial in a national court which was manifestly unfair or simply a sham trial, and should be able to try people who have been granted amnesties or pardons in any state. National courts, however, should not have the power to retry anyone who has been acquitted or convicted in the international criminal court on the same charges or in the same circumstances. The international criminal court should be able to transfer the trial of an accused to a national court, if it is satisfied that the trial would be just, fair and effective and would exclude the death penalty as a possible sentence.

A person who is sentenced to a term of imprisonment by the court should have the conditions of his or her imprisonment supervised by the international criminal court, which should have the sole authority to grant pardons and commutations of sentences.

Most of these rights are adequately guaranteed in the draft statute.

Among other things, however, the draft statute does not expressly guarantee the rights of the accused to

confidential communication with counsel, equality before the courts, and to compensation in cases in which the accused has been wrongfully convicted.

The draft statute should incorporate all of the internationally recognized international standards for fair trials. In particular, the draft statute should guarantee the rights of the accused:
- **to communicate freely and confidentially with their lawyer and adequate time and facilities to prepare a full defence;**
- **to equality of treatment before the court.**

***iv. Trials* in absentia**

Amnesty International believes that the accused should be present in court to hear the full prosecution case, put forward a defence, refute evidence and examine witnesses. Given the complexity of the cases which will be tried before the court, the reliability of the verdict will always be in doubt if the accused is not present to challenge the prosecution case. There is also the danger that the inability to enforce judgments against absent defendants could undermine the authority of the court.

The draft statute allows trials to proceed in the absence of a defendant when the absence is due to ill-health, because of risks to the defendant's security, or because he or she has escaped from custody, absconded when on bail or has disrupted the trial.

The statute should be amended to prohibit trials in the absence of the defendant. The sole exceptions should be if the defendant has deliberately absented himself or herself from the proceedings *after* they have begun or has been so disruptive that he or she has had to be removed.

When a defendant is deliberately absent from a trial in the court, the draft statute allows the establishment of an Indictment Chamber to record evidence against the defendant. If the Indictment Chamber determines that there is a *prima facie* case against the accused, an international arrest warrant may be issued. If the accused is then arrested and tried, the draft statute would allow the evidence taken before the Indictment Chamber to be admitted at the trial. Amnesty International believes that this violates the right of the accused to cross-examine witnesses and to challenge evidence.

The statute should be amended to ensure that evidence taken by an Indictment Chamber is not admissible at any subsequent trial.

7. No Death penalty

The draft statute excludes the death penalty as possible punishment. Amnesty International welcomes this provision of the draft statute, which is consistent with the worldwide trend towards abolition of the death penalty. It follows the precedent set in the statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda. Amnesty International believes that the death penalty violates the right to life and is the ultimate form of cruel, inhuman and degrading punishment.

8. Protection of victims and witnesses

The international criminal court must protect the interests of victims and witnesses, including defence witnesses, and safeguard their right to participate in the proceedings. These rights, however, must at all times be balanced against the rights of the accused to hear and challenge witnesses.

The draft statute addresses the need to protect victims, their families and witnesses. It takes into account

the mental anguish they might suffer from having to recount horrific events repeatedly before investigators, prosecutors and judges. The statute provides for the possibility of conducting closed proceedings or allowing the presentation of evidence by electronic or other special means.

The draft statute does not include a mechanism for victims and their families to obtain restitution, compensation and rehabilitation.

The court or some other mechanism should ensure that victims are paid compensation or their property is returned, if they suffered because of the criminal act in question.

9. Financial and practical support from states

If the court is to be effective it must have the full cooperation of national governments and must have adequate resources. The effectiveness of the court will depend on the willingness of states to:
- ratify the treaty establishing the court;
- adopt necessary legislation or cooperation agreements to permit the transfer of persons to the court;
- submit to the jurisdiction of the court concerning crimes against humanity and serious violations of humanitarian law;
- cooperate in the investigation of crimes and the arrest of suspects found in their jurisdiction; and
- enforce the judgments of the court.

The court will need adequate funds and staff. Sufficient resources will be necessary to pay professional and competent investigators, prosecutors, interpreters and defence counsel and judges.

The budget of the court should be financed through the regular budget of the UN, rather than on contributions by state parties to the statute.[9]

The establishment and maintenance of the court must be an international undertaking both in theory and practice.

III. WHAT YOU CAN DO:

Amnesty International urges you to join our efforts to ensure that a just, fair and effective international criminal court is established by the UN without further delay.

We encourage you to write letters to your government. (We generally suggest sending letters to the head of state and to the Foreign Minister and the legal adviser in the foreign ministry.)

Your letters should urge the officials to:

1. work to encourage the 50th UN General Assembly to convene an international conference to draft and

9 Problems of relying on states parties for the funding of the Committee against Torture under the UN Convention against Torture has led to amendments of that treaty to provide for funding from thLeaving the financing of the international criminal court to states who ratify the treaty to establish the court could deter some less wealthy states from ratification.e general budget of the UN.

adopt a treaty establishing a just, fair and effective permanent international criminal court by 24 October 1996, the end of the UN's 50th anniversary year. Please recommend that, like the UN Convention against Torture and the International Covenant on Civil and Political Rights,[10] the treaty require a small number of ratifications or accessions in order for it to enter into force quickly.

2. welcome the positive aspects of the International Law Commission's draft statute for the international criminal court. These include the court's inherent jurisdiction over the crime of genocide, a number of fair trial guarantees, measures to protect victims and witnesses which are consistent with the rights of the accused to a fair trial, and the exclusion of the death penalty.

3. urge that the draft statute be strengthened by:

a) including clear definitions of the crimes within the court's jurisdiction, in a manner which is consistent with international law, and setting out what defences are allowable. Specifically call for the systematic practice of torture, extrajudicial executions or "disappearances" to be included as crimes which the court has power to try;

b) ensuring that the independent Prosecutor has power to initiate investigations and prosecutions based on information from any source;

c) ensuring that the role of the UN Security Council is limited to submitting situations, not individual cases, involving threats to peace and security. The UN Security Council should not be given the power to veto prosecutions;

d) ensuring that the court has automatic jurisdiction over a common and broad core of crimes, in addition to genocide, including all crimes against humanity in peace and war and serious violations of humanitarian law in all types of conflict;

e) ensuring that the court may exercise its jurisdiction over people suspected of crimes under international law when the suspect is in the custody of a state which has consented to the jurisdiction over the crime, even if other states would also have jurisdiction;

f) incorporating expressly or by reference into the statute all relevant international fair trial standards including:
Articles 9, 10 and 11 of the Universal Declaration of Human Rights; Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR); the UN Standard Minimum Rules for the Treatment of Prisoners; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Articles 7 and 15 of the UN Convention against Torture; the UN Basic Principles on the Independence of the Judiciary; the UN Basic Principles on the Role of Lawyers; the UN Guidelines on the Role of Prosecutors; and fair trial guarantees in the Geneva Conventions of August 12 1949 and Additional Protocols I and II. The statute of the international criminal court should make clear that the statute does not exclude any other internationally recognized rights, to enable the international criminal court to take into account evolving concepts of fairness.

4) ensure that the court is provided with sufficient resources to carry out its functions. Such resources should be sufficient to cover the costs of the court and staff, including a competent body of investigators, a staff for the Prosecutor, a public defender's office, and judges. The statute of the court should provide a method for adjusting the number of judges in response to the court's changing workload. Staff should be sensitive to differing cultural and religious mores and to issues related to violence against women and children.

10These treaties required ratification or accession by 20 and 35 states, respectively, to enter into force.

5) ensure that the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda receive adequate resources to carry out their tasks effectively. Urge your state to cooperate with these two tribunals, as directed by UN Security Council Resolutions 827, 955 and 978, through such steps as adopting any necessary legislation or cooperation agreements to enable cooperation with these tribunals, assisting in investigations, permitting the seizure of evidence, arresting suspects and transferring suspects to the jurisdiction of the tribunals.

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