

**Proposal for an
International War Crimes
Tribunal for the Former
Yugoslavia**

by

**Rapporteurs (Corell - Türk - Thune)
under the CSCE Moscow Human Dimension
Mechanism to Bosnia - Herzegovina
and Croatia**

9 February 1993

International War Crimes Tribunal for the Former Yugoslavia ● CSCE Rapporteurs Corell - Türk - Thune

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SUMMARY

On 28 September 1992 the Rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia were given the mandate i.a. "to investigate reports of atrocities against unarmed civilians in Croatia and Bosnia, and to make recommendations as to the feasibility of attributing responsibility for such acts".

The Rapporteurs visited Croatia during the period of 30 September - 5 October 1992. On 7 October 1992 they issued a report on this visit. One of the proposals contained in this report was that a Committee of Experts from interested States should be convened as soon as possible in order to prepare a draft treaty establishing an international *ad hoc* tribunal for certain crimes committed in the former Yugoslavia.

In view of the fact that the Rapporteurs had been unable to visit Bosnia-Herzegovina, on 24 November 1992 they offered to make an interim report on that State, analyzing the relevant penal law, and to draft a convention establishing an international *ad hoc* tribunal to deal with war crimes and crimes against humanity committed in the former Yugoslavia. In a decision on 15 December 1992, the CSCE Council welcomed the offer of the Rapporteurs to refine their proposals on making the principle of personal accountability effective, including the possibility of the establishment of an *ad hoc* tribunal. The CSCE Council foresaw continuing consultations in the matter with the Commission of Experts established pursuant to Security Council Resolution 780 (1992).

Having studied the question further and after consultations with the UN Expert Commission and contacts with i.a. representatives for the Rapporteur on the former Yugoslavia under the United Nations Commission on Human Rights, the

International Conference on the former Yugoslavia and the Minister for Foreign Affairs of Bosnia-Herzegovina, the Rapporteurs decided to draw up the present report in spite of the fact that they were not able to visit Bosnia-Herzegovina.

The main part of the report consists of a proposal for an International War Crimes Tribunal for the former Yugoslavia. The purpose of this Tribunal is to try individuals accused of war crimes and crimes against humanity as defined in international law and the domestic criminal law provisions of the former Yugoslavia and determined in scope by the proposed Convention.

The law to be applied by the Tribunal consists of a number of provisions from the Penal Code of the Former Socialist Federative Republic of Yugoslavia. This law is still in force in the territory of the former Yugoslavia, either directly, or, as in the case of Bosnia-Herzegovina and Croatia, through reference with or without modifications. In accordance with the proposal, the Tribunal will have jurisdiction over war crimes and crimes against humanity, as specified in the Convention, committed in the territory of the former Yugoslavia as from 1 January 1991.

The main features of the Tribunal are as follows.

The Tribunal consists of five bodies: the Court, the Procureur, the Secretariat, the Board on Clemency and the Standing Committee.

The responsibility for the administration of the Tribunal rests with the Standing Committee which consists of representatives of States parties to the Convention. The Court has two instances to meet current obligations under international law concerning the right of appeal. The task of the first instance is to adjudicate cases in Chambers composed of three judges. The Court of Appeal shall adjudicate cases appealed from the first instance and shall sit in Chambers composed of five judges. The task of the Plenary Court is to decide mainly on administrative matters.

The Procureur is independent in relation to the Court. It is obliged to indict the accused, if the findings in the criminal inquiry indicate that the case is reasonably founded in fact and law. The task of the Secretariat is to serve the Tribunal with a particular responsibility for the Court.

The jurisdiction of the Tribunal is exclusive and compulsory in relation to States parties to the Convention in the territory of the former Yugoslavia. However, the draft Convention provides for the transfer of jurisdiction back to those States when they have the appropriate means to adjudicate effectively and fairly cases falling under the jurisdiction of the Tribunal.

The Court is competent to impose deprivation of liberty and fines. It may not pass sentence of capital punishment. Sentences are to be served in the territory of the former Yugoslavia under international supervision.

The draft Convention provides that victims can participate in the criminal proceedings. There is also a limited possibility for victims to claim restitution of property and compensation.

The text of the draft Convention should be supplemented by Rules of the Tribunal, to be drawn up by the Plenary Court. These rules will i.a. provide for legal aid and defence counsel.

The costs of the Tribunal are to be distributed among the States parties to the Convention. However, the costs for the enforcement of judgments will rest with the State responsible for execution.

The report does not take a stand on the question in which forum the Convention should be negotiated. However, the draft is designed in order to facilitate action by the CSCE participating States or some of these States within the framework of the CSCE or any other appropriate framework.

The main conclusions of the Rapporteurs are:

- * In view of the urgency of the situation in certain areas of the territory of the former Yugoslavia the adjudication of cases concerning war crimes and crimes against humanity should dealt with by an ad hoc Tribunal (Section 8.1).
- * The Rapporteurs advise strongly against waiting for the work done on the project for the elaboration of a draft statute for an international criminal court entrusted to the International Law Commission (Section 8.1).
- * National law, interpreted in the light of the international commitments which underlie this legislation, forms a sufficient basis for adjudication (Section 8.2).
- * A general and well-structured method of information collection with a view to assisting prosecutors must be implemented as soon as possible (Section 8.3).
- * The costs for a Tribunal of the kind foreseen by the Rapporteurs will be marginal in comparison to the amounts spent on various other efforts necessary for the restoration of peace in the area (Section 8.10).
- * It is not only desirable but also feasible from a legal point of view to establish an international war crimes Tribunal for the former Yugoslavia. In view of this conclusion, the establishment of such a Tribunal is primarily a question of political will (Section 10).

1 INTRODUCTION

The following is a report of the Rapporteurs (Corell-Türk-Thune) under the OSCE Moscow Human Dimension Mechanism mission to Bosnia-Herzegovina and Croatia, drawn up in response to their mandate and to a decision by the OSCE Council on 15 December 1992.

The report contains a description of the background to the Rapporteur mission (Section 2) and some general reflections on the mandate of the mission and the publication of the present report (Section 3). Subsequently, the Rapporteurs make some observations on the situation in Bosnia-Herzegovina (Section 4). They then go on to describe relevant legislation in Bosnia-Herzegovina, the corresponding information on Croatia appearing in their report on this country, issued on 7 October 1992 (Section 5). They then proceed to discuss questions of principle in relation to the prospect of attributing responsibility (Section 6) and to deliberate on a competent jurisdiction (Section 7).

The main part of the report contains a proposal for an International War Crimes Tribunal for the Former Yugoslavia. The proposal consists of a general part, a draft Convention and a Commentary on the proposed articles (Section 8 and Annexes 6 - 8).

Acknowledgements and a few concluding remarks appear at the end of the report (Sections 9 and 10). There are eight annexes to the report.

The Rapporteurs wish to emphasize that the subject matter is of a complex nature and that they have had limited time at their disposal. They also wish to draw the attention to the fact that according to the rules a rapporteur mission is a mission of short duration; its report should be produced

three weeks after the last rapporteur has been appointed, or, they presume, after their mandate has been finalized if this occurs at a later date. In the present case, conditions have been somewhat different, particularly after the decision by the CSCE Council on 15 December 1992 (cf. Section 2.4).

Nonetheless, the Rapporteurs consider it necessary to strike a balance between their ambitions and the urgency of the question; no matter how much time they spent on drafting a proposal, this proposal would still have to be subjected to a very close scrutiny and, finally, if the suggested course of action was to be followed, to deliberations at a diplomatic conference.

The Rapporteurs have attempted to deal with the complex materia in as limited space as possible. On the other hand, they have also tried to elaborate a fairly complete proposal. To increase legibility they have avoided using too many legal concepts and have tried to explain the meaning of those which have been used. Furthermore, they have not included references and the multitude of foot-notes that usually accompany a document of the present nature. They hope that their proposal will be of service for future decisions taken by the CSCE participating States.

This report represents the unanimous opinion of the Rapporteurs. The Commentary on the draft Convention was exclusively elaborated by Ambassador Corell, who had also prepared the basic draft for the statute of the Tribunal.

2 BACKGROUND

2.1 Formation of the Rapporteur Mission

On 5 August 1992 the United Kingdom informed the Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw that the United Kingdom, with the support of Italy, Portugal, Denmark, the United States, Greece, Spain, the Netherlands, Ireland and Germany, had decided to invoke the Moscow Human Dimension Mechanism with respect to Bosnia-Herzegovina and Croatia. Subsequently, ODIHR was informed that France and Belgium had also joined the supporting States.

The rules of the Moscow Human Dimension Mechanism are laid down in the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE. The relevant provisions appear as Annex 1 to this report. The United Kingdom had invoked Paragraph 12 of the Document which allows for engaging this mechanism in case a participating State considers that a particularly serious threat to the fulfilment of the provisions of the CSCE human dimension has arisen in another participating State.

On 19 August 1992 the ODIHR was informed that the United Kingdom had appointed Ambassador Hans Corell, Under-Secretary for Legal and Consular Affairs, Ministry for Foreign Affairs of Sweden, as Rapporteur.

On 29 August 1992 the ODIHR informed the United Kingdom that the Republic of Bosnia-Herzegovina and the Republic of Croatia had appointed as Rapporteur for the mission to their respective countries Ambassador Helmut Türk, Deputy Secretary-General and Legal Advisor of the Federal Ministry for Foreign Affairs of Austria.

On 4 September 1992 Ambassador Corell and Ambassador Türk informed the ODIHR that they had on that day appointed Mrs. Gro Hillestad Thune, member of the European Commission of Human Rights, from Norway, as the third Rapporteur for the mission to Bosnia-Herzegovina and to Croatia.

Consequently, the Moscow Human Dimension Mechanism in the present case was established and ready to enter into function on 4 September 1992. The participants in the Rapporteur Mission for the preparation of this report appear in Annex 2.

2.2 The mandate

Originally, the mandate for this Rapporteur Mission was to enable investigation of reports of attacks on unarmed civilians in Bosnia-Herzegovina, especially in Sarajevo and Gorazde, and in Croatia.

Due to circumstances which prevailed after the initiation of the Mission, the mandate was further discussed among the initiators. On 28 September 1992 the mandate of the Mission was finalized. The Rapporteurs were informed through the Foreign and Commonwealth Office of the following mandate:

"To investigate reports of atrocities against unarmed civilians in Croatia and Bosnia, and to make recommendations as to the feasibility of attributing responsibility for such acts.

The additional mandate, depending on how much can be accomplished in the time available and in the light of any organisational difficulties which may arise, is to visit areas which may be under threat of ethnic cleansing, and to investigate allegations of the arbitrary arrests of Serbs in Croatia."

Due to the time which had lapsed since the original contact with the Rapporteurs, in particular since Ambassador Corell was first approached, they had difficulties in performing their task as a whole immediately. Furthermore, the United Kingdom informed the Rapporteurs that the Foreign and Commonwealth Office would need some time to prepare a visit to Bosnia-Herzegovina in view of the security situation. In consultation between the United Kingdom, the ODIHR, and the Rapporteurs it was decided that the

Rapporteur Mission should perform its task in two steps. It was thus decided that they should first visit Croatia, commencing on 30 September 1992, i.e. two days after the mandate was finalized. The visit to Bosnia-Herzegovina was contemplated for mid-November 1992.

2.3 The report on Croatia

The Rapporteurs visited Croatia on 30 September - 5 October 1992. On 7 October 1992 they issued their report. For the purpose of the present report it may suffice to quote the following from the summary:

"There are numerous reports regarding atrocities perpetrated against unarmed civilians as well as the practice of "ethnic cleansing" in territory of the Republic of Croatia. Although responsibility for these grave violations of human rights and the norms of international humanitarian law is to be attributed to both parties to the conflict, it appears that the scale and gravity of the crimes committed by the Yugoslav National Army, Serbian paramilitary groups and the police forces of the Kain authorities are by far the most serious. On the Serbian side, such violations of generally accepted international norms seem to form part of an officially tolerated or even supported systematic policy.

Besides the fact-finding elements of their mission the Rapporteurs saw their main task to be investigation of the possibilities of attributing responsibility for acts of atrocities against unarmed civilians. In this connection, they examined the relevant national legislation and the administration of justice in Croatia as well as pertinent international legal instruments. On the basis of this examination, the Rapporteurs conclude that there is a sufficient legal basis for international prosecution."

In connection with this part of their mandate the Rapporteurs made the following two proposals.

First: A committee of experts should be convened immediately to examine the possibility of establishing a system for the administration of collected information. The mandate of the committee should be to propose within a very short time the necessary rules as well as the administrative and technical solutions for the collection of information, and to make an estimate of costs.

Second: Since there is a viable possibility for establishing an international jurisdiction to deal with the alleged war crimes and crimes against humanity committed in the former Yugoslavia, a committee of experts from interested States should be convened as soon as possible in order to prepare a draft treaty establishing an international ad hoc tribunal for certain crimes committed in the former Yugoslavia. The committee should also make an estimate of costs for such a jurisdiction.

The Rapporteurs note that no genuine action was taken regarding their recommendations.

2.4 Relevant decisions by the CSCE Council and the CSO

The report on Croatia was examined by the Committee of Senior Officials (CSO) at their meeting in Prague on 5 and 6 November 1992. On 6 November the CSO took a decision on the report. The decision contains i.a. the following:

"Decides that the mission of the Rapporteurs Ambassador Corelli, Ambassador Turk and Mrs. Thune, should be completed as soon as it is possible, bearing in mind the need to assure the safety of the Rapporteurs;

Asks the Chairman-in-Office to release the report to the public and to transmit it to the Committee of Experts drawn up by UNSCR 780;

Welcomed the report's recommendations and invited the Rapporteurs to report on their findings to the appropriate UN bodies.

The CSO asks the Chairman-in-Office to draw the attention of the UN Secretary-General to the report's recommendation and particularly to the urgency of its implementation within the appropriate international framework. The UN Commission of Experts should give particular attention to the principle of personal responsibility for war crimes and examine how this principle could be put into practice by an ad hoc tribunal.

Endorses the urgency of the exhumation of mass graves in UNPA Sector East and strongly calls on the Belgrade authorities to fully co-operate in providing conditions for the safe exhumation of the mass graves in the UNPA Sector East of Croatia. Having noted also the activities and resources of UN Special Rapporteur Mazowiecki in this respect, the CSO considered that the

recommendation should be referred to the Special Rapporteur and the SCR 780 Commission of Experts, via the UN Secretary General, for follow-up action."

In view of the fact that it was difficult to organize a visit to Bosnia-Herzegovina and the increasing demand that suspected war criminals should be brought to justice, the Rapporteurs communicated on 24 November 1992 the following message to the Government of the United Kingdom with reference to the decision by the CSO:

"The Rapporteurs would in this context like to mention that Ambassador Corelli was asked to attend a meeting of the UN Commission of Experts on 5 November. At this meeting the chairman of the Commission expressed the opinion that it was not for the Commission to study the question of an ad hoc tribunal. Neither was it their task to set up a more structured system for collection of information in line with the proposal made by the Rapporteurs.

In the meantime the Rapporteurs were informed that it could take some time before they could go to Bosnia-Herzegovina, since UNPROFOR was not in a position to guarantee their safety. The request yesterday about our preparedness to visit Bosnia-Herzegovina in the near future therefore came somewhat unexpected. Naturally, we are prepared to visit Bosnia-Herzegovina if reasonable guarantees for our safety could be given. But we must also agree on the mandate. This is not clear to us, although we assume that it would be the same as for Croatia mutatis mutandis.

As the matter now stands we would like to make the following proposal.

The fact that war crimes and crimes against humanity are committed in Bosnia-Herzegovina is obvious. This appears from various sources of information, i.a. the reports of the mission of Sir John Thomson and the special rapporteur of the United Nations Commission on Human Rights, Mr Tadeusz Mazowiecki.

As can be seen from the Report on their visit to Croatia the Rapporteurs paid special attention to the part of their mandate which concerned the attribution of personal responsibility.

It seems quite clear that the UN Commission of Experts has no mandate to make proposals for an ad hoc tribunal. Since a number of declarations to the effect that those who have committed war crimes should be brought to justice (i.a. by the EC Ministers of Foreign Affairs on 5 October and by the CSO on 7 November) the

Rapporteurs think that, for the moment, the best manner to carry on their mandate would be:

- 1) to make an interim report on Bosnia-Herzegovina, analyzing the relevant penal law, and
- 2) to draft a convention establishing an international ad hoc tribunal to deal with war crimes and crimes against humanity committed in the former Yugoslavia.

This work could be carried out promptly and would not presuppose a visit to Bosnia-Herzegovina. It would, however, presuppose a mandate given by the States concerned. The Rapporteurs would appreciate a reaction to their proposal as soon as possible, not least due to the fact that Ambassador Türk is taking up his post as Austria's Ambassador to the United States on 28 January 1993."

The matter was subsequently discussed among the States which had invoked the Moscow Mechanism and within the CSO. It was further deliberated at the meeting of the CSCE Council in Stockholm on 14 and 15 December 1992. In its decision on the former Yugoslavia on 15 December the CSCE Council included the following language (paragraph 14):

"The Ministers welcomed the offer of the rapporteurs on Croatia and Bosnia-Herzegovina under the Moscow Human Dimension Mechanism to refine their proposals on making the principle of personal accountability effective including the possibility of the establishment of an ad hoc tribunal, and to do so through continuing consultations with the Commission of Experts established pursuant to Security Council resolution 780 (1992)."

2.5 Co-ordination with other missions and other contacts

Before their visit to Croatia the Rapporteurs had contacts with the office of the Special Rapporteur appointed by the United Nations Commission on Human Rights, former Prime Minister Tadeusz Mazowiecki of Poland, and Sir John Thomson, appointed by the CSO to head a Mission to the former Yugoslavia.

On 5 November 1992, Ambassador Corelli presented the report on Croatia to the Commission of Experts established pursuant to Security Council Resolution 780 (1992). Following the

decision by the CSO on 6 November, and in view of the fact that the UN Commission had scheduled its second meeting for 14 December, Ambassador Corelli contacted the Chairman of the Commission, Professor Frits Kalshoven. In a letter to Professor Kalshoven on 10 December Ambassador Corelli said on behalf of the Rapporteurs that it would be very helpful if they could receive a message as soon as possible about the outcome of the deliberations of the Commission. In this way the Rapporteurs could inform - in accordance with the CSO-decision - the competent bodies within the CSCE about their contacts with the UN Commission. The Commission was also informed about the CSCE Council meeting on 14 och 15 December 1992.

On 16 December 1992 Ambassador Corelli informed Professor Kalshoven about the decision of the CSCE Council of the day before.

In a letter of 18 December 1992, Professor Kalshoven informed the Rapporteurs i.a. as follows:

"As regards the idea of consultations between your mission and the Commission of Experts on matters relating to the principle of personal accountability for violations of international humanitarian law, including the possibility of the establishment of an ad hoc tribunal, the Commission in its recent session decided that there would be no objections to such consultations, it being understood that as far as the Commission is concerned, this cooperation will have an entirely informal character and will have to remain within the confines of its terms of reference as set out in SC Resolution 780 (1992)."

The Commission decided further to mandate Professor M. Cherif Bassiouni as its representative in these informal consultations."

On 24 January 1993 the Rapporteurs met with three of the members of the UN Commission, namely the Chairman Professor Frits Kalshoven, Professor Cherif Bassiouni and Mr William Fenrick. They further had consultations with Professor Bassiouni on legal and technical issues on 25 January. During their talks the members of the Commission expressed the view that the Commission was not mandated to occupy itself with

the question of the establishment of an international criminal court. However, they demonstrated a profound interest in the establishment of such a court, and the Rapporteurs were able to draw on their thinking in this field.

On 25 January 1993 the Rapporteurs met with Dr. Georg Mautner-Markhof and Professor Roman Wieruszewski, advisers to Mr. Tadeusz Mazowiecki, Special Rapporteur of the UN Commission on Human Rights on former Yugoslavia.

During the meeting it was underlined that there is at present an urgent need to co-ordinate the flow of information concerning atrocities committed in the former Yugoslavia. The view was also expressed that an international tribunal which can convict those responsible for such acts is highly needed. The Rapporteurs were in this context asked to transmit a copy of the present report to the Special Rapporteur as soon as possible, notably before he is presenting his next report to the Human Rights Commission in February. The Rapporteurs said that it was not within their competence to disseminate the report but that they would bring this request to the attention of the appropriate bodies of the CSCE.

With respect to the International Conference on the former Yugoslavia, the Rapporteurs had noted the following part of the opening statement of Mr. Cyrus Vance to the Ministerial Meeting of the Steering Committee of the Conference on 16 December 1992:

"We have also taken action on allegations of war crimes and other breaches of international humanitarian law. We have sought to help the Commission of Experts bring about a forensic examination of the mass grave site at Ovchara near Vukovar and this is in train this week. Lord Owen and I believe that atrocities committed in the former Yugoslavia are unacceptable, and persons guilty of war crimes should be brought to justice. We, therefore, recommend the establishment of an international criminal court."

On 26 January 1993 the Rapporteurs had a meeting with Ambassador Peter Hall, Deputy to Lord Owen, in order to inform the Co-chairmen of the International Conference on the

former Yugoslavia about their proposals regarding the establishment of an international tribunal. Ambassador Hall reacted favourably to the idea of establishing such a tribunal and said that the idea undoubtedly had the support of both Co-chairmen. At the same time he stressed that it was important that such an international instance function even-handed without discriminating against any particular group of the population in the former Yugoslavia. Furthermore, he pointed to the importance of precisely targeting the persons who are alleged to have committed war crimes and crimes against humanity.

On 25 January 1993 the Rapporteurs had a meeting with H.E. Haris Silajdzic, Minister for Foreign Affairs of the Republic of Bosnia-Herzegovina, Professor Dr. Muhamed Filipovic, Vice-President of the Academy of Science and Art of the Republic of Bosnia-Herzegovina and Member of the Assembly of the Republic of Bosnia-Herzegovina and Dr. Kasim Trnka, Member of the Constitutional Court of the Republic of Bosnia-Herzegovina.

The Rapporteurs outlined the main elements of their proposal regarding the establishment of an international criminal tribunal to deal with war crimes and crimes against humanity committed in the territory of the former Yugoslavia. Minister Silajdzic stated in this connection that the Government of the Republic of Bosnia-Herzegovina insisted on the establishment, as soon as possible, of such an international tribunal. He shared the view of the Rapporteurs that such an instance should be designed to permit the punishment of any person having committed such crimes, irrespective of that person's nationality or religion.

The Rapporteurs also held an exchange of views with Minister Silajdzic and his colleagues on the actual human rights situation in Bosnia-Herzegovina which was documented by a great number of reports drawn up by various institutions, presenting a vivid picture of the appalling violations of human rights and norms of international humanitarian law. The Bosnian side shared the view of the Rapporteurs that

therefore it did not seem necessary to draw up a further report on the human rights situation, i.e. by the Rapporteurs, but rather to take speedy action on the already existing reports.

On 26 January 1993 the Rapporteurs met with the President of the parliament of Bosnia-Herzegovina, Mr. Miro Lazovic.

Mr. Lazovic confirmed that the parliament has not been able to meet since 14 April 1992 when its functions were transferred to the Presidency. Efforts are being made to reassemble its members outside Sarajevo.

Mr. Lazovic expressed his strong conviction that there is an urgent need for an international tribunal in order to prosecute perpetrators of war crimes - regardless of ethnic origin. He saw no legal or formal obstacles to this and told the Rapporteurs that he expected that parliament without any difficulties would ratify a treaty establishing such a tribunal.

Mr. Lazovic, who presented himself as a Serb, stressed the urgency of the matter and held the view that the Government of Bosnia-Herzegovina should insist on the publication of the present report immediately after having been transmitted to the initiating States within the CSCE.

On 29 January 1993 Ambassador Corelli met with Dr. Ove Bring of Sir John Thomson's mission. Dr. Bring had returned from a visit to Serbia and was finalizing a report on that visit to be presented to the CSO at their meeting on 2 - 4 February 1993. The report was communicated to the Rapporteurs on 4 February 1993.

The Rapporteurs finally note in this context that the Standing Committee of the CSCE Parliamentary Assembly (comprising the Heads of the national delegations) met in Copenhagen on 13 - 14 January 1993. The resolution adopted by the Committee includes the following language (paragraph 8):

" s t r e s s e s the need to establish international forums, including an international court, under which those responsible for mass rape, torture, murder, imprisonment, and other criminal acts can be held fully accountable for their crimes."

2.6 Relevant documents

There are a great number of reports and documents concerning the situation in the former Yugoslavia. The Rapporteurs have tried to study as many of them as possible. In their report on Croatia they mentioned in particular the following:

- Report of the CSCE Mission to Bosnia-Herzegovina 29 August to 4 September, headed by Sir John Thomson
 - 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 paragraph 14 of Commission resolution 1992/S-1/1 of 14 August 1992 (E/CN.4/1997/S-1/9:28/8-1992)
 - Further report of the Secretary-General pursuant to Security Council Resolution 743 (1992) and 762 (1992) of 28 September 1992 (S/24600)
 - War Crimes in Bosnia-Herzegovina: A Helsinki Watch Report - August 1992
 - Submissions of Information to the United Nations Security Council by the US-Government in accordance with paragraph 5 of Resolution 771 (1992) of 22 September 1992.
- At the present juncture the Rapporteurs should like to refer in particular to the following documents:
- The documents enumerated in Annex 3.

- Report of the Secretary-General on the Financing of the United Nations Protection Force of 2 December 1992 (Doc. A/47/741)
- Report of the Secretary-General on the International Conference on the Former Yugoslavia of 24 December 1992 (S/25015)
- Report of the Secretary-General on the Activities of the International Conference on the Former Yugoslavia of 6 January 1993 (S/25050)
- Further report of the Secretary-General pursuant to Security Council Resolution 787 (1992) of 8 January 1993 (S/25000/Add. 1)

3 REFLECTIONS ON THE MANDATE AND THE PUBLICATION OF THE REPORT

As appears from Paragraph 11 of the Document of the Moscow Meeting of the Conference on Human Dimension of the CSCE (cf. Annex 1), CSCE Rapporteurs "will establish the facts, report on them and may give advice on possible solutions to the question raised". The Rapporteurs of the present Mission assume that the idea of the rules was basically to make proposals to the receiving States. The rules also mirror tasks of a quite different nature from the one which has been entrusted to the present Mission.

There are two significant features, which the Rapporteurs would like to highlight, namely the fact that both of the requested States actually turn to the international community and ask for help in establishing an international criminal jurisdiction, and the fact that the CSCE Council has taken a step which endorses the proposal by the Rapporteurs made in the report on Croatia and specified in a message to the initiating States on 24 November 1992; the Rapporteurs are asked to refine their proposal on making the principle of personal accountability effective including the possibility of the establishment of an ad hoc tribunal (emphasis added here) (cf. Section 2.4).

The Rapporteurs assume, however, that the Mission is still governed by the rules on the Moscow Human Dimension Mechanism. They therefore intend to apply those rules and to report according to the same. They note in this context that the United Kingdom, which according to the Moscow Rules is the initiating State, has handed over this responsibility to Denmark, which holds the Presidency of the European Community as from 1 January 1993.

As will be seen, a significant feature of the proposal in

this report is that the "advice on possible solutions" is directed to the CSCE participating States in general.

They note in this context that the Rapporteurs according to the rules shall submit their report to the participating State or States concerned and, unless all the States concerned agree otherwise, to the CSCE Institution, i.e. the Office for Democratic Institutions and Human Rights (ODIHR), no later than three weeks after the last Rapporteur has been appointed. The requested State will submit any observations on the report to the CSCE Institution, unless all the States concerned agree otherwise, no later than three weeks after the submission of the report. The CSCE Institution will then transmit the report, as well as any observations by the requested State or any other participating State, to all participating States without delay. The report may then be placed on the agenda of the next regular meeting of the CSO, which may decide on any possible follow-up action. The report will remain confidential until after that meeting of the Committee.

In the view of the Rapporteurs this is a most unfortunate situation. They have all the time been concerned that a mission of the present kind does not fit very well under the Rules of the Moscow Mechanism. If these rules were to be followed in this case, the report cannot be made public until the end of March at the earliest. At the same time the United Nations Commission of Human Rights is debating the question of the former Yugoslavia during its meeting at Geneva from 1 February to 12 March 1993. National groups are also being set up in different States to study the question of a possible war crimes tribunal. The Rapporteurs know of such initiatives in Canada, France, Italy and Switzerland. They have been approached by participants in such national groups asking for information and preferably drafts prepared by the Rapporteurs. The Rapporteurs are naturally not in a position to hand out any documentation, but have to follow the Moscow Rules scrupulously.

However, they are very concerned if the report cannot be made public immediately upon delivery. They note in particular the plea by the Minister for Foreign Affairs of Bosnia-Herzegovina and the urgent request by representatives of the United Nations to have access to the report as soon as possible (cf. Section 2.5). They therefore request that the report be published immediately upon delivery.

4 REPORTS ON THE HUMAN RIGHTS SITUATION IN BOSNIA-HERZEGOVINA

General observations

Numerous reports about the human rights situation in Bosnia-Herzegovina have been submitted by governmental and non-governmental institutions. A list of these reports is contained in Annex 3. These reports bear witness to gross violations of human rights and norms of international humanitarian law, including war crimes and crimes against humanity, in Bosnia-Herzegovina. The reports reveal a recognizable pattern of appalling human rights violations in that country.

The reports ascribe responsibility for the human rights violations to all ethnic groups involved in the armed conflict: the Croats, the Bosnian Muslims and the (Bosnian) Serbian forces. The reports, however, emphasize that human rights violations by Croats and Bosnian Muslims are not comparable to those committed by Serbian and Bosnian Serbian forces.

Abuses of individuals, mostly unarmed civilians, take every conceivable form: torture, killing, rape and other humiliations. Reports attribute the most serious human rights violations by Serbian and Bosnian Serbian forces to the policy of "ethnic cleansing".

By the end of 1992 between 25 000 (UN figure) and 130 000 (figures of the Bosnian government) people had died as a result of the war; more than 1,5 million people (i.e. one-third of the total population and one-half of the Muslim population) are reported to be displaced. Approximately 70 per cent of Bosnian territory (mostly northern and western) is presently under Serbian control.

Human Rights violations, including "ethnic cleansing" and rape

The Serbian policy of "involuntary transfers of the Muslim population from Serbian controlled territory" is generally seen as the basis of all human rights violations by the (Bosnian) Serbian forces. The victims are mainly Muslim civilians. So far, hundreds of thousands of Muslims have been affected by the policy of "ethnic cleansing". "Ethnic cleansing" is carried out either by direct means (random executions, maltreatments, rapes, destruction of homes, threats) or indirectly (confiscation or compulsion to sign away property).

According to some reports Croat forces also destroyed Muslim villages. The policy of "ethnic cleansing" is, however, in general considered being part of the Serbian strategy to expel Muslims from Serbian controlled areas.

Situations of armed conflict tend to contribute to a high incidence of rape; rape is therefore often referred to - tragically enough - as being a by-product, a "casualty" of war. The various reports on rape in Bosnia-Herzegovina provide disturbing information on rapes of Croatian and Serbian women as well as sexual abuse of men in detention camps. However, the great majority of rapes is said to be committed by (Bosnian) Serbian forces on Muslim women. These rapes are viewed to be too systematic to be mere by-products of the conflict, but rather considered to form part of the Serbian policy in Bosnia and to serve as a strategic purpose in itself. It is beyond doubt that the number of rapes is substantial and that they often have been committed in extremely humiliating and violent circumstances.

The reports on human rights violations in Bosnia-Herzegovina also provide information on executions of civilians by military and paramilitary forces; arbitrary arrests, torture, disappearances and destruction of property.

The reports, in general, blame the (Bosnian) Serbian forces for more serious human rights violations and more cruel abuses

of the civilian population than the other parties to the conflict.

Human rights violations in detention camps

The various reports blame all parties to the conflict for arbitrary arrests of civilians, for torture and inhuman treatment of prisoners. The sanitary and medical situation in the camps are considered most worrisome, humanitarian aid is desperately needed. According to the reports, however, human rights violations in Serbian camps, by far, exceed those in other camps. The reports also give examples of rape and sexual abuse of women and of men in detention camps. Cases are known where women are explicitly detained in order to be sexually abused in detention.

Violations of International Humanitarian Law

International humanitarian law and international conventions on the treatment of civilians are found to be heavily and systematically violated in Bosnia-Herzegovina. Reports by non-governmental organizations on investigations of alleged war crimes in Bosnia-Herzegovina describe numerous cases of executions and disappearances of civilians, "ethnic cleansing", aggression against medical assistants and journalists and widespread destruction of property.

Further sources point to indiscriminate attacks against civilians, including massacres; detention of civilians and the worst kinds of torture and killings of prisoners; forced movement of populations; use of paramilitary groups, including criminals.

While in the reports all sides are considered guilty of violence against civilians, attacks on population centers and prevention of delivery of humanitarian aid are reported as features of the behaviour of the Serbian forces and their paramilitary allies.

5 RELEVANT LEGISLATION AND ADMINISTRATION OF JUSTICE IN BOSNIA-HERZEGOVINA

5.1 Relevant legislation

Constitutional law

It is to be recalled that the negotiations within the framework of the International Conference on the former Yugoslavia are aiming at the adoption of a new constitution for Bosnia-Herzegovina. The present situation is therefore somewhat unclear. The only constitution formally in force seems to be the Constitution of the Socialist Republic of Bosnia-Herzegovina. Before the elections in November 1990, this Constitution had been supplemented by the Federal Yugoslav Constitution, which contains a number of provisions applicable to all six Republics in the former Yugoslavia. These provisions were not repeated in the constitutions of these Republics.

The coalition consisting of the three parties which won the elections in Bosnia-Herzegovina (Croatian Democratic Community, Serbian Democratic Party and the Party of Democratic Action) intended to elaborate a new constitution for this State. They were, however, not successful in their efforts to find a common ground for this endeavour. These efforts have later been continued through international assistance from EC States and within the framework of the Conference just mentioned. At present there is no agreement as to the contents of a new constitution for Bosnia-Herzegovina.

As far as the Rapporteurs have been able to establish, the legal constitutional situation is characterized by certain lacunae; parts of the old Constitution of Bosnia-Herzegovina, as well as the Constitution of the former Yugoslavia, are not

considered relevant to the new situation.

Two constitutional aspects come to the forefront. First, whether under domestic law in Bosnia-Herzegovina there are any constitutional obstacles against transferring jurisdiction to an international judicial body. Secondly, the question what legal status international treaties carry in the internal legal order in Bosnia-Herzegovina.

As regards the first question, the Rapporteurs have found no such legal obstacle. This conclusion is based on written material and oral submissions, in particular information given at the meetings at Geneva between the Rapporteurs and representatives of the Government and Parliament of Bosnia-Herzegovina and their legal advisers on 25 and 26 January 1993.

As regards the second question, the Rapporteurs note Article 210.2 of the Yugoslav Constitution of 1974. According to this provision international treaties and conventions are directly applicable in domestic law. The Rapporteurs have, however, not been able to establish the exact status of this provision in Bosnia-Herzegovina at present.

Criminal law

No new Criminal Code has yet been adopted in Bosnia-Herzegovina following the elections in November 1990.

During consultations with representatives of the Government of Bosnia-Herzegovina as well as with legal experts, the Rapporteurs have been informed that the applicable criminal law is almost identical to the Criminal Code of the former Yugoslavia. The exceptions concern an increase in the possible length of sentences for certain serious crimes. It follows that serious crimes such as war crimes and crimes against humanity are punishable according to the provisions of Chapter 16 of the Criminal Code of the former Yugoslavia (attached to Annex 6) regardless of whether such acts have been committed before or after the change of the

constitutional situation in Bosnia-Herzegovina.

5.2 Administration of justice

Criminal procedure was uniform throughout the former Yugoslavia, including Bosnia-Herzegovina, and was governed by the Code of Criminal Procedure and the Criminal Code. In Bosnia-Herzegovina the adaptation to the new State Constitution is still going on, but the two Codes mentioned are still in force.

There are three court instances. The first instance is the Municipal Court. These courts handle all cases except the more serious ones. The second instance is the District Court. These courts have jurisdiction over serious crimes and also act as Courts of Appeal with respect to judgments by the Municipal Courts. The Supreme Court is the Court of Appeal in matters where the District Court is the court of first resort.

The court sits in panels of three judges (one professional judge and two lay judges). In cases of serious crimes, the panel consists of five judges (three professional judges and two lay judges). Simple cases are adjudicated by one professional judge. The lay judges are appointed by the court from among the members of the Municipal counsels. The former Yugoslavia court system does not include jury trials.

The judges are appointed by representative bodies at the different territorial levels. Their term of office is six years, and they can be re-appointed.

The prosecutor generally does not have the freedom to decide not to prosecute. He may decline to prosecute only those acts which are "almost not dangerous for the society". Only conduct that is "dangerous to society" can be characterized as a criminal offence under the criminal law of the former Yugoslavia.

The criminal procedure consists of four stages: the pre-trial phase, the preliminary judicial inquiry, the trial process

(which includes the main hearing) and appellate review. In the first phase the prosecutor may request a preliminary judicial inquiry. If he has already sufficient evidence, he may bring out a formal accusation immediately.

A preliminary judicial inquiry is initiated by the Examining Magistrate when he considers that there is sufficient ground to believe that an offence has been committed. The Prosecutor can decide to forego further prosecution and dismiss the case at any time during the preliminary judicial inquiry.

In the trial process the prosecutor must bring out the formal accusation within fifteen days after the preliminary judicial inquiry is closed. After the formal accusation, the court examines whether all the formal requirements are fulfilled and starts a main hearing. A written judgment should be filed within eight days, or, in complicated cases, within fifteen days after the pronouncement.

As regards the appeal procedures, both the defendant and the prosecutor have the right to appeal within fifteen days of the written judgment. The Court of Appeal appoints a panel which makes a decision on the basis of a meeting to which all the parties are invited. The panel may order a new hearing if there is new evidence. The Court of Appeal may:

- (i) leave the judgment unchanged;
- (ii) vacate the judgment and refer the case back to the court of first resort for a new panel of judges;
- (iii) change the judgment; however, if only the defendant has appealed, the Court of Appeal can neither increase the punishment nor issue a sanction for a more serious crime.

It is obvious to the Rapporteurs that the legal system in Bosnia-Herzegovina will have little possibilities to deal within a foreseeable future with all war crimes and crimes against humanity which have been committed and continue to be committed in that country (cf. Section 7).

6 ATTRIBUTING RESPONSIBILITY

The question of attributing responsibility was examined by the Rapporteurs already in their report on Croatia (see Section 7 of that report). The examination was made with respect to principles, collection of information and administration of justice.

In the opinion of the Rapporteurs, this examination applies equally to Bosnia-Herzegovina. As they indicated already in the report on Croatia a possible proposal on their part would also inevitably have an impact on other parts of the former Yugoslavia.

The Rapporteurs identified and defined the following requirements which should be met by a criminal justice system in the present case:

- Suspects should be brought to justice as soon as possible
- The justice system must comply with international norms
- The system must be as cost-effective and accessible as possible
- The persons sentenced must be treated according to the applicable standards for the treatment of prisoners and this should be done under international supervision.

The Rapporteurs found that it was necessary to investigate several options before a definite decision could be taken. They also contemplated the possibility of combining different solutions.

The contents of the present report reflects the further thinking of the Rapporteurs on this matter.

7 DELIBERATIONS ON A COMPETENT JURISDICTION

The question of a competent jurisdiction was also examined by the Rapporteurs in their report on Croatia (see Section 9 of that report).

They deliberated on three options: national courts, the establishment of an international criminal court and the establishment of an international *ad hoc* tribunal for certain crimes committed in the former Yugoslavia.

As far as national courts are concerned the Rapporteurs saw no real possibility of an effective prosecution of war crimes and crimes against humanity at the national level. The following part of Section 9.1 of their report on Croatia, reflecting the reasons for this conclusion, could be quoted:

"First, the Croatian courts are still in a transformation process from the court system under communist rule into a judiciary which would meet the prerequisites for courts in States operating under the rule of law.

Second, the antagonism which the Rapporteurs have experienced between Croats and Serbs as a result of the armed conflict is so intense at the moment, that it is unlikely that the courts in Croatia would be considered as impartial and independent by many of the persons concerned.

Third, the trials will inevitably mean that witnesses and other persons concerned will have to appear before the courts. In such cases, it can be assumed that persons from e.g. Serbia would hesitate to go to Croatia to appear as witnesses against suspected Croatian war criminals. The same would apply vice versa.

Fourth, the bringing to justice of suspected war criminals presumably encompasses persons of high level in the respective countries. In such cases, it could be argued that it is less appropriate that the administration of justice be entrusted to any of the parties to the conflict.

Fifth, a reassuring impression from the visit of the Rapporteurs to Croatia is that the Government of

Croatia is, in principle, in favour of an international tribunal and would seem to be ready to cooperate with other States in order to establish such a jurisdiction.

These reasons would in the opinion of the Rapporteurs apply A fortiori to Bosnia-Herzegovina.

As far as the establishment of an international criminal court is concerned, the Rapporteurs in their report on Croatia made reference to the on-going work within the United Nations. They stated that, although they were very much in favour of the establishment of such a court, they would strongly advise against waiting for such a court to be established before action was taken against serious criminal acts committed in connection with the armed conflict in the territory of the former Yugoslavia.

They then went on to deliberate the third option and discussed questions on applicable law, procedural law, establishment of a jurisdiction, prosecution, implementation of sentences, and languages. They then made the following summary:

"The foregoing discussion demonstrates that there is a viable possibility of establishing an international jurisdiction to deal with alleged war crimes and crimes against humanity committed in the former Yugoslavia. The review which the Rapporteurs have made is certainly not exhaustive. They are anxious to stress that the review is made only for the purpose of making an illustration of the problems which would have to be solved if an international jurisdiction were contemplated. There are no shortcuts, and an international jurisdiction must be set up to meet the highest standards of legal protection as well as efficiency. This examination would have to be made by experts in the field."

The Rapporteurs then proposed that a committee of experts from interested States be convened as soon as possible to prepare a draft treaty establishing an international *ad hoc* tribunal for certain crimes committed in the former Yugoslavia. The committee should be instructed to elaborate such a draft and to make an estimation of costs.

It seems that the Rapporteurs are now themselves faced with this very task. The present report contains their proposals in the matter.

8 PROPOSAL FOR AN INTERNATIONAL WAR CRIMES TRIBUNAL FOR THE
FORMER YUGOSLAVIA

8.1 General considerations

In its report on Croatia on 7 October 1992 the Rapporteurs proposed that an international *ad hoc* tribunal for certain crimes committed in the former Yugoslavia be established. The Rapporteurs subsequently offered to prepare a draft treaty on such a tribunal (cf. Section 2.4). This offer was welcomed by the CSCE Council on 15 December 1992 (*ibidm*). After consultations with the Commission of Experts established pursuant to Security Council Resolution 780 (1992) and after talks with representatives of other organisations involved in the situation in the former Yugoslavia as well as with representatives of Bosnia-Herzegovina, the Rapporteurs have decided to make a proposal for an *ad hoc* tribunal. The proposal consists of a general part, a draft Convention and a Commentary to the provisions of the draft.

The Rapporteurs are anxious to emphasize that the setting up of an *ad hoc* tribunal is a major undertaking. First of all the establishment of the tribunal is a complex issue *DEL SE*. Secondly, such a tribunal may have implications for the efforts to stop the armed conflicts and bring peace to the area. Furthermore, the tribunal also entails costs and has to be maintained for a number of years. In principle, the establishment of an international tribunal requires the same rules as the establishment of courts at the national level, which rules govern every stage of the process, from the inquiry and apprehension of suspects to the implementation of sentences.

Efforts to establish an international criminal jurisdiction have been going on for quite some time. The latest development is reflected in the report of the International

Law Commission on the work of its forty-fourth session (4 May - 24 July 1992; General Assembly, Official records, 47th session, Supplement no. 10; A/47/10). Based on this report and the debate in the Sixth Committee of the United Nations General Assembly, the Assembly decided to request the Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session (G.A. Res. 47/33, 25 November 1992).

The Rapporteurs, however, advised already in their report on Croatia (Section 9.2 of that report) strongly against waiting for the work of the United Nations in this field to be completed. Instead they encouraged the establishment of an *ad hoc* tribunal.

Having given this idea further thought, the Rapporteurs feel even more convinced today of this course of action. The situation in the former Yugoslavia lends itself to a *sui generis* solution, which should be chosen in particular in view of the urgency of the matter. The Rapporteurs have decided not to engage in any extensive deliberations in this report on arguments for or against an international court. Judging from the many statements made by representatives of States, in particular CSCE participating States, the Rapporteurs assume that there is a determination common to a number of concerned States to take action with a view to attributing personal accountability for war crimes and crimes against humanity committed in the former Yugoslavia. The Rapporteurs also note that two of the States in the territory of the former Yugoslavia have advocated the establishment of an international jurisdiction: Bosnia-Herzegovina in a letter to the Secretary-General of the United Nations on 10 August 1992 (Annex 4) and in contacts with the Rapporteurs (See Section 2.5), and Croatia in contacts with the Rapporteurs (See Section 13 of the report on Croatia) and in a statement in the Sixth Committee of the United Nations General Assembly on 6 November 1992 (Annex 5).

As will be explained in the following (Section 8.2) the Rapporteurs are of the opinion that the jurisdiction of an *ad hoc* tribunal should not be limited to the territory of those two States. In view of the fact that the acts in question are criminal in accordance with applicable national law in the entire territory of the former Yugoslavia, the Rapporteurs are of the opinion that a tribunal should be established to administer justice with respect to acts committed in that territory.

With respect to the creation of a tribunal and its administration, the Rapporteurs think that it should be governed by its own statute, in the form of a convention. This is particular so in view of the *sui generis* solution which the Rapporteurs propose and the fact that the proposal can be described as a system of "ceded jurisdiction" (cf. Section 8.2). One feasible option is that the convention should be open to the CSCE participating States.

There are three arguments voiced against the creation of an international jurisdiction for the former Yugoslavia which the Rapporteurs should like to address.

One argument which the Rapporteurs have heard since their report on Croatia was established is that there are so many technical and legal difficulties involved that States would be reluctant to engage in the establishment of such a jurisdiction. The Rapporteurs do not believe that the problems are insurmountable. They note in particular that the Working Group of the ILC in its excellent report has come to the conclusion that the technical problems connected with the establishment of an international criminal court can be resolved (cf. para. 432 of the ILC report). This conclusion would apply *a fortiori* to the establishment of an *ad hoc* tribunal for a specific territory and in a context where it is not necessary to solve the problem of the relation between the tribunal and an international code of crimes.

A second argument is that an *ad hoc* tribunal would hamper the efforts to establish peace in the area. The Rapporteurs think

that this is a dangerous argument. In every armed conflict there would be efforts to end the fighting and to establish peace. This means that the argument could be advanced in connection with any conflict. To avoid the question of criminal responsibility or to yield to demands for abolition would in the view of the Rapporteurs be contrary to the idea of rule of law. Furthermore, the establishment of an international tribunal would be a demonstration of international co-operation which would have immediate preventive effects.

A third argument is that an *ad hoc* tribunal for the former Yugoslavia would be detrimental to the work towards the establishment of an international criminal jurisdiction presently being done within the United Nations, and in particular by the International Law Commission. The Rapporteurs are not at all convinced by that argument. Two of the Rapporteurs have been involved in this work in the UN General Assembly for a number of years, and they fail to see that an *ad hoc* tribunal in the present case, based on the national law in the area, can in any way be contrary to what is being done within the United Nations. The obvious question to put as a counter-argument is: Should war criminals go unpunished just because we are expecting in some future the results of a work which has been going on within the United Nations for over forty years?

Even if the problems connected with an international tribunal can be overcome, it is - as already said - a major undertaking to create such an organ. The crucial question is naturally the level of ambition. The proposals for an international criminal court which have been presented so far reflect a relatively limited organ. In the present situation and judging from the reports emanating from the former Yugoslavia, it can be assumed that there are hundreds, not to say thousands of suspected war criminals and persons having committed crimes against humanity in the area. The need for an international jurisdiction apply equally to almost all of these suspects. The Rapporteurs have therefore chosen to model their proposal in such a way that the tribunal can deal

with all crimes which fall under the provisions in question. The system of "ceded jurisdiction" foreseen by the Rapporteurs is furthermore a system which contracting States can implement to live up to their obligation to try suspected war criminals at the national level which follows i.a. from the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

Based on these considerations the Rapporteurs propose that an international *ad hoc* tribunal for war crimes and crimes against humanity committed in the former Yugoslavia be established. In the following sections they address some of the questions of principle connected with such establishment. The tribunal is referred to as the International War Crimes Tribunal for the Former Yugoslavia, or in short the Tribunal.

A draft Convention, establishing the Tribunal, appears as Annex 6 to this report.

8.2 Jurisdiction and applicable law

Jurisdiction - General remarks

A basic feature in criminal law is that States have jurisdiction over individuals within their territory. But national jurisdiction is wider than that, and comprises individuals of the nationality of the States in question also outside the territory, e.g. on board vessels flying the national flag of the State, or aircraft registered in the same State. They would also have jurisdiction over crimes committed against their own citizens irrespective of where the crime is committed. A comparative study would, however, show that rules on jurisdiction differ widely from State to State; in some cases jurisdiction is rather limited, in other cases a State would assume jurisdiction over crimes committed also outside the territory of the same State and committed by persons with little or no connection with the State in question.

A common feature of many conventions, in which States agree to criminalize acts as international crimes, is the principle of aut dedere, aut judicare. The principle means that a State is under the obligation either to prosecute an accused individual or to deliver him for trial in another contracting State. The ways in which States observe these rules under their national law differ. In case the State has a wide jurisdiction, these rules could correspond to rather restrictive rules on extradition and vice versa. Depending therefore on the scope of national jurisdiction and the possibilities to extradite, States would make their choice. In many cases, States would not be in a position to extradite their own citizens. If that is the case, they would have to establish jurisdiction over crimes committed by these citizens abroad in order to comply with international commitments under the clause just referred to.

Irrespective of which system applies in a particular case, the common denominator is that the jurisdiction is national. Subject to the rules of national constitutions, States would however have the possibility of conferring jurisdiction upon an international judicial body. This is one of the key questions which has been discussed in connection with the various efforts made in the past to establish an international criminal jurisdiction. The question is closely related to the matter of applicable law.

In this context it may suffice to note one important reason for this link between jurisdiction and applicable law; it must be ascertained that an international jurisdiction is wholly in conformity with general principles of criminal law, in particular the principle of legality, expressed in the Latin sentence: nulum crimen sine lege, nulla poena sine lege (no act is criminal unless this is laid down in law; no act can be punished unless punishment is prescribed by law). However, provided that this principle is respected and the applicable law is clear enough, there is no legal restraint on the possibility for States to confer their jurisdiction to an international body which fulfils international legal requirements for a court. Among the most prominent features

of such a court is that it should be independent, impartial and established by law (or treaty at the international level). Reference is made i.a. to Articles 14 and 15 of the International Covenant on Civil and Political Rights and Articles 5 and 6 of the European Convention on Human Rights.

Another question is whether the international jurisdiction contemplated should be exclusive or concurrent with national jurisdiction. Yet another question is whether jurisdiction should be general or dependent on the decision in the particular case by national organs to hand over the jurisdiction to the international entity. In case an international criminal court would be established, it is necessary to investigate the various options.

In the present case the Rapporteurs are convinced that the method to be used is in principle the one of compulsory exclusive jurisdiction conveyed to the Tribunal. The reasons for this are those that appear in Section 7 and the fact that two of the States in the territory of the former Yugoslavia have asked for international co-operation. To confer exclusive jurisdiction on the Tribunal would mean that all suspected war criminals from the area would be treated on an equal basis, and that there would be no reason for allegations of bias on the part of the judicial organs.

Since the proposal foresees that a number of States outside the area of the former Yugoslavia will become parties to the treaty it is also necessary to examine the question whether they too should confer jurisdiction to the Tribunal. In this context it is important to note that all States concerned can be assumed to be parties to the 1949 Geneva Convention III relative to the Treatment of Prisoners of War and the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War. As such they are under the obligation to establish jurisdiction over persons alleged to have committed grave breaches as defined in the Conventions (Articles 130 and 147, respectively).

In the view of the Rapporteurs it could be a considerable merit in designing the Convention in such a way that also States outside the former Yugoslavia confer, or "cede", jurisdiction to the Tribunal. The greatest merit with such a solution would be that it would not be possible for suspects to take refuge in contracting States who might be inclined to deal more leniently with those persons than would the Tribunal. However, the Rapporteurs recognize that this is a matter which may influence the preparedness of States to become parties to the Convention. It might therefore prove feasible to design the Convention in such a way that States in the territory of the former Yugoslavia are always obliged to deliver suspects to the Tribunal, whereas other States parties to the Convention can apply the principle of *aut dedere, aut iudicare*. This solution is reflected in the draft Convention (Article 59).

In this context it should be noted that the expression "ceded jurisdiction" is used by the Working Group of the ILC to describe the situation where a State has jurisdiction to try an offender under a relevant treaty or under general international law, and it consents to an international court exercising jurisdiction instead (cf. para. 456 of the ILC report). The Working Group, however, is not certain that the "ceded jurisdiction" argument would work. The reason is that other States - presumably not parties to the treaty establishing the international criminal court - could have jurisdiction based on the international rules on universal jurisdiction. This third State could be said to be "concerned" and have rights, or potential rights, of jurisdiction which cannot be affected without their consent.

Since this situation may occur in the present case, the Rapporteurs should like to forward the argument that they think that "ceded jurisdiction" would work. There can already today be a competition, where several States ask for extradition and where the requested State has to decide which application should be granted. In case there is a dispute between the States concerned, this matter can ultimately be brought before the International Court of Justice. In the

present situation the Tribunal established under the draft Convention would be in a similar position to a "State". In case a third State argues that an individual should be extradited to it rather than delivered to the Tribunal, the matter would, if pursued, ultimately have to be settled in the same way. The Rapporteurs assume, however, that a request from the Tribunal to have a person delivered would carry particular weight, since the Tribunal is a joint effort by a number of States concerned having conferred their jurisdiction to this international body.

Another important question is which persons should be subject to the jurisdiction of the Tribunal. This matter is dealt with below.

Yet another matter is the fact that jurisdiction would have to be limited to crimes committed in the territory of the former Yugoslavia (Article 3). This definition is certainly not as clear as the Rapporteurs would have wanted. In particular problems might arise in connection with preparation, conspiracy and complicity. In the view of the Rapporteurs it is, however, not necessary to solve in detail these questions in the Convention. Irrespective of efforts in this direction there would still be an area where the treaty-maker has no other choice but to leave the matter to be decided upon within the framework of the jurisdiction of the competent organs of the Convention, *n.b.* the Court.

Applicable law

The question which law to apply is one of the central issues in connection with the establishment of an international criminal jurisdiction. In this context reference is often made to Article 38 of the Statute of the International Court of Justice. This Article reads as follows:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

Note: Article 59 lays down that the decision of the Court has no binding force except between the parties and in respect of that particular case.

In writings on international criminal jurisdiction it is often mentioned that this provision, although included in the statute of a court which has no criminal jurisdiction, is indispensable also in such jurisdiction. The Rapporteurs are not convinced. And even if the provision would be referred to, it is certainly not sufficient. As already stated, the principle of legality (*nulum crimen sine lege, nulla poena sine lege*) must be observed.

A significant feature of the conventions in which contracting States undertake to criminalize acts as international crimes is that the international instrument does not contain a complete provision which would fulfil the requirements of the principle of legality. The question of punishment is left to the contracting States to regulate in the national law. This means that, even if a State ratifies a convention containing a provision which makes a certain act criminal, this provision is not sufficient for courts to apply, if they are seized with a concrete case. They need in addition a penal provision which lays down the punishment which the court should mete out, in case the accused is found guilty.

This system is aptly demonstrated by the 1949 Geneva Convention IV. To illustrate, Articles 146 and 147 of this Convention could be quoted:

"Article 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

Article 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

The situation in which the treaty-maker finds himself in the setting up of an international criminal tribunal is therefore to identify the applicable substantive law. (A distinction

should be made between the substantial law and the procedural law, see below.) The options are here either to draft an international criminal code or at least include complete penal provisions in the treaties in question, or to rely on national provisions fulfilling the requirements of the principle of legality.

It is at this juncture which the United Nations finds itself. The ILC has been entrusted with the task of drafting a statute for an international criminal tribunal. The question which law this tribunal should apply is not yet resolved. An international code of crimes has reached the stage of first reading in the ILC, and Member States were asked to submit their views on this draft to the Secretary-General before 1 January 1993. It is obvious that the question of an international criminal code is a very difficult issue, and that there is still a long way to go before such a code can see the light of the day.

An international court can however be set up independently of an international code. But the question would still be which law this court should apply. The choice would again be the same: to identify acts which are considered criminal under international law and to add to them international penal provisions, or, as appears from the above, to rely on national legislation.

It is against this background which the conclusions by the Rapporteurs in their report on Croatia should be seen. The Rapporteurs recall the statement on this matter in the said report:

"A special feature in this connection is the principle *Nullum crimen sine lege*. The meaning of this principle is that the alleged crime must have been punishable at the time it was committed. In other words, the suspect should have been under the obligation to observe the rule in question when he committed the act. Whether he in fact did know about the rule is of no relevance.

The question in this connection is whether international instruments such as the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide would be a sufficient basis for

action by an international jurisdiction. The same holds true of the 1949 Geneva Conventions and the additional protocols of 1977. The characteristic of these instruments is that they require contracting States to provide penal sanctions for violations of certain provisions in the instruments in question. The instruments themselves, however, do not contain any provisions as to the punishments which should follow upon conviction. Such provisions ought, therefore, to be found in national laws.

If an international jurisdiction is set up, one option would be to formulate international provisions laying down the punishment which should follow upon the finding that a person is guilty of a crime against any of the provisions in question, e.g. the Geneva Conventions. Another solution is to examine whether the national legislation in force is a sufficient basis for legal action."

The Rapporteurs then went on to examine Articles 141 through 155c of the Penal Code of the Socialist Federal Republic of Yugoslavia (Annex 6 to the report on Croatia) as well as the corresponding provisions in the Penal Code presently in force in Croatia. The Rapporteurs found that those provisions provided a sufficient legal basis for the administration of justice with respect to suspected war criminals in the former Yugoslavia.

The Rapporteurs have now deliberated further on this matter and have come to the conclusion that the Tribunal should apply national law, *nota bene* the Penal Code of the Socialist Federal Republic of Yugoslavia. However, it is not sufficient to rely only on the provisions just mentioned (they are annexed to the draft Convention appearing as Annex 6 to the present report). It is also necessary to look into a number of provisions, which are normally drafted in a general way so as to be applicable to all penal provisions. As examples of such provisions could be mentioned provisions on attempt, preparation, conspiracy, complicity, and extenuating circumstances. Other important provisions are the general provisions on penalties (maximum and minimum periods of imprisonment, time to serve, parole, etc.) and also provisions on damages and restitution of property. These questions are further dealt with in the Commentary to Articles 28-30, 46 and 47.

If this method is chosen there would be no problem with respect to the principle of legality. The acts in question were criminal and punishable at the time they were committed.

This means that the suspect or accused was under the obligation to observe the pertinent rule when the act was committed. It is irrelevant whether the person in question in fact did know about the relevant rule or not (*ignorantia juris nocet*).

It must, however, be stressed that the Penal Code of the former Yugoslavia may not be in force today in all States in the territory of the former Yugoslavia. As in Croatia there might be a new Penal Code. Whether this is a problem or - like in Croatia - will not hamper the possibilities of bringing the accused to justice, is a matter to be investigated in a future drafting exercise.

A related matter is the question of double criminality, which is dealt with in the Commentary to Article 59.

Turning now to the substantive law to be applied by the Tribunal, this matter has to be examined in relation to the following three factors: jurisdiction in relation to the time factor (*ratione temporis*), subject-matter jurisdiction (*ratione materiae*), and personal jurisdiction (*ratione personae*).

Jurisdiction *ratione temporis*

It is evident that the convention establishing the Tribunal must lay down a point in time from which acts committed should fall under the competence of the Tribunal. It is important to underline that here, at least as the Rapporteurs see it, there is no problem with respect to the principle of legality. This principle does not really limit enactment of new procedural rules, e.g. which court should be competent to try acts which are criminal. Normally rules on procedure take immediate effect and can be applied to cases which are pending or cases which are initiated later but concern crimes

which were committed before the change in the procedural rules was made.

Against this background the Rapporteurs propose that a date is set which determines the competence of the Tribunal. This means that, if a case pertaining to a point in time before the date set would be brought to the attention of the Tribunal, the organ of the Tribunal seized with the matter would have to declare the case inadmissible. The Rapporteurs suggest that this date should be 1 January 1991.

As will appear, the Rapporteurs do not propose any provision laying down the point in time when the jurisdiction of the Tribunal should cease. The reason for this is that it would in their view be unfortunate if such a date was set. It would merely lead to speculations and calculated actions on the part of various actors under the system with a view to eventually avoiding the jurisdiction of the Tribunal. Instead the Rapporteurs have designed their proposal in such a way that the activities of the Tribunal could be phased out in the light of development, in particular the ability of national courts to take over jurisdiction. This means that the functions of the Tribunal after some time could be reduced to a supervisory function and the decision-making concentrated to a quick review of cases before a decision is taken to transfer the proceedings from the Tribunal back to States in the territory of the former Yugoslavia (See Section 8.9).

Jurisdiction *ratione materiae*

The Rapporteurs are of the opinion that one should be careful not to make the jurisdiction of the Tribunal too wide. It should rather be limited to the most serious crimes, in particular in view of the fact that international proceedings are always more complex, costly and time-consuming than proceedings at the national level. Also the interest of prosecuting serious crimes is greater than in other cases. As a starting point the Rapporteurs have taken international law and the most important conventions in this context, namely

the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions III and IV, the Additional Protocols of 1977, and the 1954 Hague Convention (cf. Commentary to Preamble).

The following provisions of the Convention against Genocide should be quoted in order to facilitate the understanding of the reasoning of the Rapporteurs:

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide."

Having studied these provisions and having studied further the above mentioned Penal Code of the former Yugoslavia, as well as available reports on the situation in the former Yugoslavia and against the background of their own observations, the Rapporteurs have come to the conclusion that the substantial provisions to be applied by the Tribunal should be Articles 141 (Genocide), 142 (War crimes against the civilian population), 144 (War crimes against prisoners of war), 150 (Rude treatment of the wounded, sick or prisoners of war), and 151 (Destruction of cultural and historical monuments) of the Penal Code of the former Yugoslavia.

Among the considerations which the Rapporteurs have made in arriving at this conclusion they would like to mention the following:

- The law is known in the whole territory of the former Yugoslavia, and would create no problems with respect to the principle of legality;

- The law is based on international commitments laid down in the Conventions just mentioned, which would mean that corresponding provisions would appear also in the Penal Codes of other contracting States, which, in fact, are under the obligation to try or extradite persons accused of crimes against those provisions, should the suspects appear on their territories or otherwise come under their jurisdiction;

- The law would cause no problem in a system which is designed to phase out the activities of the Tribunal and transfer jurisdiction back to the States in the territory of the former Yugoslavia;

- The law would limit the jurisdiction of the Tribunal so as to deal with cases where an international support in the bringing of those responsible to justice is mostly needed.

Another question is how to categorize the crimes falling under the jurisdiction of the Tribunal as suggested by the Rapporteurs.

In the discussion over the years the following concepts have been employed: crimes against peace, war crimes, and crimes against humanity. The rapporteurs certainly do not intend to enter into a discussion on whether these categories are appropriate or whether other ways of structuring should be employed. They simply note that these concepts are well-known, and that they have been used in the past.

If this categorization is employed, it is apparent that the crimes which the Rapporteurs suggest should fall under the jurisdiction of the Tribunal belong to the categories of war

crimes and crimes against humanity. The Rapporteurs have therefore chosen to describe the crimes in those categories, and this method is employed throughout the report. However, in proposing the title of the draft Convention the Rapporteurs deemed it more appropriate only to refer to war crimes (cf. the Commentary to Title and Preamble).

The reasoning in regard to the present topic is further developed in the Commentary to Article 28.

Jurisdiction Ratione Personae

The third criterion to be examined is which persons should fall under the jurisdiction of the Tribunal. This question is naturally of utmost importance. The Rapporteurs assume that all those who should be regarded as responsible under international law should fall under the jurisdiction of the Tribunal. Article 2 of the draft Convention is therefore formulated accordingly.

The Rapporteurs are aware of the fact that jurisdiction over both individuals and legal persons have been contemplated in previous efforts of establishing international criminal jurisdiction. They think, however, that the jurisdiction now contemplated should be confined to individuals. There are many reasons for this. One of the most obvious is that a wider jurisdiction might bar possible contracting States from joining in the international effort.

The Rapporteurs are finally of the opinion that the Tribunal should not have jurisdiction over disputes between States parties to the Convention relating to the application of the Convention.

8.3 Collection of information

As already mentioned (Section 2.3) the Rapporteurs proposed in their Report on Croatia that a committee of experts should be convened immediately to propose the necessary rules and the administrative and technical solutions for collection of

information on suspected war criminals, and to make an estimation of costs.

The Rapporteurs recall that they stated in their report on Croatia that there is an urgent need to co-ordinate the efforts in the present collection of information. They had observed frustration among persons serving in the various organizations engaged in the collection of such information because of the fact that there was no central and competent authority to whom they could forward the information. The Rapporteurs, therefore, saw a need to institutionalize the collection of information and to entrust the responsibility for this collection to a particular organ on a more permanent basis. They expressed the view that a system for such collection should:

- make it possible to establish personal responsibility,
- make it possible for victims or their relatives to participate and at the same time to ease their grief,
- give the possibility for witnesses and organizations to deposit their statements or contributions in order to assist in the establishment of personal responsibility,
- give a clear signal to the world that the international community is prepared to take action and to pursue such efforts,
- save the possibilities for different options with respect to actions needed, in particular the bringing of suspects to justice.

Since that proposal was made, the Security Council of the United Nations has appointed the Commission of Experts under Resolution 780 (1992). The mandate of this Commission is as follows:

"to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts, of other persons or bodies

pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia;"

During the first contacts between the Rapporteur mission and the UN Commission, the latter made clear that it was not in their mandate to elaborate a system of administration of information of the kind foreseen in the Report on Croatia.

In order to find out whether the preoccupations of the Rapporteurs with respect to data collection were correct, Ambassador Corell had a short interview with two experienced criminal investigators in Stockholm. From this interview appears the following.

There are various methods to be used in connection with the investigation of crimes of the character which would have to be investigated in the former Yugoslavia. An important factor in this context is also the extent to which investigators can rely upon existent systems in the States in question.

There is a clear distinction between investigation of cases where there is a suspect, on the one hand, and investigations where there is no suspect or where there is a considerable number of persons among whom the perpetrator is to be sought, on the other hand. In particular in the latter category of cases it is imperative that a rational system to retrieve information is developed. In this context computers are often used. There are different systems with a different degree of elaboration. Irrespective of which system one would choose, there would still be need for analysis and assessment of different options, to be followed by purchase and education of the personnel to be entrusted with the operation of the system. It is also important that there is a registrar to supervise the persons who operate the computers.

In the actual registration it is necessary to use criteria of the kind already mentioned by the Rapporteurs: name of depositor; plaintiff/witness/other; suspects, if any; the

alleged violation; time; place, etc. But important factors are also the ability of the persons involved and their professional capacity in organizing the police work, since cases differ widely in character.

It is important that registration is started at an early stage, since collected information which is not registered and organized tends to be very difficult to deal with the longer the time elapses. It is equally important to start investigations and to allow people to give information to the investigators at an early stage.

Once a person emerges as clear suspect the situation changes. In that situation the computers are not used in the same way, although all new information must be registered. But when a suspect is there, the investigation is concentrated on this person and in gathering evidence with respect to that case. Here the investigators are in a better position to collect information and to make the proper documentation to be presented to the prosecutor and also to the defence counsel, when time comes.

The conclusion which the Rapporteurs draw from this information is that their preoccupations in the report on Croatia on 7 October 1992 were justified. It is imperative that this first step in a process towards bringing war criminals to justice is examined thoroughly by experts in the way the Rapporteurs suggested. It would seem that in cases where there are already suspects, and where witnesses have given statements (the Rapporteurs have been informed that there are a considerable number of such cases), one could relatively quickly arrive at a stage where the prosecutor can take a decision on indictment. The Rapporteurs note, however, the caution by the investigators interviewed that information not registered properly as soon as it has been delivered will become very difficult to administer at a later stage. Therefore, even if there are already now cases which could be presented to a court in a relatively short time, it is necessary to decide at the outset on a more general framework

of the registration of information. This decision must also contain rules on secrecy etc.

The Rapporteurs are aware that the UN Commission under Security Council Resolution 780 (1992) are at present collecting information. It must be observed, however, that it is a different matter to collect information in a more general way and to collect information within the framework of a criminal investigation with the intention to bring suspects to justice. The Rapporteurs see a risk for duplication of work if collection of information is to be made for different purposes. No doubt, the information collected by the UN Commission will be of help to investigators acting within the framework of an international tribunal. But the sooner a decision is taken on a general and well structured method of information collection with a view to assist prosecutors, the better.

From the contacts which the Rapporteurs have had with professor Cherif Bassiouni (cf. Section 2.5) it appears that he has on his own initiative paid attention to these questions and that he has, within the framework of the UN Expert Commission, organized a separate system for collection and storage of data related to war crimes and crimes against humanity. This system might serve as the starting-point for a system of the kind which the Rapporteurs foresee.

8.4 Organization of the Tribunal

The Rapporteurs would first like to refer to the prerequisites to be met by an international jurisdiction which they have identified. They appear in Section 7.

If a Tribunal is set up, it would need at least four organs: a court, a prosecutorial function, a secretariat and a standing committee of contracting States. The Rapporteurs also foresee an organ to deal with matters of clemency.

As far as the COURT is concerned, it is obvious that this instance would perform exactly the same functions as national

courts. As the Rapporteurs have stated in their report on Croatia (Section 7.1) the administration of justice by an international jurisdiction must fulfil the international standards for criminal proceedings. Among those are the right to appeal. The Rapporteurs cannot foresee that a tribunal containing only one instance to deliver judgments without appeal could be contemplated in this case. Therefore, it is necessary to create within the Tribunal an instance of appeal.

The question arises whether judges could alternate from adjudicating cases in the first instance and in the instance of appeal. The Rapporteurs strongly advise against mixing these functions. There are many draw-backs with such a system, the most significant being the risk for disqualification, the impropriateness of judges alternating as the examiner and the examined, and the risk for general confusion in the administration of the court. They therefore propose that the judges of appeal be a category separate from the other judges.

A significant feature of existing international courts is that they are entitled to draw up their own rules of procedure. The Rapporteurs think that such competence is necessary also in the present case. This task and other tasks of an administrative matter mean that the court must be able to meet and make decisions also in an administrative capacity. Since all the judges should be entitled to participate in such decisions, it is necessary to create a forum where they can participate irrespective of whether they belong to the first instance or the instance of appeal.

Based on these considerations, the Rapporteurs propose that the Court shall consist of a Court of First Instance, which shall perform its judicial functions in Chambers of three judges, a Court of Appeal, which shall perform its judicial functions in Chambers of five judges, and the Plenary Court, which shall perform its functions with the participation of all the judges of the Court.

It is imperative that the system is flexible and that the number of judges could be increased or decreased in relation to work-load and possible back-log. The Rapporteurs therefore propose that the judges be appointed directly by the States parties to the Convention. Each State should appoint two judges for the Court of First Instance and one judge of appeal. However, no judge should serve on the Court until called by the Standing Committee (see below).

If twelve ratifications are required for the entry into force of the proposed Convention the number of appointed judges would be 24 + 12 at the outset. From these a sufficient number would be called to serve.

As far as the system of prosecution is concerned, the Rapporteurs recommend that an independent prosecutorial system be implemented. With such a system there would be no need for a formal preliminary hearing by a small chamber of the court, as foreseen in earlier draft treaties for an international criminal court. The Rapporteurs note that their view coincides with the view taken by the Working group of the International Law Commission (cf. paras. 509 and 512 of the ILC report).

A Procurator-General should be appointed to act as chief officer of the prosecutorial authority. This authority should have an independent power -- and duty -- to prosecute all the cases where substantiated charges can be made. The Rapporteurs also foresee a possibility to appeal against decisions by prosecutors.

The initiation of cases should not be limited to complaints, but the prosecutor should examine all prospective cases independent of their origin. Since the Rapporteurs foresee that the proposed Court should in principle assume exclusive jurisdiction over the crimes in question, there can be no limitation as to who should be able to communicate with the prosecutorial authority.

The need for a Secretariat is obvious. Reference is made to the draft Convention and the Commentary.

There is also an obvious need for a Standing Committee of the States parties to the Convention. The task of this Committee should be to administer the Convention, and in particular to decide on questions of budget. In view of the method suggested for the appointment of judges, the Standing Committee should also have the important duty of calling appointed judges to serve on the Court. The Committee would be in the same position as Governments and Parliaments at the national level; it would be responsible for the allocation of sufficient resources for the proper administration of justice. This argument applies not only to the resources of the Court but to the Tribunal as a whole.

Finally, the question of clemency cannot be overlooked. There must in the view of the Rapporteurs also be a body established by the Convention to exercise with respect to persons sentenced by the Court this function in lieu of competent national organs of the States parties to the Convention (cf. Article 48 of the draft Convention). Hence the Rapporteurs foresee a Board of Clemency.

A graphic presentation of the organization of the Tribunal appears in Annex 7.

8.5 Seat of the Tribunal

The question of the seat of the Tribunal needs careful consideration. The Rapporteurs are aware that this question also has important political connotations. They therefore abstain from making any concrete proposal, but would nevertheless like to point out the following in this connection.

The Rapporteurs foresee a great number of cases to be heard by the Court, and it is obvious that these hearings will involve not only the presence of the accused, but also of victims and witnesses from the area. This means that the

Court must be very close to those who shall appear before it. On the other hand, it could be considered as a bias, if the formal seat of the Tribunal would be located in any one of the States in the territory of the former Yugoslavia.

The most appropriate solution might therefore be that the formal seat of the Tribunal is established in a place outside the territory of the former Yugoslavia with a possibility for the Court (i.e. the Chambers) to meet at locations in the territory of the former Yugoslavia. This would on the other hand mean a drawback to the co-operation between the different organs of the Tribunal, in particular the co-operation between the Chambers of the Court and the Secretariat; the prosecutors would obviously have to "follow" the Court. The need for the Plenary Court to meet must also be observed.

Other important aspects to be looked into are the premises as such, in particular the Court rooms, archives, as well as the security for those connected with the Tribunal and persons appearing before its organs. The question of arranging for the detention of persons accused while their cases are being dealt with must also be resolved.

An important aspect is also that it would be necessary to conclude a headquarters agreement between the Tribunal and the State where the seat of the Tribunal is located. It should be observed in this context that special arrangements might be needed, if hearings are contemplated at the seat, in particular concerning the premises necessary for keeping detained persons under appropriate custody. The relation between the Tribunal and States where Chambers may meet should preferably be covered by the general provisions on co-operation in the Convention itself. All these formalities must perhaps not necessarily be regulated under public law; to some extent contract might be feasible.

8.6 International judicial assistance to the Tribunal

It is obvious that the establishment of an international *ad hoc* tribunal of the kind which the Rapporteurs foresee presupposes a close co-operation between the Tribunal and the contracting States.

The Rapporteurs take it for granted that accused persons will not be tried *in absentia* (cf. Report on Croatia, Section 9.3). It will therefore be necessary to bring accused persons before the Court. Here the Rapporteurs think that it is necessary to distinguish between cases where the accused is present in a State party to the Convention within the territory of the former Yugoslavia, and present in another State party to the Convention. Yet another case is where the accused is present in a third State. In the discussion on an international criminal court the argument has been advanced that the statute of the court should provide that transfer to the court was not to be regarded as extradition (cf. paras. 519-527 of the ILC report). The Rapporteurs do not think that it is necessary to resolve the question whether a transfer should be regarded as extradition or not. This matter could be left to the requested State, which has to ascertain that obligations towards the Tribunal can be respected under national law.

The draft treaty also provides for the application of the principle *aut dedere, aut iudicare* (cf. Article 59). According to the draft this option is, however, not open to States parties to the Convention within the territory of the former Yugoslavia. The way in which the draft is designed, such States undertake to respect compulsory jurisdiction of the Tribunal, which means that they must always be prepared to transfer the accused to the Court.

As already stated with respect to the seat of the Tribunal assistance and co-operation must also cover the situation when Chambers of the Court must arrange hearings in other States than the State where the seat of the Tribunal is (cf. Section 8.5).

In addition to this there are a number of means of legal assistance and co-operation. In general it should suffice to apply the system of legal assistance and co-operation which is applied between States today. The Rapporteurs refer to Articles 53 - 58 of the draft Convention, which contain general rules and rules on communications and requests, provisional measures, delivery of persons, the so called speciality rule, and rules on costs.

8.7 Legal aid and defence counsel

As the Rapporteurs have already stated (cf. Section 6) the justice system to be set up must comply with international norms. This means that a number of judicial guarantees must be ascertained for the accused persons. Among these guarantees are the right for the accused to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it.

The Rapporteurs have contemplated whether to include in the draft Convention provisions to this effect. Except for a general provision on judicial guarantees (Article 31) the draft Convention does not contain any provisions on this subject; this matter could be left to the Rules of the Tribunal. It should be observed, however, that adequate funds have to be allocated by the Standing Committee in order to pay for legal assistance, since it can be assumed that very few of the defendants will be anywhere near the possibility of paying the costs for this assistance. This related in particular to the fees which will be granted by the Court to defence counsel.

8.8 Sanctions, enforcement of judgments and supervision thereof

The sentence *Nullum Crimen sine lege* requires that punishments for criminal acts must be laid down in law when

the crime was committed in order that the Court may mete out this punishment. As already explained (Section 8.2) it will be necessary for the Tribunal to rely on the pertinent national legislation in this respect.

According to the criminal law of the former Socialist Federal Republic of Yugoslavia the following punishments may be imposed: capital punishment, imprisonment and fines.

Already in their report on Croatia the Rapporteurs concluded that it was in their opinion inconceivable that the CSCE should endorse the death penalty (cf. Section 7.1 of that report). The draft Convention therefore includes a provision to the effect that the Court shall not pass a sentence of capital punishment, although this punishment appears in the provisions of the national law (Article 29, paragraph 2).

Since capital punishment will be excluded, it is necessary to examine more in detail how imprisonment is imposed according to the pertinent national law. It appears that the general rule on imprisonment (Article 36 of the Penal Code) lays down that imprisonment may not be shorter than fifteen days, nor exceed fifteen years. However, for crimes for which capital punishment is prescribed, the Court may also impose the punishment of imprisonment for twenty years. The question is, therefore, if it is possible to lay down in the Convention the possibility of imposing imprisonment for life. A first look at the national law may indicate that this is not possible. On the other hand, it could be argued that, if capital punishment cannot be imposed, there would be a possibility of imposing imprisonment for more than twenty years, n.b. lifetime, according to the principle *MAIUS INCLUDIT MINUS*. The Rapporteurs are, however, not prepared to make any proposal in this respect since the question undoubtedly needs further study.

Otherwise, the Rapporteurs foresee, that imprisonment in accordance with the national legislation will be a normal sanction imposed by the Court. Fines should, however, not be excluded. Fines could be imposed as a principal and as an

accessory punishment. One must also bear in mind that the Court may not find that the act for which the accused is indicted is of such a grave nature that imprisonment must follow; the prosecutor must of course accept that the Court can make another assessment in this respect than the one made in the indictment.

A major issue is to decide where imprisonment is to be served. The Rapporteurs hold the view that the rule should be subject to a narrow field of exception - that the sentences shall be served in the territory of the former Yugoslavia (cf. Article 46). This undoubtedly puts a heavy burden on the States in that territory. But unless they are prepared to take upon themselves to accept enforcement, the Rapporteurs foresee little possibility that justice can be done in the present case; the number of prisoners will probably be considerable.

The proposed solution also raises other important questions. The arguments putting the possibilities for national jurisdiction in the present case in question (cf. Section 7) could partly be invoked also against the idea of prisoners serving sentences in the territory of the former Yugoslavia. There is a risk that prisoners, with whom the population in the province where the sentence is served might sympathize, would be treated in an unduly favourable way, while prisoners belonging to the "opposite side" might even risk maltreatment. It is therefore necessary to have a rigorous international supervision of the enforcement. The Rapporteurs trust, however, that it would be in the interest of the States in the territory of the former Yugoslavia to build up societies under the rule of law. One of the hallmarks of such a society is that it should respect also the personal dignity of those who have violated the laws of that very society.

In sum, the Rapporteurs foresee that the question of sanctions, enforcement of judgments and supervision thereof needs careful consideration in the future deliberations. Further reflections on these questions appear in the Commentary to Articles 29, 46 and 47.

8.9 Transfer of proceedings from the Tribunal to States in the territory of the former Yugoslavia

As appears from Section 8.2, the Rapporteurs propose that the jurisdiction of the Tribunal should be exclusive with respect to States in the territory of the former Yugoslavia. This means that the States in which the crimes have been committed do not any more have jurisdiction over these crimes, if they become parties to the Convention.

As appears, the draft Convention, which limits jurisdiction to crimes committed after a certain date, does not contain any provision on the time when jurisdiction of the Tribunal should cease. The reasons for this have already been explained (Section 8.2).

In the view of the Rapporteurs it is necessary to create a flexible system. The greatest flexibility can be achieved if the Court would be given the right to transfer proceedings back to States in the territory of the former Yugoslavia.

This would make it possible for the Court to assess the situation and gradually phase out the activities of the Tribunal.

The Rapporteurs foresee that a provision to this effect could be applied gradually and with respect to certain parts of the territory, while other parts would have to wait.

The Rapporteurs are anxious to emphasize that the formulation of the provision (Article 60) must in no way be construed as showing disrespect to the States in question. On the contrary, the Rapporteurs fully understand the difficulties which these States are facing. Their conclusions concerning jurisdiction by national courts reflected in Section 7 should also be borne in mind. The way in which the draft Convention is formulated, a transfer back to national jurisdiction means that the Court no longer has jurisdiction in the case. A decision on transfer should in their view be final. On the other hand it should not be made without the consent of the State to which the transfer is intended.

8.10 Financing

One of the most important issues to be regulated in the Convention is the financing. Matters pertaining to financing should be dealt with in the same way as is normal at the national level. This means that the organs of the Tribunal will have to provide the Standing Committee with sufficient basis in order for the Committee to be able to take a decision on the establishment of the annual budget.

The Convention and in particular its Annex 2 is drafted so as to provide the maximum of flexibility. This means that the budget may have to provide for certain resources which can be used, if necessary.

The items of the budget, as the Rapporteurs can foresee them at present, could be:

- Cost for the office
- Salaries for the judges
- Salaries for the Procurator-General and the members of the staff of the Procurocy
- Salaries for the Secretary and the members of the staff of the Secretariat
- Costs for legal aid
- Costs for witnesses and other evidence
- Travelling expenses and per diems
- Costs for interpretation and translation
- Unforeseen.

The main rule of the costs of the Tribunal appears in Article 52 of the draft Convention. The substantive provisions are,

however, laid down in a Financial Protocol in order not to burden the Convention itself with too much detail. The protocol is partly modelled after the draft Financial Protocol to the Stockholm Convention on Conciliation and Arbitration within the CSCE.

The Rapporteurs suggested in their report on Croatia that experts looking into the matter of drafting a treaty on an ad hoc tribunal should also make an estimation of costs. This is a question which requires thorough knowledge of many aspects of the establishment of international organizations, a field in which the Rapporteurs unfortunately lack much experience. They have, however, collected some information from the organs operating in the Hague. Some experience has also been drawn from the present work on the drafting of the Financial Protocol just mentioned. Based on this knowledge the following very - the Rapporteurs underline very - general calculations could be made.

In order not to create expectations the Rapporteurs prefer not to itemize the posts, but their assumptions are that the Court of First Instance would at the outset consist of 15 judges and the Court of Appeal of 7 judges. There would be 15 prosecutors, and the staff - including investigators - would consist of approximately 50 persons.

The annual cost for salaries to such a personnel would be approximately USD 8 - 10,000,000.

To this would come rental and maintenance of premises, miscellaneous equipment, audit services, transport of detained persons etc., counsel's fees and travel expenses etc. as well as costs for witnesses and other persons called before the court.

A very rough calculation would indicate a total cost of USD 16,000,000 per year, or USD 0.044 million per day.

In this context it is interesting to make a comparison with the costs for the United Nations Protection Force (UNPROFOR).

From the Secretary General's report of 2 December 1992 (Doc. A/47/741) appears i.a. the following (cf. Annex IV to the report). The net total for UNPROFOR for the period 12 January - 14 October 1992 (revised apportionment) was USD 260,000,000. The cost estimate for the period 15 October 1992 - 20 February 1993 is USD 290,924,000, and the cost estimate for the period 21 February 1993 - 20 February 1994 is USD 569,548,200. The latter figure corresponds to USD 1.56 million per day.

In the Secretary-General's report of 8 January 1993 (Doc. S/25000/Add. 1) there are estimates of the additional costs to the United Nations arising from the proposal to enlarge the mandate and strength of UNPROFOR. It is estimated that the costs associated with the additional responsibilities of monitoring crossing-points on the borders of Bosnia and Herzegovina with the Federal Republic of Yugoslavia would amount to some USD 694,125,000 for an initial six-month period. It is further estimated that the monthly cost thereafter will be approximately USD 69,155,000.

The Rapporteurs certainly do not intend to make any comparison whatsoever between UNPROFOR and a Tribunal; they have themselves observed the indispensable efforts in which this force is engaged, and they were very kindly assisted by UNPROFOR during their visit to Croatia. But it is nevertheless interesting to note that a forceful international jurisdiction could be set up at a cost which is only marginal - perhaps one or two per cent - in comparison to the costs for UNPROFOR.

The Rapporteurs would, however, not look only at the figures in relation to the Tribunal as such. One of the basic ideas of the international co-operation today is the rule of law. At the national level considerable funds are allocated to various institutions set up in defence of this idea. An important factor in the assessment of funds to be allocated to this end is the benefit which the judicial system brings to the society as a whole: the benefit of prevention.

In the view of the Rapporteurs the same reasoning should be applied also at the international level. The preventive effect of establishing the rule of law at the international level must also be recognized. Experiences from financing international operations for peace-keeping and for the monitoring of different international crises demonstrate that the costs for such undertakings tend to be soaring. A clear demonstration of determination and international co-operation in the matter with which this report is concerned would in the view of the Rapporteurs have a preventive effect, which in the long run would balance the costs foreseen at the present juncture.

8.11 Proceedings before the Tribunal

The preceding sections deal with some important questions of principle. The Rapporteurs are aware that it may be difficult to get a clear picture of the entire proceedings before the Tribunal. They therefore decided to present in this section a brief outline of the proceedings. They have chosen to do so by making reference to a case proceeded before the different organs of the Tribunal.

The first stage would be the investigation. A prosecutor would probably indicate what cases the investigators should concentrate on. But there would also be a general work concentrated on retrieving information which can indicate starting points.

There would be several sources of information (cf. Section 8.3). The investigators would have to rely on contacts and assistance at the national level. Victims and witnesses would have to be interviewed.

When the investigation has reached a stage where it is possible to start preparing an indictment, the prosecutor will get more directly involved. If the suspect is under arrest at the national level (the Convention should not prevent such actions at the national level) the prosecutor might request the Court to issue a warrant of arrest, whereby

the Court would take over responsibility for the person detained. If the suspect is not to be found, a warrant of arrest could nevertheless be granted, and States parties to the Convention as well as Interpol might be engaged. This would mean that the suspect would be apprehended if found, e.g. at a border-crossing or an airport.

When there is enough material gathered, the prosecutor has to take a stand whether to terminate the inquiry or to indict the suspect.

The indictment is then filed with the Secretary of the Tribunal, who allocates the case to one of the Chambers of the Court of First Instance. The Court makes an overview of the case and decides to serve the indictment on the accused. The accused would then be summoned (or brought) to a main hearing before the Court. He will have access to counsel, and the principle of "equality of arms" requires that he should be able to call witnesses and present evidence in the same manner as the prosecutor.

The main hearing will in principle be in public. When the proceedings are closed, the Court will withdraw and eventually pronounce its judgment. If the accused is acquitted, the case is closed unless the judgment is appealed. If the accused is found guilty, the judgment will be enforced. If the judgment is appealed, enforcement will depend on the outcome of the proceedings before the Court of Appeal.

If the case is appealed, the proceedings before the Court of Appeal will be very similar to the proceedings before the Court of First Instance. It should be noted, though, that the case before the Court of Appeal could be limited to certain questions or certain parts of the judgment. A common feature in appeal proceedings in criminal cases is that the accused may accept the fact that he is found guilty of a certain crime, but he wants the Court of Appeal to impose a more lenient sanction.

The judgment of the Court of Appeal will be final. If the accused is sentenced to imprisonment, the care for the convict will be transferred from the Tribunal to the national prison authorities in a State in the territory of the former Yugoslavia. The convict will be placed in an appropriate prison. General rules in this field may require that he should serve the sentence in such a way that his possibilities of receiving visits from members of his family are not impeded.

The case will now also be registered with the Supervising Judge, who must always be kept informed about the whereabouts of the prisoner. The prisoner will be informed about his right to communicate with the Supervising Judge, who may also visit prisons in the former Yugoslavia.

Eventually, the prisoner might ask for a modification of the sentence or for conditional release. This matter would have to be dealt with by the ordinary competent national organs. Their decision is, however, dependent on the approval by the Supervising Judge.

If the prisoner applies for clemency, this will not be a matter for national authorities but for the Board of Clemency. Eventually, the prisoner will have served his term, and the matter will be closed also with the Supervising Judge.

9 ACKNOWLEDGEMENTS

The Rapporteurs wish to express their gratitude to the Government of the Republic of Bosnia-Herzegovina for the co-operation extended to them despite the fact that the Rapporteurs were not able to visit that country. In particular they are grateful for the material provided which has made it possible for the Rapporteurs to examine the most important legal aspects of the subject matter entrusted to them. The Rapporteurs furthermore wish to express their gratitude to the Minister of Foreign Affairs of Bosnia-Herzegovina, Mr. Haris Silajdzic, the President of the Parliament of Bosnia-Herzegovina, Mr. Miro Lazovic, and to the other members of the Bosnian delegation for answering to their call for a meeting at Geneva at a time when they were otherwise engaged in the negotiations within the International Conference on the former Yugoslavia.

They would also like to thank Professor Frits Kalshoven and the other members of the Expert Commission established under United Nations Security Council Resolution No. 780 (1992), and in particular Professor M. Cherif Bassiouni, for a valuable exchange of views and information about the work of the Commission.

They furthermore thank Dr. Georg Mautner-Markhof and Professor Roman Wieruszewski, advisers to Mr. Janusz Mazowiecki, Special Rapporteur of the United Nations Commission on Human Rights on the former Yugoslavia, for informing them about the Rapporteur mission and for their kind advice. They are also grateful to Ambassador Peter Hall, Deputy to Lord Owen, and Mr. David Indlow, Private Secretary to Lord Owen, for informing them about the present situation in the International Conference on the Former Yugoslavia and for offering helpful comments in relation to their mandate.

The Rapporteurs also extend their gratitude to Ms. Birgit Kofler and Ms. Karin Proidl, Legal Officers of the Federal Ministry for Foreign Affairs of Austria, for preparing Annex 3, and to Ms. Ann Marie Pennegård, Counsellor, Permanent Delegation of Sweden to the United Nations at Geneva, who assisted them during their visit to Geneva on 24-26 January 1993.

They also express their gratitude to the Government of Norway for financial support of the translation of legal texts into English.

Finally, the Rapporteurs wish to thank the Ministry for Foreign Affairs of Sweden and the staff of the Legal Office of the Ministry, in particular Ms. Ulla-Britt Lagell and Ms. Anna Nilsson, for making possible the prompt completion of this report, and Ms. Ritva Manoli, for the graphic design of the cover and Annex 7.

10 CONCLUDING REMARKS

The Rapporteurs would like to reiterate their statement in the concluding remarks in their report on Croatia:

"It is beyond any doubt that gross violations of human rights and norms of international humanitarian law, including war crimes and crimes against humanity, have been committed in connection with the armed conflict in the former Yugoslavia. It is also common knowledge that every day atrocities continue to be committed. The evidence is overwhelming and undeniable. The international community cannot allow this horrifying situation to persist. In various fields, decisive measures should be taken to put an end to this tragic situation. One such field is the legal field."

The Rapporteurs can only note that the atrocities in the former Yugoslavia have continued since their report was issued on 7 October 1992. Many examples could be mentioned. The Rapporteurs are, however, especially concerned about numerous reports on extensive abuse of women in Bosnia-Herzegovina.

The Rapporteurs have noted the increased concern by the international community regarding this appalling situation: a concern demonstrated by a number of activities in different fields, i.e. by the United Nations, the CSCE, the EC, and the International Conference on the former Yugoslavia. They have noted in particular the resolutions adopted by the United Nations Security Council and the work performed by the Commission established under Security Council Resolution No. 780 (1992), and they are aware of all the efforts undertaken in various fields in order to protect the civilian population in the area. However, the time has come to act with increased determination in the legal field. As the Rapporteurs stated in their report on Croatia, the international community shares a common responsibility to bring to justice those who have committed crimes in connection with the armed conflict in the former Yugoslavia.

The Rapporteurs wish to point out that a wealth of information has already been gathered by various governmental and non-governmental organizations and institutions. Much of this information in their view would be sufficient to serve as a legal basis for criminal proceedings against suspected perpetrators. If no action is taken in the near future, it will become increasingly difficult to prosecute.


The Rapporteurs are convinced that the States on the territory of the former Yugoslavia which have declared their willingness to co-operate will do so. Persons under the jurisdiction of those States and suspected of having committed war crimes and crimes against humanity would therefore be delivered for trial by the Tribunal.

The Rapporteurs trust that in due course all the States on the territory of the former Yugoslavia will bow to the dictates of public conscience and accept the prosecution of suspected war criminals by the proposed Tribunal.

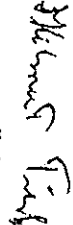
The message should be clear: Nobody committing war crimes and crimes against humanity will escape justice!

The Rapporteurs reiterate their conviction that the establishment of an International War Crimes Tribunal for the former Yugoslavia is not only desirable but also feasible from a legal point of view. The establishment of such a Tribunal is therefore primarily a question of political will.

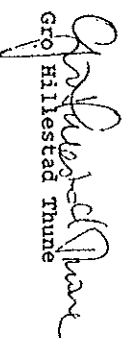
Stockholm, Washington and Oslo, 9 February 1993



Hans Corell



Helmut Türk



Gro Hillested Thune

Annexes

ARTICLES 4, 6, 10-12 AND 14 OF THE MOSCOW MEETING OF
THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE

- (4) A participating State may invite the assistance of a CSCE mission, consisting of up to three experts, to address or contribute to the resolution of questions in its territory relating to the human dimension of the CSCE. In such case, the State will select the person or persons concerned from the resource list. The mission of experts will not include the participating State's own nationals or residents or any of the persons it appointed to the resource list or more than one national or resident of any particular State.

The inviting State will inform without delay the CSCE Institution when a mission of experts is established, which in turn will notify all participating States. The CSCE institutions will also, whenever necessary, provide appropriate support to such a mission.

- (6) The inviting State will co-operate fully with the mission of experts and facilitate its work. It will grant the mission all the facilities necessary for the independent exercise of its functions. It will, *inter alia*, allow the mission, for the purpose of carrying out its tasks, to enter its territory without delay, to hold discussions and to travel freely therein, to meet freely with officials, non-governmental organizations and any group or person from whom it wishes to receive information. The mission may also receive information in confidence from any individual, group or organization on questions it is addressing. The members of such missions will respect the confidential nature of their task.

The participating States will refrain from any action against persons, organizations or institutions on account of their contact with the mission of experts or of any publicly available information transmitted to it. The inviting State will comply with any request from a mission of experts to be accompanied by officials of that State if the mission considers this to be necessary to facilitate its work or guarantee its safety.

(10) The requesting State or States may appoint one person from the resource list to serve as a CSCE rapporteur. The requested State may, if it so chooses, appoint a further rapporteur from the resource list within six days after notification by the CSCE Institution of the appointment of the rapporteur. In such case the two designated rapporteurs, who will not be nationals or residents of, or persons appointed to the resource list by any of the States concerned, will by common agreement and without delay appoint a third rapporteur from the resource list. In case they fail to reach agreement within eight days, a third rapporteur who will not be a national or resident of, or a person appointed to the resource list by any of the States concerned, will be appointed from the resource list by the ranking official of the CSCE body designated by the Council. The provisions of the second part of paragraph 4 and the whole of paragraph 6 also apply to a mission of rapporteurs.

(11) The CSCE rapporteur(s) will establish the facts, report on them and may give advice on possible solutions to the question raised. The report of the rapporteur(s), containing observations of facts, proposals or advice, will be submitted to the participating State or States concerned and, unless all the States concerned agree otherwise, to the CSCE Institution no later than three weeks after the last rapporteur has been appointed. The requested State will submit any observations on the report to the CSCE Institution, unless all the States concerned agree otherwise, no later than three weeks after the submission of the report.

The CSCE Institution will transmit the report, as well as any observations by the requested State or any other participating State, to all participating States without delay. The report may be placed on the agenda of the next regular meeting of the Committee of Senior Officials, which may decide on any possible follow-up action. The report will remain confidential until after that meeting of the Committee. Before the circulation of the report no other rapporteur may be appointed for the same issue.

(12) If a participating State considers that a particularly serious threat to the fulfilment of the provisions of the CSCE human dimension has arisen in another participating State, it may, with the support of at least nine other participating States, engage the procedure set forth in paragraph 10. The provisions of paragraph 11 will apply.

(14) The participating State or States that have requested the establishment of a mission of experts or rapporteurs will cover the expenses of that mission. In case of the appointment of experts or rapporteurs pursuant to a decision of the Committee of Senior Officials, the expenses will be covered by the participating States in accordance with the usual scale of distribution of expenses. These procedures will be reviewed by the Helsinki Follow-up Meeting of the CSCE.

THE RAPPORTEURS UNDER THE MOSCOW HUMAN DIMENSION
MECHANISM TO BOSNIA-HERZEGOVINA AND CROATIA
(Composition for the preparation of the present report.)

RAPPORTEURS

Ambassador Hans CORELLI, appointed by the United Kingdom and co-sponsors

Ambassador Helmut TÜRK, appointed by Bosnia-Herzegovina and Croatia

Mrs. Gro HILLESTAD THUNE, appointed by Hans Corelli and Helmut Türk

REPORTS ABOUT ABUSES OF HUMAN RIGHTS AND BREACHES OF
INTERNATIONAL HUMANITARIAN LAW IN THE TERRITORY OF THE FORMER
YUGOSLAVIA

I. RAPPORTEUR MISSIONS

Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia

The Special Rapporteur of the UN-Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia, M. Tadeusz MAZOWIECKI, visited Bosnia-Herzegovina, Croatia and Serbia from 21 to 26 August 1992 and from 12 to 22 October 1992. His reports identify the Serbian policy of "ethnic cleansing" as the direct reason for the grave violations of human rights, such as random executions, maltreatments, rapes, taking of hostages and the destruction of homes, especially in Bosnia-Herzegovina and the United Nations Protected Areas (UNPAs). The victims of such abuses are, according to his reports, mainly Muslim and Croatian civilians. The reports, however, also underline that violations of human rights also occur in territories of Bosnia-Herzegovina controlled by the Government or by ethnic Croats as well as in Croatia. Nevertheless, these abuses can - according to the reports of Mr. Mazowiecki - not be compared with the systematic use of force practiced by the Serbian side.

Source: UN. Doc. A/47/418-S/24516 (1st report)
UN. Doc. A/47/635-S/24766 (2nd report)
UN. Doc. A/47/666-S/24809 (3rd report)

CSCE-Mission headed by Sir John Thomson to Bosnia-Herzegovina from 29 August to 4 September 1992

A CSCE-Mission, headed by Sir John Thomson, visited Bosnia-Herzegovina from 29 August to 4 September 1992 with the aim to investigate the status and the treatment of persons detained by the parties to the conflict. The report describes the overall dramatic situation in the detention camps. It is emphasized that detained persons, mostly civilians, often show signs of maltreatments. According to Sir Thomson's report, it can also be assumed that innocent persons were executed. He further refers to the insufficient food supply as well as the catastrophic sanitary and medical situation in the camps.

The report confirms that all parties to the conflict are to be held responsible for violations of human rights. The most severe breaches are, however, attributed to the Serbian side.

Source:
Conference on Security and Cooperation in Europe,
Office for Democratic Institutions and Human Rights
Warsaw

CSCE-Rapporteur-Mission (Correll-Juerk-Thune) to Croatia from 30 September to 5 October 1992

The Mission under the Human Dimension Mechanism of the CSCE reports about grave abuses of the civilian population, such as persecutions, killings and torture as well as "ethnic cleansing" on the territory of the Republic of Croatia. While the responsibility for such acts is attributed to all parties to the conflict, the violations committed by the Yugoslav National Army, Serbian paramilitary forces and Serbian police forces are described as particularly severe, because the atrocities seem to form part of an officially tolerated or even supported Serbian policy.

Source:
Conference on Security and Cooperation in Europe
Office for Democratic Institutions and Human Rights
Warsaw

EC Investigating Mission into the treatment of Muslim women in the former Yugoslavia

The team headed by Dame Anne Warburton visited Bosnia-Herzegovina from 18 - 24 December 1992. The report draws the conclusion that rapes are widespread and a part of a recognizable pattern. It states that Muslim women undoubtedly form the vast majority of rape victims but that there are also disturbing reports regarding the rape of Croatian and Serbian women as well as sexual abuse of men in detention camps.

Source:
Comision of the European Community
Brussels

II. NONGOVERNMENTAL INTERNATIONAL ORGANIZATIONS

Helinski Watch:

Rules of war violations in Croatia by Croatian Forces, February 1992

The report, also submitted to the Croatian President by Helinski Watch, refers to cases of violations of human rights and international humanitarian law by Croats, such as summary executions of civilians, disappearances, torture in detention camps, arbitrary arrests, destruction of property as well as killing and harassment of journalists.

Source:
Human Rights Watch
New York

Helinski Watch: War Crimes in Bosnia-Herzegovina, August 1992

The report describes numerous cases of executions of civilians, "ethnic cleansing", "disappeared" persons, taking of hostages, attacks on medical personnel and journalists and destruction of property in the territory of Bosnia-Herzegovina. The responsibility for such violations of human rights and international humanitarian law, according to this report, is to be attributed to the Serbian, Croatian and Muslim side. It is, however, stressed that the majority of war crimes was witnessed in the territories controlled by Serbian forces.

Source:
Human Rights Watch
New York

Helinski Watch: Yugoslavia, Human Rights Abuses in Kosovo 1990 - 1992, October 1992

In this report, Helinski Watch stresses that the use of force against the civilian population and the systematic violation of human rights as part of the strategy of "ethnic cleansing" are not restricted to areas of conflict in Croatia and Bosnia-Herzegovina, but form part of the official policy in Kosovo since 1990, although in a less brutal manner. The report describes maltreatments and killings in police custody, restrictions to the freedom of assembly and opinion and the systematic discrimination of the Albanian population.

Source:
Human Rights Watch
New York

Amnesty International: Yugoslavia, Torture and deliberate and arbitrary killings in war zones, November 1991

The report contains numerous cases of executions of civilians by military and paramilitary forces in the areas of conflict in Croatia and the neighbouring regions of Bosnia-Herzegovina. It primarily describes abuses of Croatian civilians, but also a number of violations committed by Croatian forces. Furthermore, the report deals with killings and torture of detainees.

Source:
Amnesty International
London

Amnesty International: Bosnia-Herzegovina, Gross abuses of basic human rights, October 1992

The report is mainly based on testimonies of former detainees from Bosnia-Herzegovina gathered by Amnesty International. It describes the abhorrent living conditions, acts of torture, rapes and killings in different detention camps. While the majority of breaches of human rights is attributed to the Serbian side, abuses committed by Bosnian forces are also mentioned. Furthermore, mass killings of civilians committed by Serbian units are investigated.

Source:
Amnesty International
London

Amnesty International: Bosnia-Herzegovina, Rapes and sexual abuse by armed forces, January 1993

This report contains a documentation on sexual abuse of women in Bosnia-Herzegovina. It is mainly based on testimonies

gathered by representatives of Amnesty International, journalists and women's and human rights organizations. The report states that responsibility of such acts must be attributed to all parties to the conflict, but that Muslim women form the vast majority of victims. The perpetrators are mainly to be found among Serbian forces. According to the testimonies available, rapes of women are, in some cases, committed in a systematic and organized manner. Cases are described in which women were explicitly detained in order to be sexually abused in detention.

Source:
Amnesty International
London

Amnesty International: Bosnia-Herzegovina, Rana u dusi, A wound to the soul, January 1993

The report illustrates acts of "ethnic cleansing" in the region of Bosanski Petrovac in the north-western part of Bosnia which used to be predominantly Muslim. It is based upon the verified reports contained in the diary of a Muslim of this region who describes the atrocities committed in his town from April to November 1992.

Source:
Amnesty International
London

III. NATIONAL SOURCES

The countries concerned as well as other States have published numerous reports. The following examples can be given:

War Crimes Investigation Institute of the Republic of Bosnia and Herzegovina: Data of war crimes in Bosnia and Herzegovina with special review of suffering of civilian population in concentration camps and prisons. 27 July 1992

The report not only contains a general description of the practice of "ethnic cleansing" committed by Serbian forces in Bosnia-Herzegovina, but also lists of Serbian controlled detention camps in Bosnia-Herzegovina and camps in Serbia and Montenegro where Bosnian detainees are held.

Source:

War Crimes Investigation Institute
Sarajevo

Council of Human Rights and Fundamental Freedoms: Testimonies on Killings of Civilians committed by Serbian Forces Outside a Combat Context in Bosnia-Herzegovina. September 1992

The document contains eye-witness reports of Bosnian Muslims gathered by the Council for Human Rights and Fundamental Freedoms in refugee camps in Slovenia and Croatia. They mainly describe massacres of civilians in different regions of Bosnia-Herzegovina.

Source:

Council of Human Rights and Fundamental Freedoms
Ljubljana

State Commission of War Crimes. Belgrade: Depositions of Serbian women given to the State Commission of War Crimes. Analysis of the medical psychological examinations of one group of people liberated through prisoners' exchanges. 17 December 1992

The documents mainly contain eye-witness reports of Serbian women about rapes committed by Croats and Muslims in

Bosnia-Herzegovina.

Source:

State Commission of War Crimes
Belgrade

Submission of information to the United Nations Security Council by the US-Government in accordance with para. 5 of resolution 771 and para. 1 of resolution 780. 22 September 1992; 23 October 1992; 10 November 1992

The reports submitted by the United States are based upon research conducted by the State Department as well as upon press articles. In chronological order, killings of civilians, maltreatments and tortures in camps, destruction of property and mass deportations in the former Yugoslavia, particularly in Bosnia-Herzegovina, are listed.

Source:

UN. Doc. S/24705 and S/24791

Documenta Croatica: Center for Genocide and War Victims. Zagreb

This documentation center is headed by the former Croatian Foreign Minister, SEPAROVIC; it regularly publishes reports and documents about war crimes.

Arhiv Centra za istraživanje ratnih zločina i zločina genocida nad muslimanima Zenica (Muslim Documentation Center in Zenica)

This institution, too, collects and publishes reports and documents about war crimes. Amongst others a reports about 11 mass graves with a precise description of their location has been presented.

Source:

Muslim Documentation Center



Economic and Social
Council

Distr.
GENERAL

E/CN.4/1992/S-1/5
13 August 1992

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
First Special Session
Item 3 of the provisional agenda

LETTER DATED 5 AUGUST 1992 FROM THE PERMANENT REPRESENTATIVE
OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS OFFICE
AT GENEVA ADDRESSED TO THE UNDER-SECRETARY-GENERAL FOR
HUMAN RIGHTS

Letter dated 10 August 1992 from the President of the
Republic of Bosnia and Herzegovina addressed to the
Secretary-General of the United Nations

Reiterating our already expressed intention, as a Member State of the United Nations and of the Conference on Security and Cooperation in Europe, to respect in their entirety all universal and regional systems protecting human rights,

having in view the fact that the United Nations Security Council has already, in its resolution 752 (1992) condemned the aggression against Bosnia and Herzegovina in accordance with Chapter VII of the Charter of the United Nations,

expressing our readiness to fulfil all the obligations we have undertaken in signing the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and the Additional Protocols to this Convention of 1977,

bearing in mind the evidence presented by governmental and non-governmental organizations, surviving witnesses, and local and foreign journalists concerning the drastic violations of international humanitarian laws as relating especially to civilians on the territory of the Republic of Bosnia and Herzegovina,

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and expressing our desire that justice should be satisfied and that conditions should be created for the continued existence and common life of all citizens of the Republic of Bosnia and Herzegovina on a multi-national, multi-confessional and multi-cultural basis,

We, the Presidency and Government of the Republic of Bosnia and Herzegovina, propose:

1. That an unprejudiced and independent legal body be created having the function of an international court [which] should work under the patronage of the United Nations and as an ad hoc organ of the London Conference on Yugoslavia.
2. That the creation of this court should utilize the experience of the work done by the International Military Tribunal at Nürnberg, that is, the Nürnberg precedent in international law.
3. That within the competence of this court should be included crimes against peace, crimes against humanity, war crimes and the crime of genocide.
4. That the legal basis for the work of this court should be all relevant acts connected with the international protection of human rights and rights in time of war of both a universal and a regional character, and in particular:
 - (a) The Nürnberg principles which, as *opinio juris*, were confirmed by the international community in General Assembly resolutions 3 (I) and 95 (I) of 13 February and 11 December 1946;
 - (b) The Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and the Additional Protocols to this Convention of 1977;
 - (c) The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968;
 - (d) The Convention on the Prevention and Punishment of the Crime of Genocide of 1948.
 5. That in determining the severity and type of sanctions applied to war crimes, the court take into account the provisions of the Criminal Law of the Republic of Bosnia and Herzegovina which concern violations of international law.
 6. That the composition of this court include distinguished experts in international law who are specialized in such matters, but none of whom are citizens of any of the States that have come into being as a result of the disintegration of former Yugoslavia, so that the lack of prejudice and the independence of the court may be guaranteed.

7. That the procedures and organization of the court be based on the principles of ad hoc arbitration, respecting at the same time in the course of its work all guarantees confirmed by international law.

8. That international humanitarian organizations - in the first place the International Committee of the Red Cross and the United Nations High Commissioner for Refugees as well as other international and Bosnian and Herzegovina governmental and non-governmental organizations which concern themselves with problems of human rights - should be directly included in the preparatory work of the court.

(Signed) Alija Izetbegovic
President

QUOTATIONS FROM A STATEMENT BY THE REPRESENTATIVE OF THE
REPUBLIC OF CROATIA IN THE SIXTH COMMITTEE OF THE UNITED NATIONS
GENERAL ASSEMBLY ON 6 NOVEMBER 1992

"We would like to emphasize that the Republic of Croatia has already proposed and initiated the international trials for the war crimes, crimes against humanity and international law, and the crimes of genocide, committed on the territory of former Yugoslavia, in order to punish all perpetrators and organizers irrespective of their nationality, religion, whereabouts. Republic of Croatia is fully prepared and has already offered the cooperation with the experts in this field."

"I would like to emphasize that the Republic of Croatia strongly supports the idea of the establishment of an *ad hoc* international Tribunal for war crimes, crimes against humanity and international law, crimes of genocide committed during the aggressive war against Croatia and the other parts of former Yugoslavia. The establishment of the Court would not be only of the legal and humanitarian importance, but also of the utmost political importance, because it would significantly contribute to stop and resolve the conflicts in the entire region of former Yugoslavia. In this respect we would suggest that this Tribunal should be established and should have the jurisdiction in respect of the entire territory of former Yugoslavia."

DRAFT CONVENTION ON AN INTERNATIONAL
WAR CRIMES TRIBUNAL
FOR THE FORMER YUGOSLAVIA

The States parties to this Convention, being States participating in the Conference on Security and Co-operation in Europe,

Gravely alarmed by the numerous reports on war crimes and crimes against humanity, committed in the former Yugoslavia, and by the fact that such crimes continue to be committed in certain areas thereof;

Mindful of their obligations under the 1949 Geneva Convention III relative to the Treatment of Prisoners of War and the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War to establish jurisdiction over persons alleged to have committed grave breaches as defined in Article 130 and Article 147, respectively, of those Conventions, and aware of the 1977 Protocols I and II to these Conventions;

Mindful also of their obligation under Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of that Convention;

Reaffirming their determination, as expressed in their previous statements, that suspected war criminals in the former Yugoslavia should be held personally accountable for their acts;

Responding to the appeals from States in the territory of the former Yugoslavia to establish an international jurisdiction to try individuals accused of war crimes and crimes against humanity committed in that territory,

Have agreed as follows:

CHAPTER I - GENERAL PROVISIONS

Article 1

Establishment of the Tribunal

There is hereby established an International War Crimes Tribunal for the former Socialist Federative Republic of Yugoslavia ("the former Yugoslavia").

Article 2

Purpose of the Tribunal

The purpose of the Tribunal is to try individuals accused of war crimes and crimes against humanity as defined in international law and the domestic criminal law provisions of the former Yugoslavia and determined in scope by this Convention.

Article 3

Crimes Punishable under this Convention

Crimes punishable under this Convention are the crimes referred to in this Convention and committed in the territory of the former Yugoslavia as from 1 January 1991.

Article 4

Organs of the Tribunal

The Tribunal shall consist of the following organs:

- (a) the Court, comprising the Court of First Instance, the Court of Appeal, and the Plenary Court;
- (b) the Procureur;

(c) the Secretariat;

(d) the Board on Clemency; and

(e) the Standing Committee of States parties to this Convention, hereinafter referred to as the Standing Committee.

Article 5

Legal Capacity

The Tribunal shall enjoy in the territory of each of the States parties to this Convention such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Article 6

Seat

- 1. The seat of the Tribunal shall be established at ...
- 2. The Court may upon approval of the Standing Committee meet in the territory of any State party to this Convention.

CHAPTER II - THE COURT

A. THE COURT OF FIRST INSTANCE

Article 7

Appointment of Judges

1. Each State party to this Convention shall appoint, within two months following its entry into force, two judges, both of whom shall be nationals of that State. A State which becomes party to this Convention after its entry into force shall appoint its judges within thirty days following the entry into force of this Convention for the State concerned.

2. The judges shall have no official function on the Tribunal until they are called to serve on the Court of First Instance by the Standing Committee.

3. Judges shall be persons of high moral character and have the legal competence and qualifications required for appointment to a criminal court of their States.

4. In the event of death or resignation or if there is a vacancy for any other reason, the State concerned shall appoint a new judge. The term of office of the new judge shall be the remainder of the term of office of the predecessor.

5. The names of the judges shall be notified to the Secretary of the Tribunal, who shall enter them into a list, which shall be communicated to each State party to this Convention.

Article 8

Terms of Office

1. Judges shall be appointed for a term of five years. They may be re-appointed once.

2. A judge shall continue in office beyond his term in order to complete work on any pending matter in which he was involved until final disposition of that matter.

3. In the case of the resignation of a judge, the resignation shall be addressed to the President of the Tribunal, who shall transmit it to the Standing Committee. This transmission shall make the place vacant.

Article 9

Solemn Declaration

Each judge shall, before taking up his duties, make a solemn declaration in open court that he will perform his functions impartially and conscientiously.

Article 10

Privileges and Immunities

The judges shall enjoy, while performing their functions in the territory of the States parties to this Convention, the privileges and immunities accorded to members of the International Court of Justice.

Article 11

Occupation of Judges

1. Once appointed judges may not have any occupation or business other than that of a judge in the State from which they have been appointed, or a member of the faculty of a university. Judges shall not engage in any activity which interferes with their judicial functions at the Tribunal and avoid any appearance of lack of impartiality.

2. Any doubt on this point shall be settled by the decision of the Plenary Court.

Article 12

Disability of Judges

A judge shall perform no function on the Tribunal with respect to any matter in which he may have had any involvement prior to his appointment to the Tribunal, nor with respect to any matter involving actual, apparent or potential conflict of interest.

Article 13

Disqualification of Judges

1. A judge who considers that he should not participate in a particular proceeding shall so inform the President of the Plenary Court, who may excuse the judge.

2. A party to a proceeding may submit that a judge should not participate in a particular proceeding. Such submission shall be addressed to the President of the Plenary Court.

3. If the President of the Plenary Court upon receipt of a submission under paragraph 2 or of his own motion considers that a judge should not participate in a particular proceeding, the President shall so advise the judge.

4. If the President of the Plenary Court and the judge disagree on issues referred to in this Article, the Plenary Court shall decide.

Article 14
Dismissal of Judges

1. A judge may be removed by a unanimous vote of the Plenary Court for incapacity to fulfil his functions.
2. The President of the Court shall transmit such decision to the Standing Committee. This transmission shall make the place vacant.

Article 15
Emoluments

The Standing Committee shall determine the salary of judges.

Article 16
Chambers

1. For the consideration of each case brought before it the Court of First Instance shall consist of a Chamber composed of three judges.
2. Election of the judges to the Chambers shall be by the Plenary Court by lot.
3. The President of the Court shall request the Standing Committee to call judges to serve on the Court of First Instance when the need arises. The answer to this request by the Standing Committee shall be within thirty days of the request.

Article 17
Decision-making

1. The decisions of the Chambers shall be taken by a majority of their members, who may not abstain from voting.
2. In the event that there is no majority, the judges shall make a renewed effort in order to arrive at a decision. If this is not possible, the vote of the presiding judge shall prevail.

B. THE COURT OF APPEAL

Article 18
Appointment of Judges

1. Each State party to this Convention shall appoint, within two months following its entry into force, one judge of appeal who shall be a national of that State. A State which becomes party to this Convention after its entry into force shall appoint its judge of appeal within thirty days following the entry into force of this Convention for the State concerned.

2. The judges of appeal shall have no official function on the Tribunal until they are called to serve on the Court of Appeal by the Standing Committee.

3. Judges of appeal shall fulfil the requirements laid down in Article 7, paragraph 3. In addition, they shall fulfil the requirements for appointment to a criminal court of appeal of their States.

4. In the event of death or resignation or if there is a vacancy for any other reason, the State concerned shall appoint a new judge of appeal. The term of office of the new judge of appeal shall be the remainder of the term of office of the predecessor.

5. The names of the judges of appeal shall be notified to the Secretary of the Tribunal, who shall enter them into a list, which shall be communicated to each State party to this Convention.

Article 19
Chambers

1. For the consideration of each case brought before it the Court of Appeal shall consist of a Chamber composed of five judges of appeal.

2. The Standing Committee shall elect one Chamber and two alternate judges of appeal by lot. Should the need arise, the Standing Committee shall elect two Chambers and two alternate judges of appeal by lot.

3. If there is a need for more than two Chambers, the provisions of Article 16, paragraphs 2 and 3 shall apply mutatis mutandis.

Article 20

Other Provisions

The provisions of Articles 8-15 and 17 shall apply to the Court of Appeal mutatis mutandis.

C. THE PLENARY COURT

Article 21

Constitution and Functions

1. All the judges called to serve on the Court of First Instance and the Court of Appeal constitute the Plenary Court.

2. The Plenary Court shall elect from among the judges of appeal a President and a vice-President. The President shall serve for a term of two years, and may be re-elected, although not for more than two consecutive terms.

3. The Plenary Court shall decide on matters entrusted to it by this Convention.

4. A quorum of twelve judges shall suffice to constitute the Plenary Court. The Rules of the Tribunal may lay down a higher number.

5. The decisions of the Plenary Court shall be taken by a majority of the judges participating in the vote. Those abstaining shall not be considered participating in the vote. In the event of a tied vote, the vote of the President shall prevail.

6. In case this Convention lays down special rules on the decision-making procedure of the Plenary Court, such rules shall apply instead of paragraph 5.

CHAPTER III - THE PROCURACY

Article 22

Functions

The Procuracy shall investigate and prosecute the crimes as determined in scope by this Convention.

Article 23

The Procurator-General and Members of the Staff of the Procuracy

1. The Procurator-General is the chief officer of the Procuracy and the Chief Public Prosecutor. He shall be elected by the Standing Committee from a list of at least three nominees submitted by the States parties to the Convention. He shall serve for a renewable term of five years, barring resignation or removal by a two-third's vote of the Plenary Court for incompetence, conflict of interest, or manifest disregard of the provisions of this Convention or the Rules of the Tribunal.

2. The salary of the Procurator-General shall be the same as that of the judges of appeal.

3. The Procuracy shall employ other prosecutors, investigators and clerical staff as necessary to carry out its responsibilities and consistent with the budget established by the Standing Committee. The members of the staff of the Procuracy shall be appointed and removed by the Procurator-General. Their salaries shall be determined by the Procurator-General subject to the budget established by the Standing Committee.

CHAPTER IV - THE SECRETARIAT

Article 24

Functions

1. The Secretariat is the administrative, financial, and clerical organ of the Tribunal.
2. The Secretariat shall:
 - (a) prepare a budget proposal for the ensuing financial year for each of the organs of the Tribunal on the basis of the information provided thereto by the other organs;
 - (b) publish an annual financial report and a report on the activities of the Tribunal on the basis of information provided by the President of the Court and the Procurator-General; and
 - (c) perform any other function provided in this Convention.

Article 25

The Secretary and Members of the Staff of the Secretariat

1. The Secretary of the Tribunal is the chief officer of the Secretariat. He is the clerk of the Tribunal as a whole but has a particular responsibility with respect to the Court. He shall be elected by the Plenary Court and serve for a renewable term of five years, barring resignation or removal by the Plenary Court for incompetence, conflict of interests or manifest disregard of the provisions of this Convention or the Rules of the Tribunal.
2. The salary of the Secretary shall be the same as that of the judges of appeal.
3. The Secretariat shall employ such staff as appropriate to perform its functions consistent with the budget established by the Standing Committee. The members of the staff of the

Secretariat shall be appointed and removed by the Secretary. Their salaries shall be determined by the Secretary subject to the budget established by the Standing Committee.

CHAPTER V - THE STANDING COMMITTEE

Article 26

Functions

1. The Standing Committee shall represent the States parties to this Convention. It shall perform the functions expressly assigned to it under the Convention, and any other functions that it determines appropriate in furtherance of the purposes of the Tribunal and are not inconsistent with the Convention. These functions may in no way impair the independence and integrity of the Court as a judicial body.
2. The Standing Committee shall:
 - (a) call judges to serve on the Court;
 - (b) elect the Procurator-General;
 - (c) establish the annual budget of the Tribunal;
 - (d) assist the Tribunal in carrying out its functions;
 - (e) monitor compliance by the States parties with the provisions of this Convention;
 - (f) ensure compliance with judgments and other decisions of the Court; and
 - (g) perform any other function provided in this Convention.

Article 27

Composition and Procedure

1. The Standing Committee shall consist of one representative and one alternate representative appointed by each State party

to this Convention. If no appointment is made, the permanent representative to the State where the seat of the Tribunal is located shall be regarded as representative.

2. The Standing Committee shall elect from among the representatives a presiding officer and an alternate presiding officer. The presiding officer shall have the right to have one or more assistants who are not members of the staff of the Secretariat.

3. The presiding officer shall convene regular meetings at least twice a year at the seat of the Tribunal. At the request of one third of the representatives he shall call extraordinary meetings. The Standing Committee can also decide to meet in a location other than the seat of the Tribunal.

4. The Standing Committee may exclude from participation at a given session the representative of a State party that:

(a) has failed to provide financial support for the Tribunal in accordance with the established budget; or

(b) has failed to carry out any other obligation under this Convention.

5. The Standing Committee may form an executive board or any other sub-committee as it may deem appropriate.

6. The Standing Committee may adopt rules of procedure as necessary.

7. The decisions of the Standing Committee shall be taken by a majority of the members participating in the vote. Those abstaining shall not be considered participating in the vote. In the event of a tied vote, the vote of the presiding officer shall prevail.

8. In case this Convention lays down special rules on the decision-making procedure of the Standing Committee, such rules shall apply instead of paragraph 7.

CHAPTER VI -- JURISDICTION AND APPLICABLE LAW

Article 28

Jurisdiction and Applicable Law

1. The Tribunal shall, subject to the provisions of this Convention, apply the substantive law set forth in Annex 1, to be construed in the light of the pertinent international instruments. Annex 1 constitutes an integral part of this Convention.

2. With respect to general substantive law, such as rules on attempt, preparation, conspiracy and complicity, the provisions of the Penal Code of the former Yugoslavia shall apply. In passing sentence the Court shall observe the provisions on aggravating or extenuating circumstances of the same Code.

3. In all cases before the Tribunal, the procedures, rules, and standards of the Tribunal shall apply.

4. If the jurisdiction of the Tribunal is challenged by a party to the trial, the matter shall be decided by the pertinent Chamber of the Court of First Instance at once. If it is made later, the matter shall be decided by the Court at such time as the Court thinks fit.

CHAPTER VII -- PENALTIES AND REMEDIES

Article 29

Penalties

1. The Court shall have the power to impose the penalties provided for in the Penal Code of the former Yugoslavia. Such penalties include:

(a) deprivation of liberty;

(b) fines; and

(c) confiscation of the proceeds of criminal conduct.

2. The Court shall not pass sentence of capital punishment.

Article 30
Remedies

1. The Court shall have the power to order in conformity with the legislation of the former Yugoslavia:
 - (a) restitution of property; and
 - (b) provision for damages.
2. The Court may decide not to hear matters referred to in paragraph 1, if this would impede or delay the criminal case with which the Court is seized.

CHAPTER VIII - GENERAL PROVISIONS ON PROCEDURE

Article 31
Judicial Guarantees

An individual charged with a crime under the provisions of this Convention shall be entitled without discrimination to the guarantees provided for in the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

Article 32
Double Jeopardy

1. No person who has been tried, acquitted, or convicted by the Court shall be subsequently tried for the same crime in any court within the jurisdiction of any State party to this Convention.
2. A person who has been tried in any national court shall not be tried again for the same crime before the Tribunal.

Article 33
Rights and Interests of the Victim

The rights and interests of the victim of a crime shall be protected. In particular, a victim shall have:

- (a) the opportunity to participate in the criminal proceedings in accordance with the provisions of this Convention and the Rules of the Tribunal; and
- (b) the right to claim restitution of property and appropriate compensation.

CHAPTER IX - CRIMINAL INQUIRY AND INITIATION OF THE PROCESS

Article 34
Criminal Inquiry

1. A criminal inquiry shall be conducted as soon as there is reason to believe that a crime falling within the jurisdiction of the Tribunal has been committed.
2. The Procurator-General shall appoint one of the prosecutors of the Procuracy to conduct the inquiry in the capacity of Public Prosecutor.
3. The Public Prosecutor shall have the right to call witnesses for examination, to request evidence and to call experts.
4. The person subject to inquiry shall have the right to be heard in respect of the complaint. He shall also have the right to be assisted at the inquiry by a counsel of his own choice, to submit information, and to inspect any document introduced during the inquiry.
5. The Public Prosecutor may request national authorities of States parties to this Convention to assist in the performance of his function and to supply relevant information.

6. A State party to this Convention shall render such assistance in conformity with the Convention and with national law.

Article 35

Initiation of the Process

1. Having regard to the facts established at the criminal inquiry, the Public Prosecutor shall either:

(a) terminate the inquiry against the alleged offender, should the complaint or suspicion appear to be unfounded in law or in fact, or

(b) decide to indict the accused based on the findings in the inquiry, if the case is reasonably founded in fact and law.

2. In the case referred to in paragraph 1 (a), a State party to this Convention or an alleged victim may appeal the determination to the Procurator-General.

3. In the case referred to in paragraph 1 (b), the Public Prosecutor shall prepare an indictment of the accused based on the findings of the inquiry and shall file it with the Secretary of the Tribunal. He shall also be responsible for conducting the prosecution before the Court.

CHAPTER X - PROCEDURES BEFORE THE COURT OF FIRST INSTANCE

Article 36

Pre-trial Processes

1. The Public Prosecutor may request the Court of First Instance to issue orders in aid or development of a case, in particular:

(a) warrants of arrests;

(b) subpoenas;

(c) injunctions;

(d) search warrants; and

(e) warrants for surrender of an accused so as to enable the bringing of the accused before the Court.

2. Requests for such orders may be granted without prior notice to the accused, if such notice would jeopardize the pursuit of justice.

3. All such orders shall be executed pursuant to the relevant laws of the State in which they are supposed to be executed.

4. A warrant of arrest may be issued when there exists a strong suspicion on reasonable and probable grounds that the accused person has committed the alleged offence and that the Tribunal has jurisdiction in the case. Subsequent to the arrest of the accused, the Court may request the concerned State to detain the accused or to release him provisionally. The Court may impose conditions of provisional release.

Article 37

Indictment

1. The indictment shall contain a concise statement of the facts which constitute each alleged offence and a specific reference to the legal provisions under which the accused is charged. The Court may authorize amendments to this indictment as regards the extent of crimes included.

2. The Court is not bound to apply the legal provisions which are referred to by the Public Prosecutor in the indictment but it may apply other legal provisions which appear in Annex 1 or in this Convention as it may find appropriate to the case after having given reasonable notice to the parties.

Article 38

Notice of Indictment

1. The Court shall bring the indictment to the notice of the accused.
2. The Court shall not proceed with the trial unless satisfied that the accused has had the indictment and any amendment thereof served upon him and has had sufficient time and facilities to prepare his defense.

Article 39

Withdrawal of Prosecution, Dismissal or Acquittal

1. If the Public Prosecutor withdraws the indictment, the Court shall dismiss the case. However, if the accused so requests, the Court shall discharge him.
2. If, after hearing the case, the Court does not find sufficient evidence of guilt, it shall acquit the accused.

Article 40

Main Hearing

1. The Court shall hear the case in public, unless it decides for reasons of public order or the protection of the private life of victims or to the extent strictly necessary in special circumstances where publicity would prejudice the interests of justice that the hearing shall be held in camera.
2. The Court shall have the right to call witnesses for examination and to request evidence from witnesses and other appropriate evidential material, and to call experts. The Court may call upon any State to supply information which may appear to be relevant to the case.
3. When all evidence respecting guilt and innocence has been presented and argued by the parties, the Court shall close the hearing and retire for deliberations. These shall take place in private and shall not be disclosed.

Article 41

Judgments

1. The Court shall announce its judgments orally, in full or in summary, in open court. A judgment shall state, in relation to each accused, the reasons upon which it is based.
2. The judgment shall contain the names of the judges who have taken part in the decision. It shall be signed by the presiding judge and the Secretary.
3. A judge may issue a concurring or dissenting opinion. If such opinion is issued, the judgment shall contain the same.
4. The judgment shall contain information on how to appeal.
5. Unless appealed the judgment shall be final.

CHAPTER XI - PROCEDURES BEFORE THE COURT OF APPEAL

Article 42

Initiation of the Process

1. Judgments of the Court of First Instance may be appealed by the accused upon written notice filed with the Secretariat within thirty days of the date on which the judgment was rendered in writing.
2. The Procuracy may appeal questions of law in the same manner as an accused under paragraph 1.
3. Other appeals against actions of the Court of First Instance may be examined before a final judgment is handed down only if such actions relate to procedural matters.

Article 43

The Trial

The provisions of Articles 39 and 40 shall apply to the Court of Appeal.

Article 44
Judgments and Decisions

1. Article 41, paragraphs 1-3 shall apply mutatis mutandis to the Court of Appeal.
2. Judgments and decisions by the Court of Appeal shall be final.

Article 45
Revision of Judgments

1. An accused who has been found guilty may apply to the Court of Appeal for revision of the judgment.
2. An application for revision shall not be entertained unless the Court is satisfied:
 - (a) that a fact has been discovered of such a nature as to be a decisive factor; and
 - (b) that this fact was, when the judgment was given, unknown to the Court and the applicant.
3. The Rules of the Tribunal may lay down other grounds for revision.
4. Revision proceedings shall be opened by a judgment of the Court of Appeal expressly recording the existence of the new fact and recognizing that it is of such a character as to lay the case open to revision.
5. If revision proceedings are opened, the Court of Appeal may:
 - (a) decide to withhold execution of the judgment;
 - (b) re-open the case and vacate the judgment;
 - (c) re-open the case for a new trial before the Court of Appeal; or

- (d) remand the case for a new trial before the Court of First Instance.

CHAPTER XII - ENFORCEMENT OF JUDGMENTS

Article 46
Enforcement

1. Penalties are to be enforced on behalf of the Court in a State party to this Convention which is a successor State to the former Yugoslavia.
 2. A penalty can also be enforced in another State party to this Convention, if this State consents thereto.
 3. The enforcement shall be under international supervision as provided for in Article 47 and the Rules of the Tribunal.
 4. The Court may determine the way in which a sentence shall be dealt with subject to paragraphs 5 and 6.
 5. The laws of the administering State party to this Convention as well as its administrative regulations concerning the enforcement and execution of the sentence shall apply, including conditional release or alternative measures provided under its laws, subject to the provisions of Article 47, paragraph 2.
 6. The enforcement of a fine or a confiscatory measure shall be governed by the laws and regulations mentioned in paragraph 5. However, their proceeds shall go to the Tribunal.
- Article 47
Supervision
1. The Plenary Court shall select one of the judges of the Court of First Instance to act as supervisor of the execution of judgments (Supervising Judge). An alternate Supervising Judge shall also be selected.

2. The Supervising Judge has the right to inspect any prison or other place of detention where sentences are served or persons are being kept under custody and to communicate with all sentenced persons in private. All national decisions on conditional release or alternative measures shall be subject to the approval of the Supervising Judge.
3. The provisions of this Article does not preclude the Court from suspending its judgment or place preconditions to its application in accordance with the Rules of the Tribunal.

CHAPTER XIII - CLEMENCY

Article 48

Board of Clemency

1. The States parties to this Convention shall designate a Board of Clemency. Every State party to this Convention shall be entitled to have one delegate on the Board.
2. The Board shall have the power of clemency with respect to persons sentenced by the Court in lieu of competent national organs of the States parties to this Convention.
3. Before deciding on a petition for clemency, the Board shall seek the advice of the Plenary Court.
4. The Board shall adopt its own rules of procedure.

CHAPTER XIV - ADMINISTRATIVE MATTERS

Article 49

Rules of the Tribunal

1. The Plenary Court shall draw up Rules of the Tribunal to regulate the functions and activities of the Court, the Procuracy and the Secretariat. In doing so the Court should give due consideration to the Code of Criminal Procedure of the former Yugoslavia.

2. When the Rules of the Tribunal are being drawn up, the Procurator-General and the Secretary are entitled to participate but not to vote.
3. The Rules of the Tribunal shall be published. Rules pertaining to the security of the Tribunal and related provisions may, however, be kept confidential.

Article 50

Working Languages

1. The working language of the Tribunal shall be English.
2. The Court may decide to use any other language in a particular case.

Article 51

Privileges and Immunities

1. The privileges and immunities of judges are laid down in Article 10.
2. The Procurator-General, the Secretary and other officers and employees of the Tribunal shall enjoy, while performing their functions in the territory of the States parties to this Convention, the privileges and immunities accorded to persons connected with the International Court of Justice.
3. The Plenary Court may revoke the immunity of any person referred to in paragraph 2 with a two thirds vote, except for the immunity of the Procurator-General.

Article 52

Costs of the Tribunal

The costs of the Tribunal shall be met by the States parties to this Convention. The provisions for the calculation of the costs; for the drawing up and approval of the annual budget of the Tribunal; for the distribution of the costs among the States parties to this Convention; for the audit of the accounts of the

Tribunal; and for related matters, is contained in the Financial Protocol which appears in Annex 2. The Protocol constitutes an integral part of this Convention.

CHAPTER XV - INTERNATIONAL JUDICIAL ASSISTANCE
AND OTHER FORMS OF COOPERATION

Article 53

General Provisions

1. The States parties to this Convention shall provide the Tribunal with all internationally recognized means of legal assistance. Assistance shall include, but not be limited to:
 - (a) ascertaining the whereabouts and addresses of persons;
 - (b) taking the testimony or statements of persons in the requested State or elsewhere;
 - (c) effecting the production or preservation of judicial and other documents, records, or articles of evidence;
 - (d) service of judicial and administrative documents; and
 - (e) authentication of documents.
2. The Tribunal is authorized to seek the co-operation of States non-parties to the Convention as appropriate.

Article 54

Communications and Requests

1. All communications in relation to this Convention shall be in writing and shall be between the competent national authority and the Secretariat of the Tribunal. The Procuracy may correspond directly with local authorities in the former Yugoslavia.
2. Whenever appropriate, communications may also be made through the International Criminal Police Organization

(ICPO/Interpol), in conformity with arrangements which the Tribunal may make with this organization.

3. Documentation pertaining to judicial assistance and cooperation shall include the following:
 - (a) the basis and legal reasons for the request;
 - (b) information concerning the individual who is the subject of the request;
 - (c) information concerning the evidence sought to be seized, describing it with sufficient detail to identify it, and describing the reasons why, and the legal basis relied thereon;
 - (d) description of the basic facts underlying the request; and
 - (e) description of some evidence concerning the charges, accusations or conviction of the person who is the subject of the request.
4. All communications and requests made pursuant to this Convention shall be in any of the official languages of the Convention.

Article 55

Provisional Measures

- In cases of urgency, the Tribunal may ask of the requested State party to the Convention any or all of the following:
- (a) to provisionally arrest the person sought for surrender;
 - (b) to seize evidence needed in connection with any proceedings which shall be the object of a formal request under the provisions of this Chapter; or
 - (c) to undertake protective measures to prevent the escape of the person or destruction of the evidence sought.

Article 56
Delivery of Persons

Delivery of persons for any reason from a State to the Tribunal and vice versa shall be in accordance with established legal procedures under this Convention and the Rules of the Tribunal as well as the laws of the requested State.

Article 57
Rule of Speciality

1. A person delivered to the Tribunal shall not be subject to prosecution or punishment for any other crime than that for which he has been delivered.
2. Evidence delivered shall not be used for any other purpose than for the purpose for which it was delivered.
3. Waiver of the requirements of paragraphs 1 and 2 may be made by the requested State on the basis of a motivated request by the Tribunal.

Article 58
Costs

1. The costs for the delivery of persons to the Tribunal and for other judicial assistance and co-operation shall be borne by the Tribunal.
2. The costs for execution of sentences shall be borne by the State party to this Convention in which the execution takes place.

Article 59
Obligation to Try or Extradite

1. The States parties to this Convention undertake to surrender, extradite or transfer to the Tribunal on the basis of this Convention any person under investigation, charged, sought to be tried, or convicted by the Court in accordance with the jurisdiction of the Tribunal.

2. A State party to this Convention that decides to prosecute a person for a crime under the jurisdiction of the Tribunal does not have the obligation to surrender or extradite that person to the Tribunal.
3. A State party to this Convention may, as an alternative to prosecution and as an alternative to using the jurisdiction of the Tribunal, extradite a person to another state having jurisdiction and willing to prosecute.
4. Paragraphs 2 and 3 do not apply to any State in the territory of the former Yugoslavia.

CHAPTER XVI -- TRANSFER OF PROCEEDINGS FROM
THE TRIBUNAL TO NATIONAL JURISDICTION

Article 60

Transfer of Proceedings to States in the
Territory of the Former Yugoslavia

1. When the Plenary Court is satisfied that a State party to this Convention in the territory of the former Yugoslavia has the appropriate means to adjudicate effectively and fairly cases falling under the jurisdiction of the Tribunal, it may authorize the Court of First Instance to transfer the proceedings in particular cases to the national courts of that State. Such transfer may not be made without the consent of the State to which the transfer is intended.
2. A decision by the Court of First Instance on transfer is final.
3. If transfer is decided, the case shall be dealt with in accordance with the national legislation of the receiving State.

CHAPTER XVII - FINAL PROVISIONS *

Article 61

Signature and Entry into Force

1. This Convention shall be open for signature with the Government of by the CSCE participating States until It shall be subject to ratification.
2. The CSCE participating States which have not signed this Convention may subsequently accede thereto.
3. This Convention shall enter into force two months after the date of deposit of the twelfth instrument of ratification or accession.
4. For every State which ratifies or accedes to this Convention after the deposit of the twelfth instrument of ratification or accession, the Convention shall enter into force two months after its instrument of ratification or accession has been deposited.
5. The Government of shall serve as depositary of this Convention.

Article 62

Reservations

This Convention may not be the subject of any reservation.

Article 63

Amendments

1. Amendments to this Convention must be adopted in accordance with the following paragraphs.
2. Amendments to this Convention may be proposed by any State party thereto.
3. If the Standing Committee adopts the proposed text of the amendment, the text shall be forwarded by the Depositary to States parties to this Convention for acceptance in accordance with their respective constitutional requirements.
4. Any such amendment shall come into force on the thirtieth day after all States parties to this Convention have informed the Depositary of their acceptance thereof.

Article 64

Denunciation

1. Any State party to this Convention may, at any time, denounce this Convention by means of a notification addressed to the Depositary.
2. Such denunciation shall become effective one year after the date of receipt of the notification by the Depositary.

Article 65

Notifications and Communications

The notifications and communications to be made by the Depositary shall be transmitted to the Secretary of the Tribunal and to the States parties to this Convention.

* The Rapporteurs have chosen to demonstrate a possible CSCE option. If the UN option is chosen, the provisions will naturally have to be elaborated in accordance with UN practice.

Article 66
Transitional Provisions

Annex 1
 (To draft Convention)

Until a Secretary is appointed, the duties of the Secretary under Article 7, paragraph 5, and Article 18, paragraph 5 shall be performed by the Depositary.

Done at on
 in the English, French, German, Italian,
 Russian and Spanish languages, all six
 language versions being equally authentic.

PROVISIONS FROM THE PENAL CODE OF THE FORMER YUGOSLAVIA TO BE
 APPLIED BY THE INTERNATIONAL WAR CRIMES TRIBUNAL FOR THE
 FORMER YUGOSLAVIA

Section A

Provisions from Chapter XVI of the Penal Code of the former
 Yugoslavia to be directly applied by the Tribunal

The following provisions from Chapter XVI of the Penal Code
 of the former Yugoslavia shall be applied*:

Article 141 - Genocide

Any person who, with the intent to destroy, in whole or in
 part, a national, ethnical, racial or religious group,
 orders with respect to members of such a group their killing,
 the infliction of serious physical injuries, the destruction
 of their mental or physical health, their forcible dispersal
 or deportation, the infliction of conditions of life which
 bring about the physical destruction of the group in whole or
 in part, the imposition of measures preventing births within
 the group or the forcible transfer of children to another
 group

or who commits, with the same intent, any of the acts
 mentioned,

is to be punished by a prison sentence of at least five years
 or by the death penalty.**

* Unofficial translation.

** According to Article 29, paragraph 2 of the Convention
 the Court shall not pass sentence of capital punishment.

Article 142 - War crimes against the civilian population

(1) Any person who, in contravention of the provisions of international law, during a war, an armed conflict or an occupation, orders

an attack against the civilian population, a settlement, individual civilians or incapacitated persons hors combat causing the death, serious physical injuries or health defects,

an indiscriminate attack which affects the civilian population, the killing, torturing or inhuman treatment of the civilian population, its subjection to biological, medical or other scientific experiments, the taking out of tissues or organs for transplantation purposes, the infliction of serious suffering and damage to the physical integrity and health, the dispersal, deportation or forcible change of the national identity or conversion to another creed, forcible prostitution and rape, measures aiming at threatening and terrorising, the taking of hostages, collective punishment, illegal confinement of persons in concentration camps and other illegal prisons, the denial of the right of a lawful trial before an independent court, forced enrolment in hostile armed forces or in its communication services or administration, forced labour, the denial of food supplies to the population, the confiscation of property, pillage, the illegal and unauthorized destruction or appropriation of property on a large scale and unless justified by the necessities of warfare, illegal and disproportionately high contributions and requisitions, the devaluation of the local currency or the illegal circulation of money

or who commits any of the acts mentioned

is to be punished by a prison sentence of at least five years or by the death penalty.*

* Cf. note to Article 141.

(2) The punishment according to para. 1 of this article is to be inflicted on any person who, in contravention of the provisions of international law, during a war, an armed conflict or an occupation, orders

an attack against objects which are under the special protection of international law as well as against potentially dangerous objects and installations like e.g. barrages, protective dams and nuclear power stations, and indiscriminate attack against civilian objects which are under the special protection of international law as well as unprotected places and demilitarized zones, an attack causing long-term and widespread destruction of the environment and prejudice to the health and the survival of the population or who commits any of the acts mentioned.

(3) Any person who, in contravention of the provisions of international law, during a war, an armed conflict or an occupation, orders or executes, as part of the occupying force, the resettlement of parts of his civilian population to the occupied territory is to be punished by a prison sentence of at least five years.

Article 144 - War crimes against prisoners of war

Any person who, in contravention of the provisions of international law, orders with respect to prisoners of war their killing, torturing or inhumane treatment, their subjection to biological, medical or other scientific experiments, the taking out of tissues or organs for transplantation purposes, the infliction of serious suffering and damage to the physical integrity and health, their forced enrolment in hostile armed forces or the denial of the right of a lawful trial before an independent court,

or who commits any of the acts mentioned

is to be punished by a prison sentence of at least five years or by the death penalty.*

* Cf. note to Article 141.

Article 150 - Rude treatment of the wounded, sick or prisoners of war

Any person who, in contravention of the provision of international law, inflicts a rude treatment upon the wounded, sick or prisoners of war or who prevents that they avail themselves of their rights granted by international law is to be punished by a prison sentence of between six months and five years.

Article 151 - Destruction of cultural and historical monuments

(1) Any person who, in contravention of the provisions of international law, during a war or an armed conflict, destroys cultural or historical monuments and buildings or installations serving scientific, artistic, educational or humanitarian purposes is to be punished by a prison sentence of at least one year.

(2) If by an act falling under para. 1 of this article a clearly recognizable object is destroyed which is under the special protection of international law as belonging to the cultural or intellectual heritage of a people, the perpetrator is to be punished by a prison sentence of at least five years.

Section B

Provisions from the Penal Code of the former Yugoslavia to be applied by the Tribunal within the scope of the provisions enumerated in Section A

To support the application of the provisions enumerated in Section A the Tribunal may apply any provision of the Penal Code of the former Yugoslavia criminalizing acts, which are specifically mentioned in the provisions enumerated in that Section.

Annex 2
(To draft Convention)

FINANCIAL PROTOCOL
TO THE CONVENTION ON AN INTERNATIONAL WAR CRIMES
TRIBUNAL FOR THE FORMER YUGOSLAVIA

Article 1
Contributions to the Budget of the Tribunal

- Contributions to the budget of the Tribunal shall be divided among the States parties to the Convention according to the scale of distribution applicable within the CSCE, adjusted to take into account the difference in number between the CSCE participating States and the States parties to the Convention.
- If a State ratifies or accedes to the Convention after its entry into force, its contribution shall be equal, for the current financial year, to one-twelfth of its portion of the adjusted scale, as established according to paragraph 1 of this Article, for each full month of that financial year which remains after the date on which the Convention enters into force in respect of it.

Article 2
Financial Year and Budget

- The financial year shall be from 1 January to 31 December.
- The Secretary, acting in accordance with Article 24 of the Convention, shall establish each year a budget proposal,

which shall be submitted to the States parties to the Convention before 15 September.

3. The budget shall be approved by the Standing Committee by a two-thirds majority of the attending representatives. On approval of the budget for the financial year the Secretary shall request the States parties to the Convention to remit their contributions.

If the budget is not approved by 31 December the Tribunal will operate on the basis of the preceding budget and, without prejudice to later adjustments, the Secretary shall request the States parties to the Convention to remit their contributions in accordance with this budget.

The Secretary shall request States parties to the Convention to make fifty per cent of their contributions available on 1 January and the remaining fifty per cent on 1 April.

4. Barring a decision to the contrary by the Standing Committee, the budget shall be established in [currency of host State] and the contributions of the States shall be paid in this currency.

5. A State which ratifies or accedes to the Convention after its entry into force shall pay its first contribution to the budget within two months after the request by the Secretary.

6. The year the Convention enters into force, the States parties to the Convention shall pay their contribution to the budget within two months following the date of deposit of the twelfth instrument of ratification of the Convention. This budget is preliminary fixed at [amount in the currency of the host State].

Article 3
Obligations, Payments and Revised Budget

1. The approved budget shall constitute authorization to the Secretary to incur obligations and make payments up to the amounts and for the purposes approved.

2. The Secretary is authorized to make transfers between items and sub-items of up to 15 per cent of items/sub-items. All such transfers must be reported by the Secretary in connection with the financial statement mentioned in Article 7 of this Protocol.

3. Obligations remaining undischarged at the end of the financial year shall be carried over to the next financial year.

4. If so obliged by circumstances and following careful examination of available resources with a view to identifying savings, the Secretary is authorized to submit a revised budget, which may entail requests for supplementary appropriations. The approval by the Standing Committee shall be in accordance with Article 2, paragraph 3 of this Protocol.

5. Any surplus for a given financial year shall be deducted from the scheduled contributions for the financial year following the one in which the accounts have been approved by the Standing Committee. Any deficit shall be charged to the ensuing financial year unless the Standing Committee decides on supplementary contributions.

Article 4

Salaries, Nominal Retainers, Social Security and Pensions

1. Salaries shall be determined in accordance with the provisions of the Convention by the Standing Committee by a two-thirds majority of the attending representatives.

2. The President and the vice-President of the Plenary Court shall receive an annual nominal retainer in addition to

their salaries. The annual nominal retainers shall be determined by the Standing Committee by a two-thirds majority of the attending representatives.

3. The Standing Committee shall ensure that the judges, the Procurator-General, the Secretary and other employees of the Tribunal are afforded a social security scheme and an adequate retirement pension.

Article 5

Travel Expenses

1. Travel expenses which are absolutely necessary for exercising their functions shall be paid to the judges, the Procurator-General, the Secretary and other employees of the Tribunal.

2. Travel expenses shall comprise actual transportation costs, including expenses normally incidental to transportation, and a daily travel allowance in lieu of subsistence expenses covering all charges of meals, lodging, fees and gratuities and other personal expenses. The daily travel allowance shall be determined by the Standing Committee by a two-thirds majority of the attending representatives.

Article 6*

Privileges and Immunities

1. Salaries, nominal retainers, pensions and travel expenses mentioned in Articles 4 and 5 of this Protocol are free from all taxation in the territory of the States parties to the Convention.

2. The privileges and immunities of the Tribunal, the judges, the Procurator-General, the Secretary and the staff

* This Article has not been discussed in substance within the Financial Committee of the CSCE.

of the Tribunal in the host State shall be regulated in the headquarters agreement to be concluded between the Tribunal and the host State.

Article 7

Records and Accounts

1. The Secretary shall ensure that appropriate records and accounts are kept of the transactions and that all payments are properly authorized.

2. The Secretary shall submit to the Standing Committee not later than 1 March an annual financial statement showing, for the preceding financial year:

- (a) the income and expenditures relating to all accounts;
- (b) the situation with regard to budget provisions;
- (c) the financial assets and liabilities at the end of the financial year.

Article 8

Audit

1. The accounts of the Tribunal shall be audited each year by two auditors, of different nationalities, appointed for renewable periods of three years by the Standing Committee. Judges and persons employed by the Tribunal may not be auditors.

2. Auditors shall annually conduct audits. They shall, in particular, check the accuracy of the books, the statement of assets and liabilities, and the accounts. The accounts shall be available for the annual auditing and inspection not later than 1 March.

3. Auditors shall perform such audits as they deem necessary to certify:

(a) that the annual financial statement submitted to them is correct and in accordance with the books and records of the Tribunal;

(b) that the financial transactions recorded in this statement have been effected in accordance with the relevant rules, the budgetary provisions and other directives which may be applicable; and

(c) that the funds on deposit and on hand have been verified by certificates received directly from the depositories or by actual count.

4. The Secretary shall give auditors such assistance and facilities as may be needed for the proper discharge of their duties. Auditors shall, in particular, have free access to the books of account, records and documents which, in their opinion, are necessary for the audit.

5. Auditors shall annually draw up a report certifying the accounts and setting forth the comments warranted by the audit. They may, in this context, also make such observations as they deem necessary regarding the efficiency of financial procedures, the accounting system and the internal financial control.

6. The report shall be submitted to the Standing Committee not later than four months after the end of the financial year to which the accounts refer. The report shall be transmitted to the Secretary beforehand, so that he will have at least fifteen days in which to furnish such explanations and justifications as he may consider necessary.

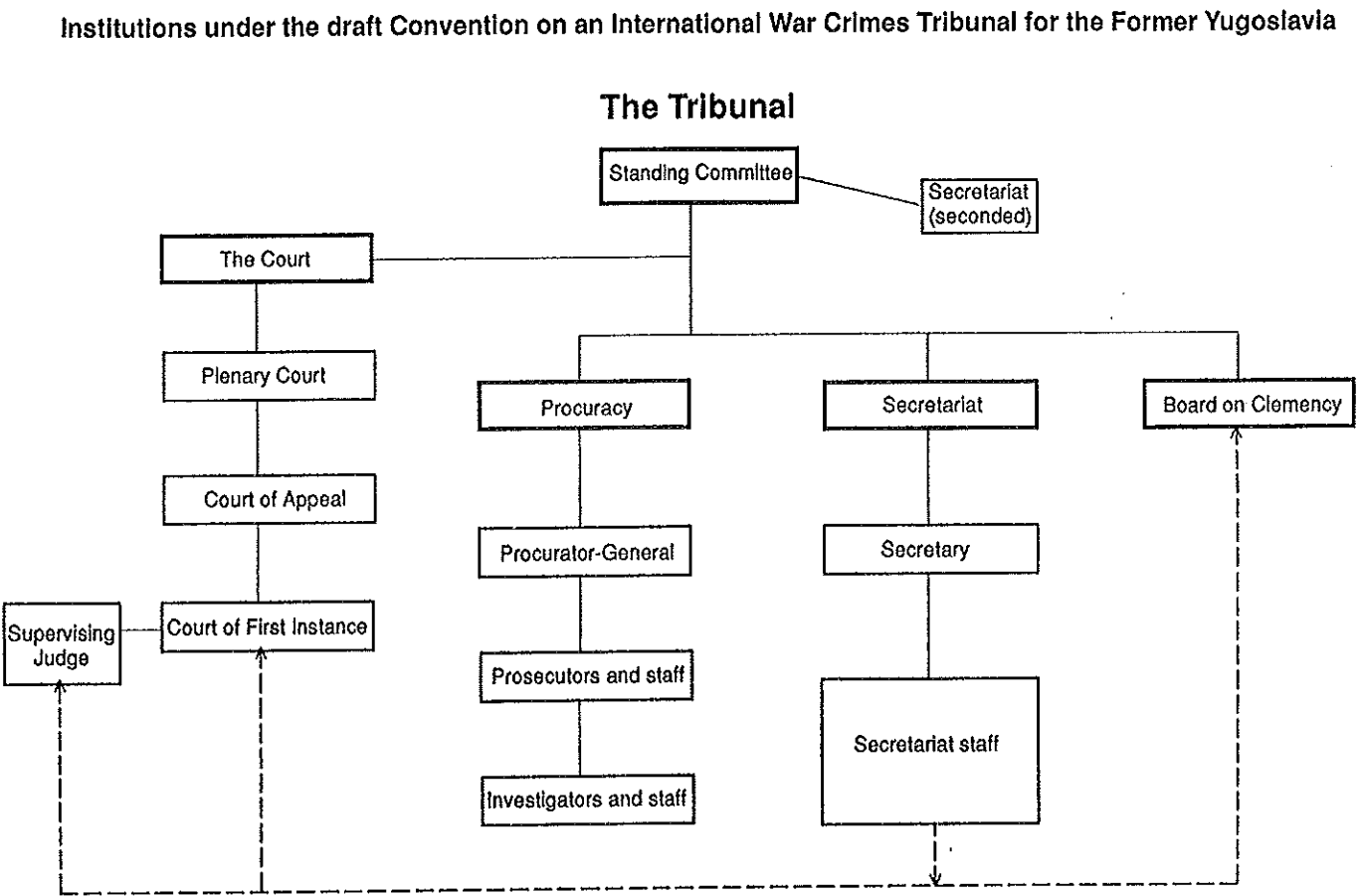
7. In addition to the annual auditing, auditors will at any time have free access to check the books, the statement of assets and liabilities, and accounts.

8. On the basis of the audit report, the Standing Committee shall signify its acceptance of the annual financial statement or take such other action as may be considered

appropriate, according to the procedure determined in Article 2, paragraph 3 of this Protocol.

Article 9
Amendments

Amendments to this Protocol must be adopted in accordance with the provisions of Article 63 of the Convention.



COMMENTARY TO THE DRAFT CONVENTION

The present Annex contains a Commentary to the draft Convention, elaborated by Ambassador Corelli (cf. Section 1 in fine).

General Remarks

Based on the general considerations under Section 8, a draft Convention on an International War Crimes Tribunal for the Former Yugoslavia has been drawn up. The text is partly based on previous texts. There are quite a few such texts available. However, some of these texts are relatively old, some of them are not fully pertinent to the present purposes, and some of them are not elaborate enough to give much guidance.

The main sources of information have been the so called London Charter, i.e. the agreement of 8 August 1945 between the United States of America, France, the United Kingdom and the Soviet Union, establishing the International Military Tribunal (The Nuremberg Tribunal), the Revised draft statute for an international criminal court prepared by the United Nations Committee on International Criminal Jurisdiction in 1953 (U.N. Doc. A/2645; 1954), the Draft statute for an international criminal court prepared by the International Law Association in 1981 (Report of the Sixtieth Conference of the ILA, Montreal 1982), and a draft Statute for an International Criminal Tribunal presented by Association Internationale des Droits Pénale (AIDP) and its President, Professor M. Sherif Bassiouni, who is also a member of the UN Expert Commission (cf. Section 2.5).

It should be pointed out, however, that the sui generis character of the Tribunal proposed by the Rapporteurs makes

it necessary to deviate in many parts from the material available. This is so in particular since the pertinent substantive penal law is already existing in the present case and that therefore the principle of legality (nulum crimen sine lege, nulla poena sine lege) should present no problem in connection with the establishment of a Tribunal as foreseen by the Rapporteurs.

Other important sources of information are the Statute of the International Court of Justice and the European Convention on Human Rights. Likewise the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes have been of guidance. Of particular importance has been the Convention on Conciliation and Arbitration within the CSCE, which was signed in Stockholm on 15 December 1992 by 29 CSCE participating States.

It should be noted that the draft reflects the option that the CSCE participating States or some of these States take the initiative to establish the Tribunal. But the text could be used also in a United Nations context, although some modifications would be necessary. The possibility of the Security Council deciding under Chapter VII of the Charter of the United Nations to establish an international jurisdiction has been mentioned in the discussion. Even if such a decision should prove possible, legally and politically, the issues dealt with in the present report still have to be resolved. In this context should be mentioned an alternative solution which should not be overlooked; the Security Council may consider ordering a State in the territory of the former Yugoslavia which is not a party to the Convention to deliver persons suspected of war crimes or crimes against humanity in the former Yugoslavia to a Tribunal established at the regional level, e.g. within the CSCE which is recognized as a regional arrangement under Chapter VIII of the Charter of the United Nations.

The draft Convention appears as Annex 6 to the present report. The following contains the text of the draft articles and a Commentary to each article.

Title and Preamble

DRAFT CONVENTION ON AN INTERNATIONAL WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA

The States parties to this Convention, being States participating in the Conference on Security and Co-operation in Europe,

Gravely alarmed by the numerous reports on war crimes and crimes against humanity, committed in the former Yugoslavia, and by the fact that such crimes continue to be committed in certain areas thereof;

Mindful of their obligations under the 1949 Geneva Convention III relative to the Treatment of Prisoners of War and the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War to establish jurisdiction over persons alleged to have committed grave breaches as defined in Article 130 and Article 147, respectively, of those Conventions, and aware of the 1977 Protocols I and II to these Conventions;

Mindful also of their obligation under Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of that Convention;

Reaffirming their determination, as expressed in their previous statements, that suspected war criminals in the former Yugoslavia should be held personally accountable for their acts;

Responding to the appeals from States in the territory of the former Yugoslavia to establish an international jurisdiction to try individuals accused of war crimes and crimes against humanity committed in that territory,

Have agreed as follows:

Commentary

As appears the title of the draft Convention is "Convention on an International War Crimes Tribunal for the Former Yugoslavia". It should be noted that the scope of the Convention is somewhat wider, since jurisdiction is conveyed to the Tribunal not only for war crimes but also for crimes

against humanity. Therefore, other titles, e.g. "Convention on the Establishment of an International Criminal Tribunal for the Former Yugoslavia" could be contemplated. It is advisable, however, to use a title which is shorter and more easily understandable to the general public. No doubt, most of the matters which the Tribunal would be seized with would be war crimes.

With respect to the preamble it should be pointed out that the text which appears in the first line demonstrates the option that the Convention is open only to CSCE participating States.

As far as the first preambular paragraph is concerned, reference is made to Sections 2.3 and 4.

The background to the second and third preambular paragraphs is explained in Section 8.2.

With respect to the fourth preambular paragraph reference is made to Section 2.4.

Reference to the appeals from Bosnia-Herzegovina and Croatia, motivating the fifth preambular paragraph, is made in Section 8.1 (cf. also Annexes 4 and 5).

CHAPTER I - GENERAL PROVISIONS

Article 1

Establishment of the Tribunal

There is hereby established an International War Crimes Tribunal for the former Socialist Federative Republic of Yugoslavia ("the former Yugoslavia").

Commentary

This provision lays down the establishment of the Tribunal. In order not to create uncertainty, the official name of "the former Yugoslavia" is mentioned in the text, thus making it possible to use the shorter definition throughout the text of the Convention.

Article 2

Purpose of the Tribunal

The purpose of the Tribunal is to try individuals accused of war crimes and crimes against humanity as defined in international law and the domestic criminal law provisions of the former Yugoslavia and determined in scope by this Convention.

Commentary

It is necessary that the Convention clearly defines the purpose of the Tribunal. As has been elaborated in Section 8.2, the present Convention does not have to deal with the problem which has been discussed in connection with many draft statutes for international criminal courts, namely an international criminal code. It is obvious that the basis of the jurisdiction is the international commitments which the former Yugoslavia undertook when the 1949 Geneva Conventions III and IV and the other instruments referred to in the preamble were ratified. The ratification of these instruments is reflected in the national penal law of the former Yugoslavia, and is carried on in new penal laws in the successor States. It is on the basis of these provisions that the Tribunal has to exercise its jurisdiction. The determination of the scope of this jurisdiction is made in Articles 2, 3 and 28 and in Annex 1 to the Convention. The present article defines the scope of jurisdiction *ratione personae* (cf. Section 8.2 *in fine*).

Article 3

Crimes Punishable under this Convention

Crimes punishable under this Convention are the crimes referred to in this Convention and committed in the territory of the former Yugoslavia as from 1 January 1991.

Commentary

As has been explained in Section 8.2 it is necessary to lay down in the Convention the crimes which are punishable under the same. As appears, the Rapporteurs are of the opinion that Articles 141, 142, 144, 150, and 151 of the Penal Code of the former Yugoslavia should be applied by the Tribunal. This delimitation is regulated by Article 28.

From Section 8.2 also follows that it is necessary to decide upon a date as from which the Tribunal should be competent to exercise jurisdiction. This date is 1 January 1991. Crimes committed before midnight between 31 December 1990 and 1 January 1991 consequently fall outside the jurisdiction of the Tribunal.

The competence is also limited to the territory of the former Yugoslavia. The Rapporteurs think that this is a natural delimitation of the jurisdiction, although they are aware of the fact that crimes which should be punished in connection with the armed conflict in the former Yugoslavia might have been committed outside that territory. In particular preparation, conspiracy and complicity might have been committed outside the territory in question. If it is considered desirable that also such crimes should fall under the jurisdiction of the Tribunal, the text has to be revised.

Article 3 should be read in conjunction with Articles 2 and 28. In particular it should be noted that Article 3 deals with the geographical criterion and with jurisdiction *ratione temporis*, while Article 2 deals with jurisdiction *ratione personae* and Article 28 with jurisdiction *ratione materiae*.

Articles 2, 3 and 28 should also be seen as the basic provisions which ascertain the principle of legality (*nullum crimen sine lege, nulla poena sine lege*) (cf. Section 8.2).

Article 4

Organs of the Tribunal

The Tribunal shall consist of the following organs:

- (a) the Court, comprising the Court of First Instance, the Court of Appeal, and the Plenary Court;
- (b) the Procuracy;
- (c) the Secretariat;
- (d) the Board on Clemency; and
- (e) the Standing Committee of States parties to this Convention, hereinafter referred to as the Standing Committee.

Commentary

Reference is made to Section 8.4, where the general considerations for the different organs of the Tribunal are presented.

It should be noted that the term "Tribunal" is used throughout the report to describe the entire entity which is created by the Convention and which, once it is set up, should be considered as a subject under international law (cf. Section 5).

The question as to which organ is competent to act on behalf of the Tribunal has to be deduced from the Convention and the Rules of the Tribunal. The highest administrative organ is obviously the Standing Committee. But important decisions could also be taken by the Secretariat or be delegated to the Secretary or other members of the staff. Other decisions - in particular in the judicial field - would be taken by the Court, yet others by the Procuracy. The intention is, however, that it must always appear which organ has made a particular decision, e.g. "The Court of First Instance of the War Crimes Tribunal for the former Yugoslavia orders etc. - -"

Sometimes reference is made to the "jurisdiction of the Tribunal". In this context the concept jurisdiction is used in a wide sense and not only with reference to the Court. As an example could be mentioned the instance where the Procureur decides not to prosecute in a particular case, because this authority thinks that the matter falls outside the jurisdiction as defined by the Convention. If this decision is not appealed against, it will be final as far as the Tribunal is concerned.

The term "the Court" is used to describe all three appearances which the Court can assume. It is also used to describe the Court of First Instance or the Court of Appeal if there is no risk of a misunderstanding.

The term "Plenary Court" may be criticized for not being altogether accurate. Normally this term is used to describe meetings of all judges of a Court which primarily adjudicates cases in Chambers composed of a limited number of the judges serving on the Court. The purpose of the plenary meeting could be to decide administrative matters but also jurisdiction, e.g. to hear a particularly important case or to decide in a case where the Court might wish to deviate from precedence created by judgments in Chambers or where there is a risk that Chambers will arrive at different decisions in cases of a similar character. However, the concept "Plenary Court" could be used in this context without creating a misunderstanding. Separate plenary meetings are not foreseen, neither of the judges of the Court of First Instance nor of the judges of the Court of Appeal (although there could be arguments for plenary meetings of the Court of Appeal). Other suggestions could be "Joint Plenary Court", "General Court" or "the Court en banc".

As to other questions, reference is made to the Commentary to the articles governing the organs of the Tribunal.

Article 5
Legal Capacity

The Tribunal shall enjoy in the territory of each of the States parties to this Convention such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Commentary

An international organ of the kind foreseen in the draft Convention must be able to assume rights and obligations and to act as a subject under international law. A provision of the present kind is therefore necessary. In this case Article 104 of the UN Charter has been used as a model. The question which organ is competent to act on behalf of the Tribunal has to be deduced from the Convention and the Rules of the Tribunal (cf. Commentary to Article 4).

Article 6
Seat

1. The seat of the Tribunal shall be established at ...
2. The Court may upon approval of the Standing Committee meet in the territory of any State party to this Convention.

Commentary

Reference is made to Section 8.5. As appears from this Section the Rapporteurs think that the question of the seat of the Tribunal needs careful consideration.

CHAPTER II - THE COURT

A. THE COURT OF FIRST INSTANCE

Article 7

Appointment of Judges

1. Each State party to this Convention shall appoint, within two months following its entry into force, two judges, both of whom shall be nationals of that State.

A State which becomes party to this Convention after its entry into force shall appoint its judges within thirty days following the entry into force of this Convention for the State concerned.

2. The judges shall have no official function on the Tribunal until they are called to serve on the Court of First Instance by the Standing Committee.

3. Judges shall be persons of high moral character and have the legal competence and qualifications required for appointment to a criminal court of their States.

4. In the event of death or resignation or if there is a vacancy for any other reason, the State concerned shall appoint a new judge. The term of office of the new judge shall be the remainder of the term of office of the predecessor.

5. The names of the judges shall be notified to the Secretary of the Tribunal, who shall enter them into a list, which shall be communicated to each State party to this Convention.

Commentary

The provisions of this article reflect the considerations in Section 8.4. Obviously there are a number of solutions to the question of appointment of judges. The proposals which the Rapporteurs have studied foresee that contracting States should elect judges from lists submitted by the States. This is obviously a solution which is designed to meet the standard required by an international criminal court with general jurisdiction. In the present case it should suffice that States appoint two judges, both of whom shall be nationals of the State in question. In view of the circumstances States are certain to give careful consideration to their appointments. The preparation of lists with a number of names for the Standing Committee to choose from would risk creating confusion rather than ascertaining quality and independence.

The possibility of entrusting the Standing Committee with the power to raise the number of judges to be appointed by States parties to the Convention should be considered in the further deliberations.

A special feature of the proposal is that the judges shall have no official function on the Tribunal until they are called to serve on the Court. The reason for this has been explained in Section 8.4.

Rules on competence and qualifications are laid down in paragraph 3. In corresponding provisions of other drafts there is a reference to knowledge of international law. No doubt, knowledge of international law in addition to the requirements proposed in paragraph 3 would be of great importance. This is, however, not specifically included in the provision. The reason is that in view of the tasks which the judges are facing it is more important that they are well acquainted with the adjudication of criminal cases in their respective States. Once the Tribunal is set up, the main feature of the work of the Court will be very similar to the work in an ordinary criminal court at the national level. A demonstrated ability to deal in a competent and expeditious manner with complex criminal cases ought therefore to carry particular weight. Judges with such qualifications will no doubt rapidly acquaint themselves with the international elements of the work.

A delicate question is whether States parties to the Convention in the territory of the former Yugoslavia should be permitted to appoint judges. Normal practice when international courts are set up is that a State which is a party to a matter before such a court would have the right to appoint a judge to sit on the court (if such judge is not already on the panel). In the present case it is different, since the State is not a party to the proceedings. In view of the circumstances it might also for other reasons be wise to take another stand in the present case. The problem is already indicated by the President of the Republic of Bosnia-Herzegovina (cf. Annex 4, item 6).

Paragraphs 4 and 5 should speak for themselves. It is necessary to have appointed judges listed in an orderly manner, since the Standing Committee must always without delay be in a position where it can call additional judges to serve on the Court.

Article 8
Terms of Office

1. Judges shall be appointed for a term of five years. They may be re-appointed once.
2. A judge shall continue in office beyond his term in order to complete work on any pending matter in which he was involved until final disposition of that matter.
3. In the case of the resignation of a judge, the resignation shall be addressed to the President of the Tribunal, who shall transmit it to the Standing Committee. This transmission shall make the place vacant.

Commentary

As appears the term of office is five years. The Rapporteurs think that this period is long enough in order for judges to gain experience and develop their skills in a new environment with the task of adjudicating serious cases, many of which will involve repulsive details. On the other hand, the term must not be too long, since this may discourage competent candidates from accepting a candidacy for the Court. If the term is coupled with the possibility of re-appointment once, sufficient flexibility should be created.

The provision in paragraph 2 reflects a normal procedure in any court and is designed to assure process economy.

Paragraph 3 should need no particular explanation. The President of the Tribunal is defined in Article 21.

Article 9

Solemn Declaration

Each judge shall, before taking up his duties, make a solemn declaration in open court that he will perform his functions impartially and conscientiously.

Commentary

The need for this provision is obvious. The formulation of the declaration could be laid down in the Rules of the Tribunal.

Article 10
Privileges and Immunities

The judges shall enjoy, while performing their functions in the territory of the States parties to this Convention, the privileges and immunities accorded to members of the International Court of Justice.

Commentary

Article 19 of the Statute of the International Court of Justice lays down that the members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 10 of the present draft accords the same privileges and immunities to the judges. The present provision, however, is limited to the territory of the States parties to this Convention. This is the same solution as was chosen for the Stockholm Convention on Conciliation and Arbitration within the CSCE. It may be that it is obvious that a treaty as foreseen by the Rapporteurs cannot commit any other States than those parties to the Convention. If the CSCE option (see above under "General Remarks" and "Title and Preamble") is chosen, it might be preferable to use the same wording in both conventions.

More detailed rules on the present subject-matter are needed. Since the question is studied presently in relation to the Stockholm Convention, it is advisable to await the result of these deliberations before the matter is developed further in this context.

As for the Procurator-General, the Secretary and other officers and employees of the Tribunal reference is made to Article 51.

Article 11
Occupation of Judges

1. Once appointed judges may not have any occupation or business other than that of a judge in the State from which they have been appointed, or a member of the faculty of a university. Judges shall not engage in any activity which interferes with their judicial functions at the Tribunal and avoid any appearance of lack of impartiality.
2. Any doubt on this point shall be settled by the decision of the Plenary Court.

Commentary

A provision of this kind is found in other drafts, which however deal with an international criminal court with general jurisdiction. The Rapporteurs think that it is appropriate to include such a provision also in the present Convention. The need is obvious in case the judge is called to serve on the Court. However, the Rapporteurs think that the provision should be observed also by judges who are appointed but still waiting to be called to serve on the Court.

If there is doubt, the decision should rest with the Plenary Court. In order not to create unnecessary deliberations within the Plenary Court, this body should concentrate on matters which concern judges called to serve. Other cases could be dealt with through the advice of the President. One could of course consider making the qualification "Any doubt on this point with respect to a judge called to serve on the Court of First Instance shall be settled etc."

Article 12
Disability of Judges

A judge shall perform no function on the Tribunal with respect to any matter in which he may have had any involvement prior to his appointment to the Tribunal, nor with respect to any matter involving actual, apparent or potential conflict of interest.

Commentary

The provisions in Article 12 and Article 13 are modelled after similar provisions in the IIC draft (See under "General Remarks"). As far as Article 12 is concerned special reference is made to the appointment to the Tribunal. One could also indicate the point in time when the judge is called to serve.

The reference to the Tribunal means that the provision has a bearing not only on the functions that the judge has on the Court but also any other function which he may have to assume under the Convention, e.g. in the Plenary Court or as Supervising Judge (cf. Article 47). The latter question could certainly be discussed. Should a judge be disqualified to act as Supervising Judge, if the supervision concerns judgments in which he has taken part? If this question is answered in the affirmative, the Supervising Judge may never be allowed to sit in a Chamber, and those serving as Supervising Judge could hence never have any experience of adjudicating cases before the Court of First Instance. The present provision leads to this result. If the fact that the Supervising Judge has participated in a judgment should not disable him from dealing with the matter as Supervising Judge, Article 12 will have to be redrafted; the Court of First Instance could substitute the Tribunal in the text.

The questions which the judges have to ask themselves under this provision are otherwise not different from those that they normally will have to consider in their day to day work at the national level.

Article 13
Disqualification of Judges

1. A judge who considers that he should not participate in a particular proceeding shall so inform the President of the Plenary Court, who may excuse the judge.
2. A party to a proceeding may submit that a judge should not participate in a particular proceeding. Such submission shall be addressed to the President of the Plenary Court.

3. If the President of the Plenary Court upon receipt of a submission under paragraph 2 or of his own motion considers that a judge should not participate in a particular proceeding, the President shall so advise the judge.

4. If the President of the Plenary Court and the judge disagree on issues referred to in this Article, the Plenary Court shall decide.

Commentary

Cf. Commentary to Article 12. The most significant feature of this provision, which is also a deviation from the model, is that a judge is not free to decide all on his own whether he should be disqualified or not. The reason is that it may not be appropriate to leave such decisions entirely to the individual judge. If he has good reasons, there should be no problem to substantiate them. It should however be noted that many cases will be difficult and involve elements of a more unpleasant kind than in general. It could therefore be tempting for judges to avoid such cases. Even if the judges can be presumed to accept the situation in which they find themselves, it may nevertheless be a restraining factor if it could be left to the President to excuse a judge who considers that he should not participate in a particular proceeding. The mere fact that the judge would have to enter into a discussion with the President may be an element which would make him consider a second time whether he has valid reasons to raise the matter of disqualification.

Questions of disqualification can otherwise be raised by a party to a proceeding and by the President *ex officio*.

As appears from paragraph 4 the idea is that the Plenary Court shall decide on these matters in all cases where the President and the judge disagree on the issues dealt with in the present article.

Article 14 Dismissal of Judges

1. A judge may be removed by a unanimous vote of the Plenary Court for incapacity to fulfil his functions.

2. The President of the Court shall transmit such decision to the Standing Committee. This transmission shall make the place vacant.

Commentary

A Convention establishing a Tribunal would have to include a provision of the present kind. If the Plenary Court considers that additional provisions are necessary, these provisions could be laid down in the Rules of the Tribunal.

Article 15 Emoluments

The Standing Committee shall determine the salary of judges.

Commentary

The determination of the salary of the judges is obviously a matter for the Standing Committee. To this decision is connected a number of other questions which have to be solved, in particular questions of pension, insurance, matters related to the family of the judge etc. Guidance could here be found in rules laid down for the International Court of Justice and the European Court of Justice in Luxembourg. Naturally regard would have to be taken to the term of office of the judges and other significant features that distinguish the service on the Tribunal established by the Convention from service on other international organs. The Rapporteurs presume that this matter needs looking into by special expertise, familiar with this particular subject-matter. Reference is also made to the Financial Protocol (Annex 2 to draft Convention).

The size of the salary is obviously a decisive factor for the cost of the Tribunal. This matter is dealt with in Section 8.10.

In this context it should be noted a question which has not been treated elsewhere, namely the question how to deal with disputes that may arise between a judge or another employee of the Tribunal and the Tribunal itself. In international organizations such disputes are normally dealt with by special organs set up under the statute of the organization. With respect to the United Nations reference could be made to the United Nations Administrative Tribunal. The Appeals Board has a similar function within the Council of Europe. In the European Community the Court of Justice is entrusted to deal with such disputes under Article 179 of the Treaty of Rome.

This matter has not been examined in depth, since it may be too detailed at this stage. However, it is important not to create unnecessary bureaucracy, and therefore it might be an advantage if matters of the actual kind could be dealt with at the national level, either before the courts of the State from which the person in question comes, if this is a State party to the Convention, or before the national courts of the State in which the seat of the Tribunal is established. If this is not possible, for reasons which there has not been proper time to investigate, other solutions might be feasible. An idea which could be mentioned is an agreement between the Tribunal and the Council of Europe where the latter undertakes to put the Appeals Board at the disposal of the Tribunal. It should be stressed that this is only an idea, and the legal implications of such an agreement have not been analyzed.

Article 16
Chambers

1. For the consideration of each case brought before it the Court of First Instance shall consist of a Chamber composed of three judges.

2. Election of the judges to the Chambers shall be by the Plenary Court by lot.
3. The President of the Court shall request the Standing Committee to call judges to serve on the Court of First Instance when the need arises. The answer to this request by the Standing Committee shall be within thirty days of the request.

Commentary

Reference is made to Section 8.4. Paragraph 1 contains the basic provision that the Court of First Instance shall exercise its judicial functions in Chambers, composed of three judges. To further explain the reasons for this provision it could be added that it is necessary that the Court of First Instance can exercise its functions in such a way that due process is observed but that at the same time expedience and efficiency are secured. To the Rapporteurs a number of three judges seems the most appropriate to achieve this result, in particular in view of the fact that the Convention foresees a Court of Appeal which consists of a Chamber composed of five judges.

The Rapporteurs have reflected on entering provisions on substitute judges to assure that a Chamber is not disqualified because of the fact that a judge is taken ill or is prevented from serving in a case which the Court has already started to hear. However, they doubt that this is a normal procedure at the national level. If a case is of particular proportions, it might naturally be wise to assure that the hearing must not be repeated, in case a judge would fall ill or be prevented from serving on the Chamber for other reasons. An extra judge could be called to serve in the Chamber in such cases. This matter could however be left to the Rules of the Tribunal.

The proposed composition is designed for instances where the Chamber adjudicates a case or otherwise hands down decisions of a particular important character. It is normal for courts to make decisions on various questions, in particular

procedural matters, before the case is heard by the full court. In such cases it is normal practice that the presiding judge or one of the judges of the Chamber is competent to make the decision. This is a matter to be dealt with in the Rules of the Tribunal.

Paragraph 2 deals with election of judges to the Chambers among those appointed by the States parties to the Convention and called to serve by the Standing Committee. In order to maintain confidence in the system it is prescribed that the election shall be by the Plenary Court to secure that all judges can be present and ascertain that the election is conducted in a correct manner. To avoid allegations that the elections are in favour of candidates from certain States, the Rapporteurs suggest that the election should be by lot.

With respect to paragraph 3 reference is made to Section 8.4. It is the duty of the President of the Court to assess with the assistance of the Secretariat the need to call additional judges to serve on the Court of First Instance. In order to make it possible for them to make the proper assessments it is necessary to lay down a point in time within which the Standing Committee is obliged to answer to a request of the kind foreseen. Since this puts an obligation on the Standing Committee, it is not possible to deal with the matter in the Rules of the Tribunal. A period of thirty days should be sufficient for the Standing Committee to evaluate the situation and to take a decision, if necessary accompanied with additional allocation of budgetary means.

Article 17

Decision-making

1. The decisions of the Chambers shall be taken by a majority of their members, who may not abstain from voting.
2. In the event that there is no majority, the judges shall make a renewed effort in order to arrive at a decision. If this is not possible, the vote of the presiding judge shall prevail.

Commentary

Paragraph 1 lays down that decisions of the Chambers shall be taken by a majority of their members. It is obvious that all members have to participate in the vote. A common feature to voting in courts is that votes are taken on different matters. If this is the situation, a judge who finds himself in minority in the decision on a particular question must participate in the voting on a subsequent matter with the proviso that he was outvoted in the preceding vote. It will probably be necessary to lay down rules in this respect, but this could be left to the Rules of the Tribunal.

The provision in paragraph 2 deals with the situation when there is no majority. If all three judges on the Chamber end up on a different vote, the rule laid down in the present paragraph means that the vote of the presiding judge shall prevail. This rule appears in other drafts studied. To the present article is added an obligation upon the judges to make a renewed effort to arrive at a decision, even if this may be considered self-evident.

It should be pointed out that in some States the rule presented in this article is not applied in matters concerning criminal law, at least not if the decision concerns punishment. In case of a split vote in such matters, the opinion which is more lenient to the sentenced person shall prevail instead. This question should be discussed further with a view to the possible inclusion of such a provision in Article 17.

B. THE COURT OF APPEAL

Article 18

Appointment of Judges

1. Each State party to this Convention shall appoint, within two months following its entry into force, one judge of appeal who shall be a national of that State. A State which becomes party to this Convention after its entry into force shall appoint its judge of appeal within thirty days following the entry into force of this Convention for the State concerned.

2. The judges of appeal shall have no official function on the Tribunal until they are called to serve on the Court of Appeal by the Standing Committee.
3. Judges of appeal shall fulfil the requirements laid down in Article 7, paragraph 3. In addition, they shall fulfil the requirements for appointment to a criminal court of appeal of their States.
4. In the event of death or resignation or if there is a vacancy for any other reason, the State concerned shall appoint a new judge of appeal. The term of office of the new judge of appeal shall be the remainder of the term of office of the predecessor.
5. The names of the judges of appeal shall be notified to the Secretary of the Tribunal, who shall enter them into a list, which shall be communicated to each State party to this Convention.

Commentary

Reference could in this context be made to Section 8.4 and to the Commentary to Article 7.

The special requirement under paragraph 3 should be observed, namely that the judges of appeal shall fulfil the requirements for appointment to a criminal court of appeal of their States. It should go without saying that documented experience of service on such courts should carry great weight when appointment is considered. To serve on the Court of Appeal will in many respects differ from service on the Court of First Instance. In particular there will be a number of procedural questions, which require special experience to be dealt with in an appropriate manner. Even if the judges will be recruited from different States, it can be expected that they will soon find many common experiences which they can use as a basis for their work within the Tribunal. One can also assume that most appeal court judges have served in lower instances in their countries and, thus, that they have experience also of adjudicating cases at that level.

A particular problem is connected with the initial operation of the Tribunal. In order for the Tribunal to become effective it is necessary to have a Plenary Court. This means that judges must be called to serve on the Court of Appeal, although there would obviously be some time before this Court

is seized with its first case. However, one should not expect that the judges of appeal will have nothing to do in the beginning. On the contrary, there would be a number of issues - in particular connected with the Rules of the Tribunal - in which the judges of appeal could engage themselves. Once appealed cases start coming in, the Court of Appeal will become quickly involved in the adjudication of cases. In view of the character of the cases to be tried by the Tribunal, it can be foreseen that the number of appeals will be considerable; the Rapporteurs are fully aware of the fact that persons sentenced to serve long terms in prison are likely to appeal to the very last instance.

With respect to paragraphs 4 and 5 reference is made to the Commentary to Article 7.

Article 19

Chambers

1. For the consideration of each case brought before it the Court of Appeal shall consist of a Chamber composed of five judges of appeal.
2. The Standing Committee shall elect one Chamber and two alternate judges of appeal by lot. Should the need arise, the Standing Committee shall elect two Chambers and two alternate judges of appeal by lot.
3. If there is a need for more than two Chambers, the provisions of Article 16, paragraphs 2 and 3 shall apply *mutatis mutandis*.

Commentary

Reference is made to Section 8.4 and to the Commentary to Article 16.

As appears, a Chamber of the Court of Appeal is composed of five judges of appeal. Also in this context one could contemplate having substitute or alternate judges. This is a matter for the Rules of the Tribunal.

With reference to the Commentary to Article 4 the question could be raised whether there should be a possibility for the Court of Appeal to meet as a Plenary Court. Judging from national experience one could certainly argue with merit that such a possibility should be introduced. At the same time one should be careful not to establish a too complex system; the present proposal may seem complex enough to States. There is of course the risk that two Chambers can arrive at different solutions and that there would be a need for an institution to create the appropriate precedence to solve the matter. It is to be feared, however, that the possibility of plenary meetings of the Court of Appeal would engage all the judges of appeal too often and for too long periods to the detriment of the well-functioning of the Tribunal as a whole. An assessment of the advantages and disadvantages has led to the conclusion that there should be no possibility for the Court of Appeal to meet in plenary sessions.

As appears from paragraph 2 the system of electing judges for the Chambers of the Court of Appeal is different from that of the Court of the First Instance. The reason is the effort to make the system as flexible as possible. At the outset one Chamber of the Court of Appeal should suffice, provided that two extra judges are elected so as not to create a situation where a quorum would not be reached because of illness or other reasons. In this situation there will be no room for the Plenary Court to elect judges of appeal for the Chamber; the decision by the Standing Committee to call the judges to serve would in fact decide the composition of the Chamber. Paragraph 2 is drafted so as to provide for two Chambers of the Court of Appeal with two alternate judges of appeal in addition. In case the Convention would enter into force upon twelve ratifications, all twelve judges of appeal appointed would have to serve on the Court of Appeal. The decision by the Standing Committee would then mean only that the Committee elects by lot the judges to serve on either Chamber and which two judges should serve as alternate judges with the possibility of joining one or the other Chamber as the need arises.

If there is a need for more than two Chambers, paragraph 3 is applicable. If the proposal by the Rapporteurs is followed, this provision cannot be applied unless there are at least fifteen ratifications. In this situation the number of judges of appeal is large enough to allow for the same procedure as prescribed for the election of judges to Chambers of the Court of First Instance in Article 16, paragraphs 2 and 3 *mutatis mutandis*.

Obviously one of the judges of appeal would have to serve as presiding judge of the Chamber. It is equally obvious that the President of the Plenary Court should act as presiding judge in one of the Chambers. If it is considered necessary, a provision to the latter effect could be introduced into the Convention. Otherwise the matter could be left to the Rules of the Tribunal.

Article 20

Other Provisions

The provisions of Articles 8-15 and 17 shall apply to the Court of Appeal *mutatis mutandis*.

Commentary

This provision means that what is prescribed for the Court of First Instance with respect to terms of office, solemn declaration, privileges and immunities, occupation of judges, disability of judges, disqualification of judges, dismissal of judges, emoluments and decision-making shall apply also to the Court of Appeal with the necessary adjustment, i.e. *mutatis mutandis*.

If the President of the Plenary Court, who is one of the judges of appeal, should find himself in a situation where he is unable to make a decision because the matter concerns himself, the function of the President should be exercised by the vice-President (cf. Article 21). Likewise the vice-President would have to chair the Plenary Court, if this Court has to take a decision which concerns the President. If

further rules are needed in this respect, they could be laid down in the Rules of the Tribunal. Normally additional criteria - in case the President and the vice-President are unable to chair a meeting - would be the oldest in office. If this is not sufficient to distinguish between the candidates, the most senior judge should take the chair.

With respect to emoluments the States parties to the Convention might wish to offer judges of appeal a higher salary than the judges of the Court of First Instance. The President and the vice-President might be offered an annual nominal retainer in addition to their salary.

C. THE PLENARY COURT

Article 21

Constitution and Functions

1. All the judges called to serve on the Court of First Instance and the Court of Appeal constitute the Plenary Court.
2. The Plenary Court shall elect from among the judges of appeal a President and a vice-President. The President shall serve for a term of two years, and may be re-elected, although not for more than two consecutive terms.
3. The Plenary Court shall decide on matters entrusted to it by this Convention.
4. A quorum of twelve judges shall suffice to constitute the Plenary Court. The Rules of the Tribunal may lay down a higher number.
5. The decisions of the Plenary Court shall be taken by a majority of the judges participating in the vote. Those abstaining shall not be considered participating in the vote. In the event of a tied vote, the vote of the President shall prevail.
6. In case this Convention lays down special rules on the decision-making procedure of the Plenary Court, such rules shall apply instead of paragraph 5.

Commentary

Reference is made to Section 8.4 and to the Commentary to Article 4.

With respect to paragraph 1 it should be noted that only judges of the two instances called to serve constitute the Plenary Court. This is again a feature of the flexibility which the Rapporteurs have endeavoured to build into their proposal. It would of course be possible to call also the remaining appointed judges to serve on the Plenary Court. However, it is doubtful whether this would be advisable. On the contrary, it would neutralize the idea of leaving the calling of judges to serve on the Court to the Standing Committee. At least at the initial stage, the Plenary Court would have to spend some time drafting Rules of the Tribunal. This means that all judges who serve on the Plenary Court must be available. If that is the case, all the judges appointed might just as well be called to serve on the respective Court. The way paragraph 1 is drafted leaves it to the Standing Committee to decide on how many judges should be called to serve. That number also constitutes the Plenary Court.

Paragraph 2 contains the rules on election of President and vice-President. The term of office is set to two years only, in order to give the Plenary Court the option of considering the Presidency at relatively short intervals. The provision provides for a maximum period of six years. It might be preferable not to set any time limit for re-election.

The functions of the Plenary Court is indicated in paragraph 3. Matters entrusted to the Plenary Court appear in Articles 13 (matters concerning disqualification of judges), Article 14 (dismissal of judges), Article 16 (election of the judges to the Chambers of the Court of First Instance), Articles 19 and 20 (similar decisions with respect to the Court of Appeal), Article 23 (removal of Procurator-General), Article 25 (removal of the Secretary), Article 49 (the drawing up of Rules of the Tribunal), and Article 51 (revocation of immunity).

The reference to the Convention in this paragraph should also include the Rules of the Tribunal, which may entrust matters to the Plenary Court. This should follow without express mentioning in the provision.

Paragraph 4 prescribes a quorum of twelve judges. The proposal is founded on the assumption that seven judges of appeal and at least nine judges of the Court of First Instance would be called to serve. It is evident that, if more judges are called to serve on the Court, it is necessary to raise the number of judges to constitute the quorum. In order to create the necessary flexibility, this matter is left to the Rules of the Tribunal. A proper indication could be that a quorum should not be less than two thirds of the judges called to serve on the Court.

Paragraph 5 lays down that decisions of the Plenary Court shall be taken by a majority. The model for this provision is to be found in the Convention on Conciliation and Arbitration within the CSCE. It is designed to avoid any uncertainty with respect to judges who are present (and consequently are counted when the question of quorum is to be decided) but who may choose not to participate in the vote. A provision obliging the judges to participate is probably not appropriate, since they may have perfectly valid reasons not to participate in a particular vote in the Plenary Court.

As appears, the vote of the President shall prevail, if there is a tied vote. The President obviously also refers to the vice-President or another judge of appeal who may have to chair a meeting of the Plenary Court.

It could naturally be discussed whether the vote of the President shall prevail in matters concerning elections. A more pertinent method in such cases could be to solve the matter by drawing lot.

From paragraph 6 appears that there may be special rules on the decision-making procedure of the Plenary Court (see e.g. Article 23, which provides for a two-thirds vote or Article 14 which provides for a unanimous vote; the latter expression to mean all judges present at the meeting of the Plenary Court).

CHAPTER III - THE PROCURACY

Article 22 Functions

The Procurecy shall investigate and prosecute the crimes as determined in scope by this Convention.

Commentary

Reference is made to Section 8.4. From this provision appears that the Procurecy shall investigate and prosecute. This role is designed in such a way that the function is very much the same as any investigative and prosecutorial function at the national level in many States. To some States the Procurecy may, however, seem vested with a wider competence than is the case in the corresponding situation at the national level. In particular, it should be noted that a prosecutor is empowered to indict the accused independently from the competence of the Court.

It is obvious that the Procurecy will have to work in close co-operation with local national authorities. It is for the Procurecy to make the first distinction between cases which fall under the jurisdiction of the Tribunal and cases which do not, and which consequently should be left for further action at the national level (cf. Commentary to Article 4).

Article 23

The Procurator-General and Members of the Staff of the Procurecy

1. The Procurator-General is the chief officer of the Procurecy and the Chief Public Prosecutor. He shall be elected by the Standing Committee from a list of at least three nominees submitted by the States Parties to the Convention. He shall serve for a renewable term of five years, barring resignation or removal by a two-thirds vote of the Plenary Court for incompetence, conflict of

interest, or manifest disregard of the provisions of this Convention or the Rules of the Tribunal.

2. The salary of the Procurator-General shall be the same as that of the judges of appeal.

3. The Procuracy shall employ other prosecutors, investigators and clerical staff as necessary to carry out its responsibilities and consistent with the budget established by the Standing Committee. The members of the staff of the Procuracy shall be appointed and removed by the Procurator-General. Their salaries shall be determined by the Procurator-General subject to the budget established by the Standing Committee.

Commentary

Reference is made to Section 8.4. The name of this function could naturally be discussed. The Rapporteurs have suggested "Procurator-General", but the term "Chief Public Prosecutor" could be used as well. To make absolutely sure the meaning of the term Procurator-General the present text contains the explanation that he is the chief officer of the Procuracy and at the same time Chief Public Prosecutor.

According to the proposal the Procurator-General holds a very important position. In view of this and of his function it is suggested that his salary should be the same as that of the judges of appeal (paragraph 2).

As appears from Section 8.4 an important task for the Standing Committee is to provide the Tribunal with sufficient means to perform its functions. This means that the Standing Committee will have to establish a budget, drawing up the frame within which the different organs of the Tribunal can act. It is for the Procuracy to employ the necessary other prosecutors, investigators and clerical staff, but always within the budget established by the Standing Committee. For the sake of efficiency, the decision-making power of the Procuracy as far as appointments, removals and determination of salaries are concerned should rest with the Procurator-General. His function will consequently to some extent be administrative, but he must as a matter of priority assume the role of Chief Public Prosecutor. Among his functions in this latter respect is to examine cases and give directions

to other prosecutors. He also has to review decisions by other prosecutors appealed to him (see Article 35).

CHAPTER VI - THE SECRETARIAT

Article 24

Functions

1. The Secretariat is the administrative, financial, and clerical organ of the Tribunal.
2. The Secretariat shall:
 - (a) prepare a budget proposal for the ensuing financial year for each of the organs of the Tribunal on the basis of the information provided thereto by the other organs;
 - (b) publish an annual financial report and a report on the activities of the Tribunal on the basis of information provided by the President of the Court and the Procurator-General; and
 - (c) perform any other function provided in this Convention.

Commentary

Reference is made to Section 8.4. As appears the Secretariat shall support all the organs established by the Convention. Article 24 highlights two important functions, namely to prepare budget requests and to publish an annual financial report (cf. also the Financial Protocol under Article 52). These two tasks are indispensable since they form the basis of the decisions by the Standing Committee, which is responsible for the Tribunal as a whole. In addition, the Secretariat shall perform any other function provided in this Convention, including the Rules of the Tribunal. It is to be presumed that the Rules of the Tribunal will contain substantial Rules, governing the assistance by the Secretariat to the Court. In fact, the Secretary will assume the function of Registrar and, consequently, the Secretariat must take responsibility for the administration of the cases before both instances of the Court. It will presumably also be for the Secretariat to distribute cases between Chambers, which is a very important function in order to achieve a reasonable burden-sharing between the judges at both levels.

Such matters are normally dealt with by a system of random distribution, which system also takes into consideration the scope of the cases distributed; all cases are certainly not equal with respect to the work which has to be put into them.

An important question is also the distribution of work between the staff of the Secretariat and the staff of the Procurocy. It is advisable - not least because of the integrity of the Court - that the staff of the Procurocy deals with most administrative questions with respect to the activities of the prosecutors and the investigators. No doubt, the Rules of the Tribunal will take this into consideration.

Article 25

The Secretary and Members of the Staff of the Secretariat

1. The Secretary of the Tribunal is the chief officer of the Secretariat. He is the clerk of the Tribunal as a whole but has a particular responsibility with respect to the Court. He shall be elected by the Plenary Court and serve for a renewable term of five years, barring resignation or removal by the Plenary Court for incompetence, conflict of interests or manifest disregard of the provisions of this Convention or the Rules of the Tribunal.
2. The salary of the Secretary shall be the same as that of the judges of appeal.
3. The Secretariat shall employ such staff as appropriate to perform its functions consistent with the budget established by the Standing Committee. The members of the staff of the Secretariat shall be appointed and removed by the Secretary. Their salaries shall be determined by the Secretary subject to the budget established by the Standing Committee.

Commentary

Unlike the Procurator-General, who is elected by the Standing Committee, the Secretary is elected by the Plenary Court. Even if he is the clerk of the Tribunal as a whole, he has a special responsibility in regard to the Court, and he must always act so as to secure the independence and integrity of the Court as a judicial body.

With respect to paragraphs 2 and 3 reference is made to the Commentary to Article 23, which applies *mutatis mutandis* also in this context.

CHAPTER V - THE STANDING COMMITTEE

Article 26 Functions

1. The Standing Committee shall represent the States parties to this Convention. It shall perform the functions expressly assigned to it under the Convention, and any other functions that it determines appropriate in furtherance of the purposes of the Tribunal and are not inconsistent with the Convention. These functions may in no way impair the independence and integrity of the Court as a judicial body.
2. The Standing Committee shall:
 - (a) call judges to serve on the Court;
 - (b) elect the Procurator-General;
 - (c) establish the annual budget of the Tribunal;
 - (d) assist the Tribunal in carrying out its functions;
 - (e) monitor compliance by the States parties with the provisions of this Convention;
 - (f) ensure compliance with judgments and other decisions of the Court; and
 - (g) perform any other function provided in this Convention.

Commentary

Reference is made to Section 8.4. It is self-evident that the States parties to the Convention must have a body to represent them and to govern the Tribunal. It should be noted that the Committee shall perform the functions expressly assigned to it under the Convention, and in addition other functions that the Committee itself determines appropriate. This means that it will not be possible for the Rules of the Tribunal to lay down obligations for the Standing Committee. In drafting the Convention it is therefore important that tasks which the States parties to the Convention want the

Committee to undertake are laid down in the text of the Convention.

At the national level it is essential to observe the delicate balance between the administration of the court system and the independence and integrity of the courts as judicial bodies. The same must apply under the Convention. It falls upon the Standing Committee to ascertain that sufficient means are put to the disposition of the organs of the Tribunal. At the same time it is necessary for the Standing Committee to examine independently budget requests - also from the Court. If these requests are not always met, this will be the responsibility of the Committee and must not be said to impair the independence and integrity of the Court. On the other hand, the Committee has no power to intervene in the judicial work or to lay down rules or directives with respect to this work.

Since the draft Convention vests the Tribunal with exclusive jurisdiction over the crimes punishable under the same, it is necessary to have an efficient administration of the system. This does not differ from the requirements with respect to the system of administration of justice, which has to be ascertained at the national level. It is obvious that there will be problems. Delays may occur, back-logs may develop, other problems may arise. The problems which national authorities are faced with in similar situations will of course be the same at the international level, with the exception that things are normally more difficult to solve in an international context than at the national level. It should however be underlined that if States join and establish an international jurisdiction of the kind foreseen in this report, there must be no question about the determination on the part of those States to fulfill the commitments under international law which they take upon themselves.

One of the most prominent features of the work of the Standing Committee will therefore be to follow scrupulously the work of the Tribunal and to foresee any actions, e.g. the

calling of additional judges, the allocation of additional funds etc., which are necessary to secure the smooth operation of the Tribunal.

Paragraph 2 lays down some of the most important matters which the Standing Committee shall deal with. It should be noted that sub-paragraphs (e) and (f) give the Standing Committee the right to approach States parties to the Convention to ask for explanations in case it is reported that States do not live up to their commitments under the Convention.

Article 27

Composition and Procedure

1. The Standing Committee shall consist of one representative and one alternate representative appointed by each State party to this Convention. If no appointment is made, the permanent representative to the State where the seat of the Tribunal is located shall be regarded as representative.

2. The Standing Committee shall elect from among the representatives a presiding officer and an alternate presiding officer. The presiding officer shall have the right to have one or more assistants who are not members of the staff of the Secretariat.

3. The presiding officer shall convene regular meetings at least twice a year at the seat of the Tribunal. At the request of one third of the representatives he shall call extraordinary meetings. The Standing Committee can also decide to meet in a location other than the seat of the Tribunal.

4. The Standing Committee may exclude from participation at a given session the representative of a State party that:

(a) has failed to provide financial support for the Tribunal in accordance with the established budget; or
(b) has failed to carry out any other obligation under this Convention.

5. The Standing Committee may form an executive board or any other sub-committee as it may deem appropriate.

6. The Standing Committee may adopt rules of procedure as necessary.

7. The decisions of the Standing Committee shall be taken by a majority of the members participating in the

vote. Those abstaining shall not be considered participating in the vote. In the event of a tied vote, the vote of the presiding officer shall prevail.

8. In case this Convention lays down special rules on the decision-making procedure of the Standing Committee, such rules shall apply instead of paragraph 7.

Commentary

Reference is made to Section 8.4. As appears, it is necessary for the Standing Committee to have a presiding officer. The main secretarial function for the Standing Committee must naturally be performed by the Secretariat, but it is obvious that in some matters it is necessary for the Committee to have a secretary independent from the Tribunal. In particular when important matters concerning the budget of the Tribunal are discussed or when elections are prepared, the representatives may wish to deliberate in private with appropriate assistance. But normal procedure should be that minutes and other documentation is prepared by the Secretariat.

The proposal lays down that special representatives shall be appointed. If a State party to the Convention overlooks to make such appointment, the permanent representative of that State to the State where the seat of the Tribunal is should be regarded as representative. The proposal also foresees a rotating chairmanship. This is naturally a matter to be discussed. Another solution would be to follow the system of the Permanent Court of Arbitration, which names the Minister for Foreign Affairs of the host country of the Permanent Court (the Netherlands) to act as chairman. This model would perhaps bring a better continuation to the system.

The bureaucracy around the Standing Committee could be reduced to a minimum. The article provides that the Standing Committee may form an executive board and may adopt rules of procedure, but this is of course not an interest per se.

The provisions of Paragraph 3 should be seen as an idea. In view of the complexity of the subject matter it will be

necessary for the Standing Committee to meet at least twice every year.

Paragraphs 4 and 7 should be self-explanatory. It should be noted that the Article does not contain provisions on a quorum, since such a provision should not be necessary.

With respect to paragraph 8 reference is made to the Financial Protocol (Annex 2 to the draft Convention) which prescribes a two-thirds majority for some of the decisions by the Committee.

CHAPTER VI - JURISDICTION AND APPLICABLE LAW

Article 28

Jurisdiction and Applicable Law

1. The Tribunal shall, subject to the provisions of this Convention, apply the substantive law set forth in Annex 1, to be construed in the light of the pertinent international instruments. Annex 1 constitutes an integral part of this Convention.

2. With respect to general substantive law, such as rules on attempt, preparation, conspiracy and complicity, the provisions of the Penal Code of the former Yugoslavia shall apply. In passing sentence the Court shall observe the provisions on aggravating or extenuating circumstances of the same Code.

3. In all cases before the Tribunal, the procedures, rules, and standards of the Tribunal shall apply.

4. If the jurisdiction of the Tribunal is challenged by a party to the trial, the matter shall be decided by the pertinent Chamber of the Court of First Instance at once. If it is made later, the matter shall be decided by the Court at such time as the Court thinks fit.

Commentary

Reference is made to Section 8.2. This provision could be seen as the foundation-stone of the draft Convention. In order to finalize this provision it is necessary to make a more profound study of the national legislation of the former Yugoslavia than the Rapporteurs have been able to do. It is also important to examine how this legislation has been

adapted to the legal system of the new States in the territory. Unfortunately, none of the Rapporteurs is able to read Serbo-Croatian, and there were no translations into English available at the outset. They have, however, been provided in January 1993 with an English translation of additional parts of the Penal Code of the former Yugoslavia.

In view of the urgency of the matter (cf. Section 1) the Rapporteurs decided nevertheless to put forward their proposal; the question of jurisdiction and applicable law will anyway have to be studied in depth in case a convention is negotiated.

The Rapporteurs were satisfied already in October 1992 that the provisions of the Penal Code of the former Yugoslavia, to which reference is made in this context, could serve as a basis for jurisdiction. It is against this background that Annex 1 to the draft Convention is formulated. This annex contains Articles 141, 142, 144, 150, and 151 of the Penal Code of the former Yugoslavia.

It should be noted that these provisions - which actually mirror the corresponding provisions of the 1949 Geneva Conventions etc. - cannot be applied without support of other substantive provisions in the domestic law. Reference to such provisions are made in paragraph 2 of the present article, since it is obvious that rules on attempt etc. are needed in addition to the penal provisions enumerated.

The question is, however, whether it is not also necessary to apply the national rules on the specific crimes mentioned in the articles enumerated. This means that the Court has to decide first of all whether a particular act would constitute e.g. murder under national law. In case the Court finds that this is the case, it has to examine further whether the murder in question would qualify under any of the provisions enumerated. Only if that examination results in an affirmative answer can the Court find the accused guilty and sentence him under the Convention.

This means that a number of other national provisions will have to be examined. It is not necessary, however, to enumerate these provisions, since the overriding articles on war crimes and crimes against humanity would determine the scope of jurisdiction.

As a consequence Annex 1 contains two parts, namely the provisions of the Penal Code of the Former Yugoslavia just mentioned (Section A) and a general reference to the provisions of national law, which are necessary in order to apply the provisions enumerated (Section B).

Against this background the question could be asked why paragraph 2 of the present article is not also included in Annex 1. This is a matter of drafting. Paragraph 2 of the present article and Section B of Annex 1 only demonstrate two ways of dealing with the question from a technical point of view. If a convention is negotiated, all these "secondary" provisions should be either in Article 28 or in Section B of Annex 1.

Paragraph 3 foresees that the Tribunal has an autonomous set of procedural laws. As appears from Article 49, due consideration to the criminal procedural rules of the former Yugoslavia should be given when the Rules of the Tribunal are drawn up.

Paragraph 4 is to secure process economy. If a matter concerning jurisdiction is raised, a decision should in principle be taken at once.

CHAPTER VII - PENALTIES AND REMEDIES

Article 29 Penalties

1. The Court shall have the power to impose the penalties provided for in the Penal Code of the former Yugoslavia. Such penalties include:

(a) deprivation of liberty;

(b) fines; and

(c) confiscation of the proceeds of criminal conduct.

2. The Court shall not pass sentence of capital punishment.

Commentary

Reference is made to Section 8.8. Much of what has been said in the Commentary to Article 28 also applies to the present Article. A general reference is made to the Penal Code of the former Yugoslavia. But it is necessary to study this question more in detail than the Rapporteurs have been able to do.

With reference to what is said in Section 8.8 about prescribing longer imprisonment in cases where the application of the law at the national level would have led to capital punishment, it should be noted that paragraph 2 of the present article would be the proper place to regulate this matter.

A different issue is whether it is necessary to lay down rules on punishment for crimes committed before the Tribunal itself. Reference could be made to such acts as perjury and contempt of court. Also it may be necessary to prescribe sanctions to secure effective respect for subpoenas and other orders directed to witnesses and others summoned before the Court or ordered to make some other performance.

Article 30

Remedies

1. The Court shall have the power to order in conformity with the legislation of the former Yugoslavia:

(a) restitution of property; and
(b) provision for damages.

2. The Court may decide not to hear matters referred to in paragraph 1, if this would impede or delay the criminal case with which the Court is seized.

Commentary

This provision should be seen as a corollary to Article 33. Reference is therefore made to the Commentary to that article.

Also in the present article reference is made to the legislation of the former Yugoslavia. In this context, however, the treaty-maker has more discretion than in the field of criminal law. It should therefore be examined more in detail whether it is necessary to make this reference or whether one could rely on general principles of law.

The term "remedies" could certainly be put in question. An alternative could be "compensation order", although this concept may have a more restricted meaning in common law. Under all circumstances the idea is that the Court should be in a position to order restitution of property and compensation in straightforward cases where the matter is obvious or where liability and quantum are clear.

As appears from the Commentary to Article 33 the whole idea of protecting the civil interests of victims needs careful consideration.

CHAPTER VIII - GENERAL PROVISIONS ON PROCEDURE

Article 31

Judicial Guarantees

An individual charged with a crime under the provisions of this Convention shall be entitled without discrimination to the guarantees provided for in the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

Commentary:

The Rapporteurs first considered modelling this provision after Article 8 in the ILC draft Code of Crimes against the Peace and Security of Mankind. They came to the conclusion, however, that it is less pertinent to re-draft provisions which are in force and which in fact form the basis for most, if not all, national rules in this field. They, therefore, decided that a general reference to the International Covenant on Civil and Political Rights and to the European Convention on Human Rights was a more prudent way of ascertaining judicial guarantees. The purpose of Article 31 should be to serve as a norm which the Plenary Court has to observe when the Rules of the Tribunal are established and which the organs of the Tribunal shall apply directly as *Lex Superioris*, if needed. The case-law of the European Court of Human Rights should be noted in this context.

Article 32

Double Jeopardy

1. No person who has been tried, acquitted, or convicted by the Court shall be subsequently tried for the same crime in any court within the jurisdiction of any State party to this Convention.
2. A person who has been tried in any national court shall not be tried again for the same crime before the Tribunal.

Commentary

This article contains the important provision on double jeopardy or *non bis in idem*. Paragraph 1 deals with the situation that a person has been tried, acquitted or convicted by the Court, the latter meaning the Court of First Instance or the Court of Appeal, as the case may be. The compliance with this provision should not cause any problems, provided that States loyally follow the same. If the Court is organized in the way that the Rapporteurs have suggested, they see no reason why States parties should not have full confidence in the jurisdiction of the Court.

Paragraph 2 deals with the opposite situation: a person who has been tried at the national level shall not be tried again for the same crime before the Tribunal. The word Tribunal is intentional, since the situation should be observed already by the prosecutors. If they find that the provision is applicable, they would of course be under the obligation to decide not to take up the matter.

It should be observed that paragraph 2 makes reference to "any national court". This is obvious, since the Tribunal must observe the principle of *non bis in idem* irrespective of where the person has been tried. It is different under paragraph 1, since the Convention cannot lay down obligations on other States than States parties to the Convention.

In this context should be highlighted a question which is not addressed in the text of the treaty, namely the case where it is obvious that the trial at the national level has been fraudulent or that the sentence in no way reflects the gravity of the act for which the person in question has been convicted. The question has been partly addressed by the ILC in the draft Code of Crimes (cf. Article 9 of that draft). It would seem, however, that a number of the substantive solutions that arrive from the ILC provision can be called in question. The Rapporteurs have refrained from making any drafting exercises in this field. It should be pointed out that if a "safety clause" is introduced, making it possible

for the Tribunal to examine cases which have been tried in an unsatisfactory manner at the national level, it will be necessary to introduce into Article 32 a provision to the effect that the Court, in passing its sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction at the national level for the same act.

Article 33

Rights and Interests of the Victim

The rights and interests of the victim of a crime shall be protected. In particular, a victim shall have:

- (a) the opportunity to participate in the criminal proceedings in accordance with the provisions of this Convention and the Rules of the Tribunal; and
- (b) the right to claim restitution of property and appropriate compensation.

Commentary

The question of rights and interests of the victim is an important issue which has to be deliberated thoroughly before the Tribunal is established. It is necessary to streamline the work of the Tribunal to the greatest extent possible, not least because of the costs involved in trials at the international level. At the same time the rights and interests of the victims which national courts are obliged to guarantee must be - at least to a certain extent - observed also by the Tribunal. It is evident that if all their rights and interests cannot be protected by the Tribunal, the "residual" rights and interests must be observed at the national level. Any failure on the part of national organs in this field cannot be attributed to the Tribunal.

The Rapporteurs have highlighted two items in the article, namely the opportunity to participate in the criminal proceedings and the right to protect civil interests to a certain extent.

In the view of the Rapporteurs the first item must be observed, since the criminal proceedings are the only ones

which will take place. Once the matter is adjudicated by the Court, the matter is finally dealt with, and the victim will have no opportunity of reverting to the matter before any other court, neither at the national level nor at the international level.

The second item is more questionable. No doubt, it will be a major undertaking for the Tribunal if victims are allowed also to bring their civil interests before the Court. The Rapporteurs have not made any comparative studies, but they are aware that it is current practice in many States that victims can protect their civil interests in conjunction with criminal cases. The most common situation is that the victim claims compensation if he has been injured or suffered damages as a consequence of the crime committed. This is, no doubt, in many cases good process economy; the victim may sometimes even be assisted by the prosecutor.

The question is whether victims should be permitted to protect their civil interests also before the Tribunal. The rules of the draft Convention imply that victims will be given some assistance, since they would probably have very limited possibilities of bringing their cases before courts at the national level. In many cases it is also doubtful whether they will be indemnified even if they are accorded compensation. On the other hand, there may be established regimes for compensation of victims under which it would be important for them to be able to present judgments in their favour. One category of claims which would warrant the provision in sub-paragraph (b) is claims for restitution of property. This category of claims might be common, and it is obvious that the victims have a great interest in having these matters examined and decided upon by the Court.

It is, however, evident that States establishing an international Tribunal have a wide discretion in the present context. Obviously, it is necessary to protect the Tribunal from being overloaded with claims of a civil character, although connected to criminal cases. It must therefore be for the Court to decide whether it is in a position to hear

such a matter. It may also be that the costs for the Tribunal would be without proportion in relation to the scope of a particular claim. Article 30, Paragraph 2 should be seen against this background. If the Court is not in a position to hear a particular matter, it would fall upon the Court to declare the matter inadmissible and refer the plaintiff to courts at the national level.

CHAPTER IX - CRIMINAL INQUIRY AND INITIATION OF THE PROCESS

Article 34

Criminal Inquiry

1. A criminal inquiry shall be conducted as soon as there is reason to believe that a crime falling within the jurisdiction of the Tribunal has been committed.
2. The Procurator-General shall appoint one of the prosecutors of the Procuracy to conduct the inquiry in the capacity of Public Prosecutor.
3. The Public Prosecutor shall have the right to call witnesses for examination, to request evidence and to call experts.
4. The person subject to inquiry shall have the right to be heard in respect of the complaint. He shall also have the right to be assisted at the inquiry by a counsel of his own choice, to submit information, and to inspect any document introduced during the inquiry.
5. The Public Prosecutor may request national authorities of States parties to this Convention to assist in the performance of his function and to supply relevant information.
6. A State party to this Convention shall render such assistance in conformity with the Convention and with national law.

Commentary

No doubt the provisions on the criminal inquiry and the initiation of the process will cause much discussion. A number of options could certainly be contemplated, and it is natural that those who participate in such a discussion will continuously refer to their domestic rules and practice. A fair amount of openmindedness will probably be needed in order to arrive at a decision in this important matter.

As appears from Section 8.4 the Rapporteurs recommend that an independent prosecutorial system is implemented. Such a system would mean that the judges of the Court will not be involved in the indictment procedure.

The responsibility for the criminal inquiry rests according to the proposal with the Procuracy. The preliminary work should be conducted by the investigators connected to the Procuracy.

The Rapporteurs realize that the provisions of the present Article govern a focal point if a Tribunal is set up. The first step to be taken is to examine all reports, containing information from various sources, which have been presented by different organizations. The information gathered by the UN Expert Commission under Security Council Resolution 780 (1992) will be important in this context (cf. Section 8.3).

Paragraph 1 contains the important provision which puts an obligation on the Procuracy to open an inquiry as soon as there is reason to believe that a crime, falling within the jurisdiction of the Tribunal, has been committed. Again "the Tribunal" is employed, since it would be for the Prosecutor to decide in the first instance whether to open an inquiry or not. If the assessment is that the Court would ultimately declare the case inadmissible, the Prosecutor must naturally draw the consequences and decide not to engage the resources of the Procuracy.

One important question which should be observed in the future work is whether there should be some equivalence to what is normally provided for at the national level, namely the possibility for some instance to make decisions on abolition in exceptional cases. This is a very delicate matter, and it is certainly premature to discuss it more in depth in the present context. It should however be observed that a general obligation to start a criminal inquiry and to indict the accused person, if the case is reasonably founded, may be too inflexible. It may therefore be wise to open a narrow possibility to relieve the Procuracy from its duty which it

otherwise must observe scrupulously and without discrimination. As at the national level, decision-making in such cases would not be vested in the prosecutors or in the Court. An analogous application of the system applied at the national level would rather indicate that the decision should lie with the States parties to the Convention, possibly acting through the Standing Committee.

It is also necessary to study more in depth the Code of Criminal Procedure of the former Yugoslavia to see if there are rules which can be applied with respect to the obligation to prosecute. Provisions which opens possibilities not to prosecute might be needed also with respect to minors, old and sick, and mentally retarded.

As appears from paragraph 2 there shall be a Public Prosecutor who is responsible for every inquiry. His involvement in the actual work will be dependent of the category of the case. Normally, most of the work could be dealt with by the investigators who will in due course present the result to the responsible prosecutor.

Paragraph 3 is a provision which would normally govern the rights of an indictment chamber of a court. It is however necessary that the public prosecutor is vested with this same power. Another matter is whether witnesses and experts are under the obligation to appear before the public prosecutor. This is a matter which has to be governed by national law, and a natural solution would be that these matters should be dealt with under normal rules of international judicial assistance.

The need for paragraph 4 is obvious and should adequately guarantee the rights of the person subject to the inquiry and the principle of "equality of arms", to be observed later in the process.

Paragraph 5 gives the prosecutor the right to make requests to national authorities. The provision is limited to the States parties to the Convention. This limitation could be

discussed. The corresponding obligation for the States appears in paragraph 6. Reference is in this context also made to Articles 53-58.

Article 35

Initiation of the Process

1. Having regard to the facts established at the criminal inquiry, the Public Prosecutor shall either:
 - (a) terminate the inquiry against the alleged offender, should the complaint or suspicion appear to be unfounded in law or in fact, or
 - (b) decide to indict the accused based on the findings in the inquiry, if the case is reasonably founded in fact and law.
2. In the case referred to in paragraph 1 (a), a State party to this Convention or an alleged victim may appeal the determination to the Procurator-General.
3. In the case referred to in paragraph 1 (b), the Public Prosecutor shall prepare an indictment of the accused based on the findings of the inquiry and shall file it with the Secretary of the Tribunal. He shall also be responsible for conducting the prosecution before the Court.

Commentary

Paragraph 1 lays down the obligation for the Public Prosecutor either to terminate the inquiry or to decide to indict the accused. With respect to sub-paragraph (b) it may be necessary to expand the scope of conditions in this provision. At the national level there are normally possibilities for the prosecutor not to indict if certain conditions are at hand. As an example could be mentioned that the accused is very old or so ill that it would be inhuman to force him to appear before a court (cf. Commentary to Article 34, paragraph 1).

From paragraph 2 follows that an alleged victim may appeal a decision to terminate an inquiry to the Procurator-General. The question is whether his decision should be final as laid down in the draft.

With reference to paragraph 3 it should be noted that indictments shall be filed with the Secretary, and not with the Court. The Secretary acts as Registrar and will probably also be responsible for the distribution of cases between the Chambers of the Court (cf. Commentary to Article 24).

CHAPTER X - PROCEDURES BEFORE THE COURT OF FIRST INSTANCE

Article 36

Pre-trial Processes

1. The Public Prosecutor may request the Court of First Instance to issue orders in aid or development of a case, in particular:
 - (a) warrants of arrests;
 - (b) subpoenas;
 - (c) injunctions;
 - (d) search warrants; and
 - (e) warrants for surrender of an accused so as to enable the bringing of the accused before the Court.
2. Requests for such orders may be granted without prior notice to the accused, if such notice would jeopardize the pursuit of justice.
3. All such orders shall be executed pursuant to the relevant laws of the State in which they are supposed to be executed.
4. A warrant of arrest may be issued when there exists a strong suspicion on reasonable and probable grounds that the accused person has committed the alleged offence and that the Tribunal has jurisdiction in the case. Subsequent to the arrest of the accused, the Court may request the concerned State to detain the accused or to release him provisionally. The Court may impose conditions of provisional release.

Commentary

The provisions of this article are similar to the ones that are normally found in procedural laws at the national level. The orders enumerated are of the kind that the prosecutor is not competent to decide upon but has to ask the Court for the necessary decision. Once the decision is taken, it is

for the prosecutor to ascertain that the decision is executed. The matter will thus fall under Article 34 or Articles 53-56, as the case may be.

Paragraph 2 opens the possibility to grant requests under paragraph 1 without prior notice. It is obvious that in many cases such notice would make the order ineffective.

Corresponding provisions can be found in procedural rules at the national level.

Paragraph 3 is taken from one of the drafts examined, but the necessity of the provision could be questioned, since its content would apply anyway.

As appears there are no rules laid down on the pre-requisites to be fulfilled in order that the Court may issue the order requested. However, since a warrant of arrest is a very serious intrusion upon an individual, there is one exception; a provision with respect to this measure is introduced in paragraph 4. This drafting method could be discussed, and the provision may be better placed in the Rules of the Tribunal, where the pre-requisites for the other orders will probably have to appear.

Article 37

Indictment

1. The indictment shall contain a concise statement of the facts which constitute each alleged offence and a specific reference to the legal provisions under which the accused is charged. The Court may authorize amendments to this indictment as regards the extent of crimes included.
2. The Court is not bound to apply the legal provisions which are referred to by the Public Prosecutor in the indictment but it may apply other legal provisions which appear in Annex 1 or in this Convention as it may find appropriate to the case after having given reasonable notice to the parties.

Commentary

Paragraph 1 lays down the requirements which an indictment shall fulfil. This provision will obviously have to be

discussed in depth if a convention is negotiated. In particular the second sentence deals with a difficult matter, which has to be discussed thoroughly. It is important that the Court takes a restrictive view in this context. Either the indictments stand, with the option that the defendant is acquitted, or may the indictment be amended within the scope of the original description of the act. A decisive factor in this context is naturally if the amendment is made before the trial or once the main hearing has started.

Paragraph 2 lays down a general provision in criminal law to the effect that the Court is not bound to apply the legal provisions to which is referred in the indictment. It is the alleged act as such which the Court has to examine. It is then for the Court to decide under which provision this act should be punished. The condition that the parties should be given notice is introduced, since it appears in one of the drafts studied. It could be put in question whether this condition is necessary and whether such a rule is generally applied.

Article 38

Notice of Indictment

1. The Court shall bring the indictment to the notice of the accused.
2. The Court shall not proceed with the trial unless satisfied that the accused has had the indictment and any amendment thereof served upon him and has had sufficient time and facilities to prepare his defense.

Commentary

This provision mirrors the normal procedure when an indictment is brought to the notice of the accused. It is for the Tribunal to lay down the more precise rules. Obviously assistance from other States is needed in many cases, but it could also be that the accused is under arrest and in the custody of the Tribunal.

Draft statutes examined contain provisions to the effect that States should be informed about indictments. This is a matter which can be discussed in a drafting process. The Rapporteurs are not convinced that such provision is necessary, but it may prove advisable for practical reasons. In this context it should be noted that States would always be entitled to assist their citizens when they are brought before the Court. Reference could be made to the principles on which the rules of the 1963 Vienna Convention on Consular Relations are based.

Article 39

Withdrawal of Prosecution, Dismissal or Acquittal

1. If the Public Prosecutor withdraws the indictment, the Court shall dismiss the case. However, if the accused so requests, the Court shall discharge him.
2. If, after hearing the case, the Court does not find sufficient evidence of guilt, it shall acquit the accused.

Commentary

This provision should be self-explanatory. Under national law an accused normally has the right to be discharged if the indictment is withdrawn. This means that the prosecutor does not dispose over the indictment once it has been filed with a court. Since the matter then normally becomes public the accused may think that this is a diffamation and that he should therefore have the right to be discharged by the Court.

Article 40

Main Hearing

1. The Court shall hear the case in public, unless it decides for reasons of public order or the protection of the private life of victims or to the extent strictly necessary in special circumstances where publicity would prejudice the interests of justice that the hearing shall be held in camera.
2. The Court shall have the right to call witnesses for examination and to request evidence from witnesses and other appropriate evidential material, and to call experts. The Court may call upon any State to supply information which may appear to be relevant to the case.

3. When all evidence respecting guilt and innocence has been presented and argued by the parties, the Court shall close the hearing and retire for deliberations. These shall take place in private and shall not be disclosed.

Commentary

Paragraph 1 reflects the obligation under international law for States to provide for hearings in public. The International Covenant on Civil and Political Rights and the European Convention on Human Rights allow for exceptions to this rule, e.g. in the interest of morals, public order or national security in a democratic society etc. (cf. Article 6 of the European Convention). The formulation in paragraph 1 is designed to cover the variety of interests that may have to be protected in the present case. The provision needs careful consideration. The provision must guarantee i.a. that women appearing before the Court as victims of rape will not have to appear unnecessarily in public before the Court.

Otherwise this provision should speak for itself. It is evident that the Plenary Court may wish to regulate the main hearing more in detail in the Rules of the Tribunal.

Article 41 Judgments

1. The Court shall announce its judgments orally, in full or in summary, in open court. A judgment shall state, in relation to each accused, the reasons upon which it is based.
2. The judgment shall contain the names of the judges who have taken part in the decision. It shall be signed by the presiding judge and the Secretary.
3. A judge may issue a concurring or dissenting opinion. If such opinion is issued, the judgment shall contain the same.
4. The judgment shall contain information on how to appeal.
5. Unless appealed the judgment shall be final.

Commentary

Attention is drawn in particular to paragraph 1 which is very important, not least from a process economy point of view. It can be assumed that the Court will seldom be in a position to hand down its judgment immediately upon the main hearing. This means that the Court will withdraw and that it will probably choose the method of rendering the judgment in writing a few days after the main hearing. In this situation one must ask whether it is good process economy that the judgment shall be announced orally. The experience of one of the Rapporteurs, based on some years' service on a Court of First Instance and on a Court of Appeal, is that sentenced persons have difficulties in following such an oral representation. They are much better served if they can be given the sentence to read it and to go through it together with counsel. The question is therefore if there is a general policy interest that judgments should be read out in court, where there would be interpretation. If not, another method should be chosen, e.g. that the judgment is made public at the Secretariat and that copies are put to the disposition of the sentenced person, his counsel, to victims and counsel and to the general public, in particular journalists. One should be careful not to design the rules in such a way that scarce court-room and other resources are occupied when it is not really necessary. If the sentenced person is in detention, he must also be brought once again to the Court accompanied by the necessary guards.

CHAPTER XI - PROCEDURES BEFORE THE COURT OF APPEAL

Article 42 Initiation of the Process

1. Judgments of the Court of First Instance may be appealed by the accused upon written notice filed with the Secretariat within thirty days of the date on which the judgment was rendered in writing.
2. The Procurator may appeal questions of law in the same manner as an accused under paragraph 1.

3. Other appeals against actions of the Court of First Instance may be examined before a final judgment is handed down only if such actions relate to procedural matters.

Commentary

Reference is made to Section 8.4. The Rapporteurs suggest that the time-limit for appeal should be within thirty days of the day of the judgment. It should apply equally to both parties.

It should be noted that the right for the prosecutor to appeal is limited to questions of law. This rule appears in one of the drafts studied. It could be argued that both parties should have equal opportunities of appealing. The stand which the Rapporteurs has taken in the draft is that it may suffice - if an international organ is set up - that this organ examines questions of evidence in one instance and that the prosecution should rest, if the Court of First Instance finds in favour of the accused. But there are certainly arguments against this standpoint.

This question is connected with the question whether the victim should be allowed to appeal. The answer to this question is probably affirmative, which means that additional provisions will have to be introduced in the present article. However, it is necessary to distinguish between two situations: whether the victim should be entitled to appeal questions relating to the indictment (where the answer probably should be negative, but where there is a strong connotation with the prosecutor's right to appeal) or whether the right of the victim should be limited to questions which concern his civil interests. Irrespective of which solution is chosen, the Court of Appeal may find itself seized with a case which only concerns damages or a request for restitution of property or the like, unless of course the ruling by the Court of First Instance should be final in such cases.

Paragraph 3 provides for appeals against actions before the judgment is handed down. This is an issue which has to be dealt with in the Rules of the Tribunal. It should be

observed that not all procedural matters lend themselves to a separate appeal. In many instances appeal should not be allowed otherwise than in conjunction with appeal against the judgment as such.

Article 43
The Trial

The provisions of Articles 39 and 40 shall apply to the Court of Appeal.

Commentary

In principle the same rules should apply to the trial in the Court of Appeal as apply in the Court of First Instance. It is possible that the present article should be made more elaborate, but the Court of Appeal should be able to apply the two articles mentioned *mutatis mutandis*. This question should however be examined further. As an example could be mentioned that, if the public prosecutor withdraws the indictment in the Court of Appeal, this Court cannot dismiss the case only; if the Court of First Instance has found the accused guilty, the Court of Appeal must vacate this judgment.

Article 44
Judgments and Decisions

1. Article 41, paragraphs 1-3 shall apply *mutatis mutandis* to the Court of Appeal.
2. Judgments and decisions by the Court of Appeal shall be final.

Commentary

Reference is made to the Commentary to Article 41. As appears, reference is in this context also made to decisions, since it should be made clear that there is no appeal against them either.

The effect of a final judgment or decision is that it can be executed. A number of rules, in particular the rules on

enforcement and supervision, will then be applicable. The States parties to the Convention will then also be under the obligation to take whatever measures the Convention may require in order to live up to their commitments under the treaty.

Article 45

Revision of Judgments

1. An accused who has been found guilty may apply to the Court of Appeal for revision of the judgment.
2. An application for revision shall not be entertained unless the Court is satisfied:
 - (a) that a fact has been discovered of such a nature as to be a decisive factor; and
 - (b) that this fact was, when the judgment was given, unknown to the Court and the applicant.
3. The Rules of the Tribunal may lay down other grounds for revision.
4. Revision proceedings shall be opened by a judgment of the Court of Appeal expressly recording the existence of the new fact and recognizing that it is of such a character as to lay the case open to revision.
5. If revision proceedings are opened, the Court of Appeal may:
 - (a) decide to withhold execution of the judgment;
 - (b) re-open the case and vacate the judgment;
 - (c) re-open the case for a new trial before the Court of Appeal; or
 - (d) remand the case for a new trial before the Court of First Instance.

Commentary

It is a general rule in procedural law that, even if a judgment or a decision is final and there is no more appeal, there must nevertheless be a possibility of revision. Reference could be made to national laws and to Article 61 of the Statute of the International Court of Justice.

A significant feature of the drafts which have been studied is that provision is only made for revision in favour of the accused who has been found guilty. Article 45 is drafted in the same manner. However, the question needs further deliberation; there could be valid reasons to open the possibility of revision also to the prosecutor and maybe also to the victim.

Another feature is that the scope of the provisions which may be invoked is rather narrow. There is probably a need for more elaborate rules in this context than appear in the various drafts presented earlier. It is against this background paragraph 3. is introduced in the present article.

The concept "revision proceedings" is used in an not altogether clear sense in existing rules and earlier drafts. It would be preferable if "revision proceedings" only referred to the proceedings up to the point in time when the Court of Appeal decides to open the case for revision. Once that decision is taken, there might be a new trial before the Court of Appeal or the Court of First Instance. These proceedings would obviously have to follow the normal rules applicable to these instances and should not be referred to as "revision proceedings".

CHAPTER XII - ENFORCEMENT OF JUDGMENTS

Article 46
Enforcement

1. Penalties are to be enforced on behalf of the Court in a State party to this Convention which is a successor State to the former Yugoslavia.
2. A penalty can also be enforced in another State party to this Convention, if this State consents thereto.
3. The enforcement shall be under international supervision as provided for in Article 47 and the Rules of the Tribunal.
4. The Court may determine the way in which a sentence shall be dealt with subject to paragraphs 5 and 6.
5. The laws of the administering State party to this Convention as well as its administrative regulations concerning the enforcement and execution of the sentence shall apply, including conditional release or alternative measures provided under its laws, subject to the provisions of Article 47, paragraph 2.
6. The enforcement of a fine or a confiscatory measure shall be governed by the laws and regulations mentioned in paragraph 5. However, their proceeds shall go to the Tribunal.

Commentary

Reference is made to Section 8.8. As can be seen this provision foresees execution in States parties to the Convention only. This solution should be contemplated further. It might very well be that there should be a possibility to have enforcement entrusted also to third States. A condition must however be that there are satisfactory guarantees that the enforcement will be just and that it will not be used to circumvent the system established by the Convention. A case where a third State could be involved is when foreigners have committed crimes falling under the jurisdiction of the Tribunal in the territory of the former Yugoslavia. General rules on treatment of

prisoners might indicate that such persons should be transferred to their own countries, in order that they may not be completely cut off from their homelands and, in particular, their families during the time when they are serving their sentences. Existing conventions on transfer of prisoners should be examined in this context. However, under no circumstances should it be accepted that States solicit execution of sentences and take care of prisoners, if one can suspect that the purpose is to circumvent the Convention.

The main rule is, however, that persons convicted to imprisonment should be sent back to a State party in the territory of the former Yugoslavia, where the enforcement can be secured. This means that the laws of this State as well as its administrative regulations concerning the enforcement and execution of sentences shall apply. The Rapporteurs have, unfortunately, not been able to examine these rules to a greater extent than they appear in the Penal Code, since they are not aware of any translation. This is therefore a matter where further detailed examination is necessary. The Rapporteurs have been told, however, that the applicable rules are basically the same as in many other States and that these rules should be generally acceptable also with respect to sentences by an international tribunal.

In particular rules concerning conditional release and alternative measures should be examined. It is important that the efforts to bring accused persons to justice and to deal with them justly and without bias are not destroyed in the application of national rules concerning the enforcement of the judgments of the Tribunal.

This question is related to the question how to supervise an eventual conditional release, which has been approved by the Supervising Judge. This is a matter which the Plenary Court might wish to study in drafting the Rules of the Tribunal.

As can be seen, the draft Convention also foresees fines and confiscation. Articles 46 and 47 do not confer any duties to the Supervising Judge in this context. Unless the Rules of

the Tribunal will regulate otherwise, it will be for the Secretary to ascertain that the proceeds of such measures go to the Tribunal, i.e. if the proposed solution is followed. In case there are problems with respect to the co-operation of the State party where these measures are to be executed, this will be a matter for the Standing Committee under Article 26.

Article 47
Supervision

1. The Plenary Court shall select one of the judges of the Court of First Instance to act as supervisor of the execution of judgments (Supervising Judge). An alternate Supervising Judge shall also be selected.
2. The Supervising Judge has the right to inspect any prison or other place of detention where sentences are served or persons are being kept under custody and to communicate with all sentenced persons in private. All national decisions on conditional release or alternative measures shall be subject to the approval of the Supervising Judge.
3. The provisions of this Article does not preclude the Court from suspending its judgment or place preconditions to its application in accordance with the Rules of the Tribunal.

Commentary

Reference is made to Section 8.8. In case there would be many executions of judgments to supervise, the proposed provision might be too rigid. In the further deliberations one could therefore contemplate whether it would be wiser to provide for the selection of one or more Supervising Judges.

The Supervising Judge has two main functions.

The first is to inspect all prisons and other places where sentenced persons may be kept in order to ascertain that they are treated correctly. In particular it is important to ascertain that they are not discriminated against or humiliated by other inmates, wardens or others who may come in contact with them. The Supervising Judge should be able to communicate with all persons subject to his supervision, and this should be in private in order that the judge can make sure that the sentenced person is not

prevented from communicating important information. In case complaints are raised or if the Supervising Judge finds reason to do so at his own will, he shall raise the matters with the local authorities or, if necessary, at the appropriate higher level. The main purpose of this supervision should be to make sure that persons sentenced by the Court are treated in conformity with international obligations concerning treatment of prisoners and detained persons.

The second task of the Supervising Judge is to examine all national decisions on conditional release or alternative measures and to approve these decisions. Unless approved by the Supervising Judge, such decisions may not be executed. This is again a measure to secure that all persons sentenced by the Court are treated in an equal manner.

A particular question to be considered is whether the present article necessitates a special agreement between the Tribunal and the States parties to the Convention. It should be pointed out that Articles 46 and 47 are drafted in such a way as to apply not only to States in the territory of the former Yugoslavia but also to other States parties in which penalties are enforced. This is naturally a solution which could be called in question. The idea is, however, that all sentenced persons should be treated equally. If the proposal is followed, this may necessitate legislation in all States parties to the Convention; decisions of parole boards and similar organs would not be valid unless the Supervising Judge approves of them. If this solution is considered too far-reaching, another solution would be to grant the sentenced persons access to the Supervising Judge, who should have the power to raise matters pertaining to his function with the competent national authorities.

Since it may be necessary to complement national rules with special rules on suspension of judgments or preconditions to the application of judgments, paragraph 3 provides that such measures could be dealt with in the Rules of the Tribunal.

CHAPTER XIII - CLEMENCY

Article 48

Board of Clemency

1. The States parties to this Convention shall designate a Board of Clemency. Every State party to this Convention shall be entitled to have one delegate on the Board.
2. The Board shall have the power of clemency with respect to persons sentenced by the Court in lieu of competent national organs of the States parties to this Convention.
3. Before deciding on a petition for clemency, the Board shall seek the advice of the Plenary Court.
4. The Board shall adopt its own rules of procedure.

Commentary

The right of some august instance at the national level to grant clemency is generally recognized. Since the draft Convention does not foresee an international institution, in which sentences are to be served, the simplest way would naturally be to leave the matter of clemency to the ordinary instance at the national level. Unfortunately this solution can hardly be regarded as appropriate. The reasons why national jurisdiction over war crimes and crimes against humanity is not sufficient in this case apply also in the present context. If the international community takes upon itself to establish an ad hoc Tribunal it is necessary to be consistent also as far as clemency is concerned. If clemency would be left to national institutions in the territory of the former Yugoslavia, there is a clear risk that decisions by such institutions would be challenged and that there would be suspicion that the decisions are biased.

It is against this background that the present provision is introduced.

Paragraph 3 lays down that the Board shall seek the advice of the Plenary Court. This is a provision which could be called in question, since the argument could be made that the Court should have no connection at all with matters concerning clemency.

Paragraph 4 provides that the Board shall adopt its own rules of procedure. There is no provision in the draft Convention which prevents the Plenary Court from adopting rules on clemency. It is, however, in the nature of clemency that it would be less advisable to lay down substantive rules for this institute. In the further deliberations one should therefore consider whether an express prohibition against substantive rules on clemency should be introduced in the Convention. It is another matter that the Board will after some time develop precedence which would be of guidance to the Board itself. This precedence will no doubt also be studied with great interest by persons serving sentences.

It should be observed that the article does not contain provisions on voting. This is a matter which has to be studied further. It might be advisable not to leave this to the rules of procedure, but to introduce a provision in the Convention, modelled after Article 26, paragraph 7. A qualified majority is probably required.

Article 49

Rules of the Tribunal

1. The Plenary Court shall draw up Rules of the Tribunal to regulate the functions and activities of the Court, the Procuracy and the Secretariat. In doing so the Court should give due consideration to the Code of Criminal Procedure of the former Yugoslavia.
2. When the Rules of the Tribunal are being drawn up, the Procurator-General and the Secretary are entitled to participate but not to vote.
3. The Rules of the Tribunal shall be published. Rules pertaining to the security of the Tribunal and related provisions may, however, be kept confidential.

Commentary

Reference is made to Section 8.4. The Rules of the Tribunal may address the Court (in all three appearances), the Procuracy and the Secretariat. The Plenary Court may not issue rules which bind the Standing Committee or the Board of Clemency. These organs are competent to adopt their own rules of procedure. See however Commentary to Article 48.

It is obvious that the Plenary Court must in the exercise of drawing up rules observe the international obligations that States parties to the Convention are obliged to follow. Reference has already been made to this fact in the Commentary to Article 31.

It is at the same time of great importance that the procedural law of the former Yugoslavia can be used to the greatest extent possible. As long as these rules comply with international obligations and standards, it should be an advantage to apply them, in particular in view of the way in which the present draft is designed (cf. the phasing out of the activities of the Tribunal as provided for in Article

60). It may even be that the Plenary Court decides to apply directly provisions of the national procedural law, or, rather, prescribe in the Rules of the Tribunal that these national rules shall apply.

The requirement in paragraph 3 that the Rules of the Tribunal shall be published is important. It is not acceptable that the organs of the Tribunal are governed by rules that are not generally accessible to the public. The only exception is that it may be necessary to issue rules pertaining to matters of security.

In this context the Rapporteurs would like to point to the fact that it will be necessary for the Plenary Court to issue rules on access to the archives of the Tribunal. Custom varies among States, and the practice may be different. In some States the general public would have access to the files, once the Court is seized with the matter, in other States only the judgments will be open to scrutiny. The States parties to the Convention may consider this question of such importance that they may wish to lay down rules on the matter in the Convention and not leave this question to be solved by the Rules of the Tribunal. It is to be hoped that the maximum openness is aimed at.

Article 50

Working Languages

1. The working language of the Tribunal shall be English.
2. The Court may decide to use any other language in a particular case.

Commentary

The question of working languages is of great importance, not least because of the costs involved. In their report on Croatia the Rapporteurs said that since the Court would be designed to deal with alleged crimes from a particular region, the languages of this region could be used as official languages of the Court. After giving further

consideration to this question the Rapporteurs have come to the conclusion that it may be unwise to employ several languages in the Court. Despite the fact that presumably all accused persons will speak Serbo-Croatian and that many documents (there are two alphabets involved in written Serbo-Croatian) and depositions will be in Serbo-Croatian, the Rapporteurs have come to the conclusion that the Tribunal must use one common language which all the personnel of the Tribunal can master reasonably well. It is also imperative that the judges have a sufficient command of that language so that they can communicate directly with each other. This is important not only with respect to the deliberations which the judges have to make but also in view of all the necessary direct contacts they must have in their daily work.

Taking all aspects into consideration, the Rapporteurs have come to the conclusion that the working language of the Tribunal should be English.

This does not mean, however, that the criminal inquiry might not to a large extent be conducted in e.g. Serbo-Croatian. The main thing is that the case, when presented to the Court, will be presented in English. Interpreters will obviously have to serve the Court at the main hearings, since defendants and others appearing before the Court will seldom have a sufficient command of English to be able to appear without the assistance of interpreters.

In view of the circumstances and taking into consideration the aspect of publicity the hearings will probably have to be translated into Serbo-Croatian even if all persons appearing before the Court would in a particular case choose to address the Court in English.

Paragraph 2 provides for the Court to decide to use any other language in a particular case. The Rapporteurs think that this option should not be excluded, if it should turn out that everybody present and acting in connection with the hearing is able to use another common language. The judgment would obviously have to be written in English though. The

question also arises whether it is not necessary to interpret the proceedings into English. If there are persons present in the court-room to follow the hearing, it will probably be necessary to provide for such translation.

Article 51

Privileges and Immunities

1. The privileges and immunities of judges are laid down in Article 10.
2. The Procurator-General, the Secretary and other officers and employees of the Tribunal shall enjoy, while performing their functions in the territory of the States parties to this Convention, the privileges and immunities accorded to persons connected with the International Court of Justice.
3. The Plenary Court may revoke the immunity of any person referred to in paragraph 2 with a two thirds vote, except for the immunity of the Procurator-General.

Commentary

Reference is made to Article 10. The provision in paragraph 2 is modelled after a similar provision in the Convention on Conciliation and Arbitration within the CSCE.

As to paragraph 3 it could naturally be discussed to what extent immunity could be revoked. The provision only excepts the Procurator-General; the judges are not mentioned in paragraph 2, and their immunity can not be revoked. The reason why only the Procurator-General is mentioned is that this person holds a position which is independent in relation to the Court, and he should have the same protection as the judges. The Secretary is the clerk of the Tribunal, and he is therefore in another position. On the other hand it is important that the Secretary can act in an independent manner within his field of responsibility. One might therefore consider including also the Secretary in paragraph 3.

Article 52
Costs of the Tribunal

The costs of the Tribunal shall be met by the States parties to this Convention. The provisions for the calculation of the costs; for the drawing up and approval of the annual budget of the Tribunal; for the distribution of the costs among the States parties to this Convention; for the audit of the accounts of the Tribunal; and for related matters, is contained in the Financial Protocol which appears in Annex 2. The Protocol constitutes an integral part of this Convention.

Commentary

Reference is made to Section 8.10. This article - or rather the Financial Protocol - is obviously one of the focal points of the draft Convention. In particular the size of the contributions to be made by States parties to the Convention are of importance, since they may influence the readiness of States to become parties to the same.

At the present juncture it is difficult to indicate more in detail how the provisions on the costs of the Tribunal should be drafted. This depends first of all on the auspices under which the Convention should be elaborated. If it is elaborated under the auspices of the United Nations, it is evident that the scale of distribution used within that organization could be used also for the present Convention.

If the Convention is elaborated under the auspices of the CSCE, the scale of distribution employed in the CSCE process could be used. In fact, since the Financial Committee under the CSO is presently elaborating a Financial Protocol to the Convention on Conciliation and Arbitration within the CSCE, this protocol in its present stage of development has been used as a model. Consequently, all provisions relating to the financing of the Tribunal appear in an annex, which forms an integral part of the Convention (see below under "Annex 2 to draft Convention").

CHAPTER XV - INTERNATIONAL JUDICIAL ASSISTANCE
AND OTHER FORMS OF CO-OPERATION

Article 53
General Provisions

1. The States parties to this Convention shall provide the Tribunal with all internationally recognized means of legal assistance. Assistance shall include, but not be limited to:
 - (a) ascertaining the whereabouts and addresses of persons;
 - (b) taking the testimony or statements of persons in the requested State or elsewhere;
 - (c) effecting the production or preservation of judicial and other documents, records, or articles of evidence;
 - (d) service of judicial and administrative documents; and
 - (e) authentication of documents.
2. The Tribunal is authorized to seek the co-operation of States non-parties to the Convention as appropriate.

Commentary

Reference is made to Section 8.6. The present article is drafted taking into consideration the reasoning of the Working Group of the ILC (cf. paras. 528-545 of the ILC report). Consequently, the article is drafted as a general provision supplemented by a non-exhaustive list of matters which would have to be included in the assistance to be given to the Tribunal. It is therefore important to note the first sentence of the paragraph which refers to "all internationally recognized means of legal assistance".

In order to make it clear that the Tribunal should have the power to approach also States non-parties to the Convention, a provision to this effect appears in paragraph 2. In view of the fact that the conventions that underlie the penal provisions to be applied by the Tribunal are universally accepted, it is to be assumed that also States non-parties to the Convention will give substantive assistance to the Tribunal.

Article 54
Communications and Requests

1. All communications in relation to this Convention shall be in writing and shall be between the competent national authority and the Secretariat of the Tribunal. The Procureur may correspond directly with local authorities in the former Yugoslavia.
2. Whenever appropriate, communications may also be made through the International Criminal Police Organization (ICPO/Interpol), in conformity with arrangements which the Tribunal may make with this organization.
3. Documentation pertaining to judicial assistance and cooperation shall include the following:
 - (a) the basis and legal reasons for the request;
 - (b) information concerning the individual who is the subject of the request;
 - (c) information concerning the evidence sought to be seized, describing it with sufficient detail to identify it, and describing the reasons why, and the legal basis relied thereon;
 - (d) description of the basic facts underlying the request; and
 - (e) description of some evidence concerning the charges, accusations or conviction of the person who is the subject of the request.
4. All communications and requests made pursuant to this Convention shall be in any of the official languages of the Convention.

Commentary

This provision should be read in conjunction with Article 34, paragraph 5. The present provision is drafted according to the system usually employed in international judicial assistance. This matter needs further consideration, however, since it is imperative that the Convention does not hinder a flexible co-operation between local authorities and the Tribunal. The provision that the Procureur may correspond directly with local authorities in the former Yugoslavia should be noted. Obviously this is where direct contacts are of the greatest importance. It could also be considered to open this option to the Secretariat, in particular with

respect to matters such as deliveries of documents and of summons to appear before the Court. The connection between Article 34, paragraph 5 and the present provision must be examined in the light of further detailed deliberations. The "competent national authority" will probably have to be designated by States upon ratification.

Paragraph 2 deals with the important question of involving Interpol in the work of the Tribunal. This involvement is of course dependent on an agreement between Interpol and the Tribunal if there should be a direct communication. Another solution might be that one of the States parties to the Convention might take upon itself to further, in particular, warrants of arrest to Interpol to ask for their assistance. It is important that suspected or accused persons can be apprehended all over the world, and in view of the international provisions which underlie the penal provisions to be applied, the Tribunal should be granted a wide co-operation.

As far as an agreement on co-operation with Interpol is concerned, it should be possible to conclude such agreement under Article 41 of the current Constitution of Interpol. A similar provision appears in Article 27 of the draft Constitution presently under consideration by the organization. The significance of Article 3 in the current Constitution (same number in the draft) would have to be analyzed in this context.

Paragraphs 3 and 4 should be self-explanatory. They need to be examined in the light of further deliberations.

Article 55
Provisional Measures

In cases of urgency, the Tribunal may ask of the requested State party to the Convention any or all of the following:

- (a) to provisionally arrest the person sought for surrender;

(b) to seize evidence needed in connection with any proceedings which shall be the object of a formal request under the provisions of this Chapter; or

(c) to undertake protective measures to prevent the escape of the person or destruction of the evidence sought.

Commentary

The question is whether it is necessary to go into detail on this subject in the Convention. It should be noted, however, that the article indirectly lays down obligations on the requested States, and that therefore the subject matter should be dealt with in the Convention.

It should also be noted that the relationship between Article 36 and the present article should be examined in detail in the further deliberations.

Article 56

Delivery of Persons

Delivery of persons for any reason from a State to the Tribunal and vice versa shall be in accordance with established legal procedures under this Convention and the Rules of the Tribunal as well as the laws of the requested State.

Commentary

Reference is made to Section 8.6. A similar provision appears in one of the drafts studied. It could be put in question, however, if the provision is absolutely necessary. It therefore appears in the present draft mainly to indicate that the question of bringing defendants before the Court has to be examined in detail in the further deliberations. The question is addressed by the Working Group of the ILC (cf. paras. 518-526 of the ILC report). Depending on the conclusions arrived at, it may be prudent to elaborate some kind of standard agreement between the Tribunal and the Contracting States, in which the latter undertake to deliver persons at the request of the Tribunal. Irrespective of how

this matter is solved, it will be necessary for the States parties to the Convention to examine in detail their legislation in the field of judicial assistance to see to it that the provisions can be applied also in relation to the Tribunal.

The possibility of the United Nations Security Council exercising a particular role in this context has been mentioned above under "Title and Preamble".

Article 57

Rule of Speciality

1. A person delivered to the Tribunal shall not be subject to prosecution or punishment for any other crime than that for which he has been delivered.
2. Evidence delivered shall not be used for any other purpose than for the purpose for which it was delivered.
3. Waiver of the requirements of paragraphs 1 and 2 may be made by the requested State on the basis of a motivated request by the Tribunal.

Commentary

The subject matter dealt with in this article is well known to everybody dealing with international judicial assistance. No major problems should arise in this context, in particular since the scope of the jurisdiction of the Tribunal is relatively narrow. Paragraph 3 may be of special importance, since it may very well be that additional crimes are discovered once the accused is brought before the Court. Accused persons may be recognized in the court-room and additional complaints may be made to the Prosecutor. It could therefore be contemplated whether one should introduce a provision to the effect that a requested State may make a general waiver of the requirements of paragraphs 1 and 2 with respect to matters falling within the jurisdiction of the Tribunal.

Article 58
Costs

1. The costs for the delivery of persons to the Tribunal and for other judicial assistance and co-operation shall be borne by the Tribunal.
2. The costs for execution of sentences shall be borne by the State party to this Convention in which the execution takes place.

Commentary

The provisions in this article need careful consideration. As can be seen, costs falling under paragraph 1 are attributed to the Tribunal, whereas costs falling under paragraph 2 are to be borne by a State party. The rationale behind this distinction is that it seems advisable to distribute equally among the States parties to the Convention the costs of bringing the accused persons to justice. The costs referred to in paragraph 1 are relatively limited in relation to costs for execution. It may also be that other States than States parties are involved in the delivery or in other judicial assistance and co-operation. It therefore seems appropriate that the Tribunal will be responsible for these costs.

As far as execution is concerned, the proposal foresees that the normal procedure would be that sentences are served in one of the States on the territory of the former Yugoslavia. When the stage of execution is reached, the Rapporteurs think that the responsibility for the effort of bringing war criminals to justice should be re-transferred to the States where the crimes were committed. The responsibility already rests with the States in question, and when the Tribunal has performed its tasks, it should be for these States to take over the responsibility. If there are many persons sentenced, this will no doubt be a heavy responsibility and a considerable economical burden upon these States. But this is something which cannot be avoided. If assistance is deemed necessary, this should be granted in other ways than through funding via the Tribunal. The idea is also that the activities of the Tribunal should be phased out, and even if

there still remains the task of supervising the execution (cf. Article 47), the Tribunal should not be entrusted with major financial issues for a long period of time and long after the adjudication of the Tribunal may have been transferred back to the States in the territory of the former Yugoslavia.

Article 59

Obligation to Try or Extradite

1. The States parties to this Convention undertake to surrender, extradite or transfer to the Tribunal on the basis of this Convention any person under investigation, charged, sought to be tried, or convicted by the Court in accordance with the jurisdiction of the Tribunal.
2. A State party to this Convention that decides to prosecute a person for a crime under the jurisdiction of the Tribunal does not have the obligation to surrender or extradite that person to the Tribunal.
3. A State party to this Convention may, as an alternative to prosecution and as an alternative to using the jurisdiction of the Tribunal, extradite a person to another State having jurisdiction and willing to prosecute.
4. Paragraphs 2 and 3 do not apply to any State in the territory of the former Yugoslavia.

Commentary

Reference is made to Section 8.2. In addition a few words could be said about the question of double criminality. This is, again, a matter with which lawyers engaged in extradition matters are well acquainted. A basic requirement in national laws for agreeing to a request for extradition is that the crime which the request concerns is punishable also under the law of the requested State. Since the provisions annexed to the draft Convention are reflections of descriptions of acts which are criminalized under international law, there should be no major problems here. One can assume that the act would be punishable in all States parties to the Convention. However, problems could arise in certain areas, e.g. in the field of statutory limitation. Even if there are international rules laying down that no statutory limitation should apply to war crimes, there will no doubt be States

which have not agreed to these rules in full. It is therefore necessary to examine the question of double criminality more in depth in the further deliberations.

With respect to the expression "jurisdiction of the Tribunal" reference is made to the Commentary to Article 4.

The motives for paragraph 4 are explained in Section 8.2.

CHAPTER XVI - TRANSFER OF PROCEEDINGS FROM
THE TRIBUNAL TO NATIONAL JURISDICTION

Article 60

Transfer of Proceedings to States in the
Territory of the Former Yugoslavia

1. When the Plenary Court is satisfied that a State party to this Convention in the territory of the former Yugoslavia has the appropriate means to adjudicate effectively and fairly cases falling under the jurisdiction of the Tribunal, it may authorize the Court of First Instance to transfer the proceedings in particular cases to the national courts of that State. Such transfer may not be made without the consent of the State to which the transfer is intended.

2. A decision by the Court of First Instance on transfer is final.

3. If transfer is decided, the case shall be dealt with in accordance with the national legislation of the receiving State.

Commentary

The motives for this provision appear in Section 8.9. The way in which the provision is designed, the decision by the Court of First Instance on transfer is final. It could be seen as a confirmation in casu of the general decision taken by the Plenary Court.

A consequence of paragraph 3 is that the case is disconnected from the Tribunal. This means that national law should apply in all aspects, and that the Tribunal will have no obligations with respect to the case in question. As a

consequence, supervision (cf. Article 47) is not applicable, which solution may have to be deliberated more in depth in the further considerations.

CHAPTER XVII - FINAL PROVISIONS*

General observation:

The drafting of the final provisions depends on the context in which the Convention is elaborated. If it is elaborated under the auspices of the United Nations, the final provisions of UN Conventions should be used as a model. As will appear, the Rapporteurs have chosen to draft the final provisions to demonstrate a possible CSCE option. The final provisions of the Stockholm Convention on Conciliation and Arbitration within the CSCE have been used as a model. There is, however, no provision which corresponds to Article 38 ("Non-parties") of the Stockholm Convention.

Article 61

Signature and Entry into Force

1. This Convention shall be open for signature with the Government of by the CSCE participating States until It shall be subject to ratification.

2. The CSCE participating States which have not signed this Convention may subsequently accede thereto.

3. This Convention shall enter into force two months after the date of deposit of the twelfth instrument of ratification or accession.

4. For every State which ratifies or accedes to this Convention after the deposit of the twelfth instrument of ratification or accession, the Convention shall enter into force two months after its instrument of ratification or accession has been deposited.

5. The Government of shall serve as depositary of this Convention.

* The Rapporteurs have chosen to demonstrate a possible CSCE option. If the UN option is chosen, the provisions will naturally have to be elaborated in accordance with UN practice.

Commentary

Cf. Article 33 of the Stockholm Convention. As can be seen, the present provision means that the Convention is open only to CSCE participating States. The number of ratifications necessary for the entry into force of the Convention has to be considered carefully. The Rapporteurs assume that the CSCE participating States will take jointly an interested approach, in case action is taken at the international level. The ratification process may, however, take longer in some States than in others. It has to be discussed whether twelve States form a sufficient basis for the commencement of the operations under the Convention.

Sweden is the depositary of the Stockholm Convention, while the Court established under that Convention has its seat in Geneva. It might be preferable if the depositary would be the same State as the State hosting the Tribunal.

Article 62
Reservations

This Convention may not be the subject of any reservation.

Commentary

Cf. Article 34 of the Stockholm Convention. In the present case no reservations are permitted.

Article 63
Amendments

1. Amendments to this Convention must be adopted in accordance with the following paragraphs.
2. Amendments to this Convention may be proposed by any State party thereto.
3. If the Standing Committee adopts the proposed text of the amendment, the text shall be forwarded by the Depositary to States parties to this Convention for acceptance in accordance with their respective constitutional requirements.

4. Any such amendment shall come into force on the thirtieth day after all States parties to this Convention have informed the Depositary of their acceptance thereof.

Commentary

Cf. Article 35 of the Stockholm Convention. This provision caused a considerable discussion when this Convention was negotiated. This should be seen against the background of the fact that there is a very strong link between that Convention and the CSCE participating States, even if they are not parties to the Convention. In the present case the link is less formal; it is more of a political nature. The Tribunal and the effects of its functioning will most certainly be discussed not only by the Standing Committee but also by the CSCE Council and the CSO.

Article 64
Denunciation

1. Any State party to this Convention may, at any time, denounce this Convention by means of a notification addressed to the Depositary.
2. Such denunciation shall become effective one year after the date of receipt of the notification by the Depositary.

Commentary

Cf. Article 36 of the Stockholm Convention.

Article 65
Notifications and Communications

The notifications and communications to be made by the Depositary shall be transmitted to the Secretary of the Tribunal and to the States parties to this Convention.

Commentary

Cf. Article 37 of the Stockholm Convention and the Commentary to Article 63.

Article 66
Transitional Provisions

Until a Secretary is appointed, the duties of the Secretary under Article 7, paragraph 5, and Article 18, paragraph 5 shall be performed by the Depositary.

Commentary

Cf. Article 39 to the Stockholm Convention. During the further deliberations it is necessary to identify the need for transitional provisions. So far, the Rapporteurs note that the lists containing the names of the judges appointed to serve on the Court of First Instance and the judges of appeal must be established before a Secretary can be appointed. It is therefore necessary to entrust this task to the Depositary, until the Secretary can take over.

Annex 1 to draft Convention

(Reference is made to the text appearing at the end of Annex 6 to the present report.)

Commentary

This text contains the relevant penal provisions of the Penal Code of the Former Yugoslavia. Reference is made to Sections 8.2 and 8.8 and to the Commentary to Article 28.

Annex 2 to draft Convention

(Reference is made to the text appearing at the end of Annex 6 to the present report.)

Commentary

Reference is made to Section 8.10 of the report and to the Commentary to Article 52. As already mentioned, the Protocol is modelled after a draft Financial Protocol presently under consideration within the CSCE. No comments are therefore offered with respect to the provisions of the Protocol. Obviously, the provisions concerning the financing have to be dealt with in detail when time comes.