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Iraq

Iraqi Special Tribunal-Fair trials not guaranteed

1. INTRODUCTION

For decades impunity for crimes under international law flourished in Iraq. Under the government of Saddam Hussein large scale human rights violations were committed and the victims denied all possibility of justice by a political and justice system designed to quash all dissent and protect human rights abusers.

Despite extensive documentation by AI and other non-governmental organizations of massive and gross violations of human rights under the government of Saddam Hussein, the international community remained largely silent.¹ In 1988, AI urged the UN Security Council to intervene in Iraq to stop the massive human rights violations against the Kurdish population. AI has repeatedly submitted reports to various UN bodies and mechanisms exposing gross violations in Iraq and calling for justice for the victims. Throughout the early 1990s AI called for the deployment of UN human rights monitors following the crushing of the Shi'a and Kurdish uprisings in the north and south respectively in 1991. AI has raised concern and intervened with the UN in relation to continued violations in Iraq, and repeatedly called on the UN Commission on Human Rights to appoint a special rapporteur on Iraq.²

The international community now has a unique opportunity to ensure justice for past violations. Genocide, crimes against humanity and war crimes are crimes under international law. The investigation and prosecution of these crimes and the provision of reparations to victims and their families are not solely the responsibility of Iraqi authorities. These are international responsibilities and the international community must provide the Tribunal with all the necessary expertise at its disposal and ensure that the Tribunal's proceedings are closely monitored. AI calls on the Tribunal to make its processes transparent and accessible to the international community, including to inter-governmental and non-governmental organizations and are seen to comply fully to international law and standards. The countless victims of

¹ For examples of the large number of reports produced by human rights organisations on Iraq see AI's web-page: <http://web.amnesty.org/library/eng-irq/index>, and Human Rights Watch webpage: <http://www.hrw.org/doc?t=mideast&c=iraq>.

² See for example Amnesty International's documents *Iraq: "Disappearance" of Shi'a Clerics and Students*, 1991; *Iraq: The Need for Further United Nations Action to Protect Human Rights in Iraq*, AI Index: MDE14/06/91, 15 July 1991; and *Iraq: Human rights violations since the uprising*, AI Index: MDE 14/05/91, July 1991.

decades of grave violations of human rights by the Saddam Hussein's government deserve nothing less.

How the issue of justice for the victims is dealt with by the new authorities in Iraq is of paramount importance for the future of human rights in the country. It is vital that suspected perpetrators of past violations and crimes are brought to justice. It is equally important that in bringing them to justice and securing justice for the victims and their relatives, human rights law and standards are respected and seen to be respected.

The Iraqi Special Tribunal (the Tribunal) has been created to try nationals and residents of Iraq suspected of genocide, crimes against humanity and war crimes. When the Statute of the Iraqi Special Tribunal (the Tribunal Statute) was finally made public, it became apparent that trials by the Tribunal would fall short of international standards of fairness. It was hoped that the many omissions and deficiencies of the Tribunal Statute would be remedied by the Rules of Procedures and Evidence (the Rules). However, while the Rules did contain some welcome improvements, neither the current Rules nor the Tribunal Statute are fully consistent with international law and standards. They also do not adequately reflect the important steps achieved in the development of international law in this area, particularly through the existing documents and jurisprudence relating to other special tribunals and the International Criminal Court (ICC). This report contains a detailed analysis of the Tribunal Statute and the Rules and highlight the areas where these fall short of the requirements of international law.

The provisions of the Tribunal Statute and the Rules include many positive guarantees of fair trial. These include provisions ensuring the independence and impartiality of judges and allowing for the appointment of non-Iraqi judges to the Tribunal (Article 4(d) of the Tribunal Statute and Rule 11). The envisaged creation of a Victims and Witnesses Unit (Rule 31) and Defence Office (Rule 49) are also to be welcomed, despite some concerns which are outlined in this report.

However, there are important deficiencies in the Tribunal Statute and the Rules. These include limited jurisdiction and a failure to ensure that provisions relating to criminal responsibility and defence are consistent with international law. Essential guarantees of the right to fair trial, such as the prohibition of the use of statements made as a result of torture and cruel, inhuman and degrading treatment, have been omitted and there are irregularities in the process and criteria for appointing and removing judges and prosecutors. Of particular concern to Amnesty International (AI) is the inconsistent and inaccurate translation of the Arabic version of the Tribunal Statute and Rules into English which could cause confusion and undermine fair trials.

AI is calling for these omissions and irregularities to be addressed before further investigations are carried out or trials commence. This can be done through amendments to the Tribunal Statute or Rules, or by the adoption of other documents which adequately define the elements of crime.³

The involvement of Iraqi jurists and others in organs of the Tribunal, often at great personal risk, is a testimony to their courage and commitment to justice. The international community has a shared responsibility to ensure that any new or existing court, that has jurisdiction over crimes under international law committed in Iraq, is not only scrupulously fair, but is also seen to be fair.

This report aims to provide practical recommendations for the administration of the Tribunal and all those involved in the process, including the Iraqi government, judges and lawyers, in order to help ensure that trials by the Tribunal conform with international law.

AI is concerned that even before the Tribunal has been established, those detained who are expected to be tried before the Tribunal – and who therefore may be at risk of the death penalty -- are being denied fundamental rights that are essential to a fair trial. They were initially held incommunicado by the occupying powers and, following the handover of power to the Iraqi Interim Government on 28 June 2004, are now held by the Multinational Force in Iraq (the MNF-I).⁴ They have had limited access to lawyers, to their families, to medical treatment and to a judge with the authority to review the legality of their detention. In addition, there are disturbing reports of deaths in custody, torture and other ill-treatment of people detained by the occupying powers, the Iraqi police and the MNF-I.⁵

³ The ICC has several supplementary documents to the Rome Statute. These include the Rules of Procedures and Evidence, the Elements of Crimes; and the Regulations of the Court. These documents include provisions that relate to many of the areas of concern addressed in this document.

⁴ The Multinational Force in Iraq (MNF-I) under a unified command was given its main mandate in Iraq by Security Council Resolution 1546 which reaffirmed the authorization established given through Security Council Resolution 1511. Resolution 1546 gives the MNF-I "the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq". The Resolution also welcomes the exchange of letters annexed to it between the Prime Minister of the Interim Government of Iraq and the US Secretary of State, which, among other things, establishes a mechanism of coordination between the two parties concerning security arrangements.

⁵ See, for example, Amnesty International *Iraq: The US must ensure humane treatment and access to justice for Iraqi detainees*, AI Index: MDE 14/142/2003, 30 June 2003; *Iraq: Killings of villains in Basra and al-'Amara*, AI Index: MDE 14/007/2004, 11 May 2004; *Iraq: Human rights protection and promotion vital in the transitional period*, AI Index: MDE 14/030/2004, 28 June 2004; Human Rights Watch, *Iraq: Torture Continues at Hands of New Government, Police Systematically Abusing Detainees*, 25 January 2005; Richard Norton-Taylor, *Troops accused on Iraq killings: MoD faces lawsuits over deaths of 18 civilians*, *The Guardian*, 21 February 2004.

2. BACKGROUND

On 10 December 2003 the Iraqi Governing Council adopted the Tribunal Statute.⁶ Former Iraqi president Saddam Hussein and members of his government are expected to stand trial before the Tribunal which was established to try those suspected of crimes under international law during Saddam Hussein's presidency.

The process for drawing up the Rules of Procedures and Evidence for the Tribunal was problematic. By the end of March 2005, the Rules had not been made generally available. At the beginning of April more than one version of the Rules were posted on the newly created website for the Tribunal.⁷ The version containing 90 rules was believed to have been the one adopted on 23 December 2004. However, another 93-rule version in English remains available on the website and its status remains unclear. (For a detailed discussion of the Rules, see section 8 below). Despite repeated requests AI did not receive copies of either the Tribunal Statute or the Rules prior to their adoption.

2.1 Applicable law

National law which applied prior to the fall of Saddam Hussein's government remains in force today, unless amended by new legislation. Article 17 of the Tribunal Statute states that subject to the provisions of Statute and the Rules:

"the general principles of criminal law applicable in connection with the prosecution and trial of any accused person shall be those contained:

i) in Iraqi criminal law as at July 17, 1968 (as embodied in The Baghdadi Criminal Code of 1919) for those offenses committed between July 17, 1968 and December 14, 1969;

⁶ Article 2 of the Tribunal Statute refers to the "Governing Council or the Successor Government". However, there is no systematic mention of "successor government" throughout the Tribunal Statute, as appropriate, whenever the Governing Council is mentioned. On 28 June 2004, all the powers and authorities of the Governing Council were transferred to the successor Iraqi Interim Government (in accordance with Security Council Resolution 1546). Article 32 of the Tribunal Statute states: "For purposes of this statute, the "Governing Council" shall mean the Governing Council of Iraq established on July 13, 2003. The powers conferred on the Governing Council in this Statute shall be transferred to the executive authority in any future government (the "Successor Government") established following the disbanding of the Governing Council." Therefore, reference to the Governing Council in the Tribunal Statute should be understood to refer to subsequent Interim Government of Iraq. Full English text of the Statute of the Iraqi Special is available on the website of the "Coalition Provisional Authority" at (http://www.cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm).

⁷ The Iraqi Special Tribunal's official web address is: <http://www.iraqispecialtribunal.org/>.

- ii) in Law Number 111 of 1969 (the Iraqi Criminal Code), as it was as of December 15, 1969, without regard to any amendments made thereafter, for those offenses committed between December 15, 1969 and May 1, 2003; and
- iii) and in Law Number 23 of 1971 (the Iraqi Criminal Procedure Law)."

No reference has been made to Iraq's obligations under international human rights treaties and standards. It is the opinion of Amnesty International that the change of government has not altered Iraq's obligations under human rights law, including human rights treaties to which Iraq is a state party. The Human Rights Committee has clarified this with regard to Iraq's continuing obligations under the International Covenant on Civil and Political Rights (ICCPR):

"The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant."⁸

Furthermore, the question of applicable law arises also in relation to those individuals who have been arrested during occupation, or by the Multinational Force (MNF-I). It is expected that several of those held by the MNF-I will be brought to trial before the Tribunal. A Tribunal statement announced on 28 June 2004 that: "an agreement was reached between the Iraqi authorities and the U.S. contingent of the multinational forces pursuant to which the Iraqi authorities will assume control of those individuals currently in custody with respect to whom arrest warrants are issued by a competent Iraqi court."⁹

According to the International Committee of the Red Cross (ICRC), the situation in Iraq is no longer that of "an international armed conflict between the US-led coalition and the state of Iraq and covered by the Geneva Conventions of 1949 in their entirety. The current hostilities in Iraq between armed fighters on one hand opposing the Multinational Force (MNF-I) and/or the newly established authorities on the other, amount to a non-international armed conflict. This means that all parties including MNF-I are bound by Article 3 common to the four Geneva Conventions,

⁸ Human Rights Committee: General Comment No. 26: Continuity of obligations (CCPR/C/21/Rev.1/Add.8/Rev.1) 8 December 1997, para. 4. The Human Rights Committee is the UN body of experts responsible for overseeing the implementation of the ICCPR.

⁹ See Press Release of the Tribunal dated 28 June 2004, available on <http://www.iraqispecialtribunal.org/en/press/releases/0007e.htm>.

and by customary rules applicable to non-international armed conflicts.”¹⁰ The ICRC adds that:

“Regardless of their status, charges against any detainee or internee are to be properly investigated. They can be prosecuted and, if proven guilty, sentenced. Whatever the crimes committed, they have the right to a fair trial, including the right to defend themselves and to be assisted by a lawyer.”

Those detained pending trial before the Tribunal must, therefore, be accorded the rights and protections set out international human rights law.

2.2 Jurisdiction

Article 1(b) of the Tribunal Statute limits the jurisdiction of the Tribunal to crimes committed between 17 July 1968 and 1 May 2003. This excludes the possibility of prosecution for crimes during the US-led occupation after 1 May 2003, following the handover of power to the Iraqi Governing Council on 28 June 2004, and during the presence of the MNF-I.

Given that statutes of limitation for genocide, crimes against humanity and war crimes are prohibited under international law and in Article 17(d) of the Tribunal Statute, there can be no justification for excluding from the Tribunal’s jurisdiction any crime under international law.

Article 1(b) of the Tribunal Statute also excludes the possibility of prosecution of anyone who is not an Iraqi national or a resident of Iraq. The Statute thus permits the Tribunal to exercise jurisdiction over Iraqi nationals for crimes under international law committed abroad and allows for a limited form of universal jurisdiction over people resident in Iraq.

2.3 Investigations

Arrests of people suspected of committing gross human rights violations in Iraq have been carried out since the start of occupation and have continued following the transfer of power on 28 June 2004.

Saddam Hussein was arrested on 14 December 2003. AI welcomed the step, stressing that: “the gravity and scale of the violations of which Saddam Hussein has been accused underscore the paramount importance that he be brought to justice in a manner that is unquestionably fair.”¹¹ The first court appearance of Saddam Hussein

¹⁰ ICRC: “Iraq post 28 June 2004: protecting persons deprived of freedom remains a priority”.

¹¹ See AI Press Release *Iraq: Only justice can serve the future of Iraq*, AI Index: MDE 14/183/2003, 15

and 11 senior members of his government took place on 1 July 2004. Since then, investigative judges have been examining cases with a view to bringing them to trial.

On 18 December 2004, Ali Hassan Al-Majeed and Sultan Hashim Ahmed, both "significant members of the former regime", appeared before the investigative judge of the Tribunal to complete investigation procedures.¹² The Tribunal announced on 28 February 2005 that the chief investigative judge had referred five men -- including Saddam Hussein's half-brother Barzan Ibrahim al-Hasan al-Tikriti, who was also former head of the Iraqi intelligence services, and Taha Yasin Ramadan, vice-president of the former regime -- for trial on charges of crimes against humanity.¹³ Their trials were set to start after a delay of at least 45 days (see below for more information on who will be brought to trial).¹⁴

These trials will be the first to take place before the Tribunal. Defence lawyers for those currently facing trial, and for others who are expected to be committed for trial soon, have stated that as of mid-April 2005 they had not been informed of trial dates nor had access to evidence and other documentation. They also told AI that they had not been provided with an official version of the Rules. AI believes that it is essential that those involved have ample time to study the Rules.

3. ENDING IMPUNITY IN IRAQ

Even before the adoption of the Tribunal Statute, AI and other human rights organizations had called for international and Iraqi experts to develop options for ensuring fair trials for those accused of widespread and grave human rights violations under Saddam Hussein's government.

AI stressed the importance of ensuring that the tribunal was competent, impartial and independent and that suspects were pursued solely on the basis of the evidence against them and through a fair process. There should be no statute of limitations and no amnesties, pardons or similar measures for crimes under international law if such measures would prevent a conclusive verdict and full

December 2003.

¹² See "Announcement" on 20 December 2004 on The Iraqi Special Tribunal's website: <http://www.iraqispecialtribunal.org/en/press/releases/0011e.htm>.

¹³ The term "investigative judge" used in this document is based on the term used in the English version of the Tribunal Statute and the official website of the Tribunal. Other countries use the term "examining magistrate".

¹⁴ Article 61(1-1) of the Rules states that: "[a]t least 45 days prior to the commencement of trial, the Prosecutor shall notify the Defense of the names of the witnesses that he intends to call to establish the guilt of the accused."

reparations for victims. Suspects should be brought to justice in proceedings that fully respect international law and standards for fair trial at all stages of the proceedings. There should be a right of appeal and no recourse to the death penalty or other forms of cruel, inhuman or degrading punishment. Victims and their families must have effective means to obtain full reparation for the violations they have suffered.¹⁵

The Tribunal cannot, therefore, be seen in isolation. It must be part of a broader effort to bring to justice all those responsible for crimes under international law committed in Iraq or by Iraqi nationals or residents in past decades, to establish the truth about what occurred and to provide full reparations to the victims and their families. The three pillars in the fight against impunity – justice, truth and reparations – are all essential if there is to be a lasting peace and true reconciliation in Iraq.

With regard to the first pillar, justice, it is likely that the Tribunal will have insufficient prosecutors, judges and staff to investigate and prosecute more than a limited number of the potentially very large number of people suspected of crimes under international law committed in Iraq or by Iraqi nationals and residents.¹⁶ There must be an effective programme, designed in consultation with civil society and international experts, to reconstruct the Iraqi criminal and civil justice system and to reform Iraqi penal codes and code of criminal procedure. Although parts of the justice system are still functioning, an enormous amount of work needs to be done. The international community can play an important role in providing the expertise needed to assess the needs of the justice system and to ensure adequate funding to effect reform.

There are no clear, strategic plans for establishing the truth about the “disappearance”, murder, rape and torture of enormous numbers of people in past decades in Iraq and the role of foreign governments in these crimes. Some Iraqi groups proposed the establishment of a non-judicial process, including a truth commission. AI considers that such a commission could potentially make an important contribution in addressing past human rights violations and preventing a repetition of such violations.¹⁷ Any truth commission should be mandated to establish an official historic record of all human rights violations in Iraq, thereby providing a

¹⁵ See *Ensuring Justice and Accountability for Human Rights Abuses* AI Index MDE 14/080/2003, April 2003. Also available on AI website at: <http://web.amnesty.org/library/Index/ENGMDE140882003?open&of=ENG-IRO>.

¹⁶ Article 1(b) of the Tribunal Statute states that the jurisdiction of the Tribunal will be “over any Iraqi national or resident of Iraq”.

¹⁷ AI has on several occasions supported the efforts of truth commissions and commented on their mandates. See for, example, *Peru: The Truth and Reconciliation Commission – a first step towards a country without injustice*, AI Index: AMR 46/003/2004; and *Morocco/Western Sahara: Increasing openness on human rights*, AI Index: MDE 29/001/2005.

document for the whole of society which establishes the facts and recognizes the suffering of victims and their families.

However, AI believes, that any such initiative in no way diminishes the duty of the Iraqi authorities, and the international community, to bring to justice those responsible for human rights violations. Any non-judicial processes should *supplement* criminal prosecutions not replace them. They should not in any way preclude criminal prosecution or private criminal and civil actions, or otherwise limit any individual's rights to compensation. Any reports produced by a future truth commission should be widely publicized; this should include disseminating widely information concerning the process of compiling testimonies. Any recommendations proposed by a truth commission should be given due weight by the Tribunal and other relevant authorities in order to ensure that steps are taken to address its concerns and to implement its recommendations.

The victims of human rights violations and their families have the right to reparations, including restitution, compensation, rehabilitation, satisfaction that justice is done and guarantees of non-repetition.¹⁸ There are no provisions in the Statute to provide reparations. Special measures are needed to address each of the five elements of reparation cited above. In particular, the system for vetting people serving in police or security forces to ensure that none are responsible for crimes under international law is an ineffective way of guaranteeing non-repetition. Specialized non-governmental organizations (NGOs) argue that: "vetting is an incomplete solution to human rights abuses and should be accompanied by broader, more systemic reforms, such as in processes of selection and training."¹⁹

Finally, it should be stressed that crimes such as genocide, war crimes and crimes against humanity have never before been prosecuted in Iraq. Investigations of many of these crimes will be complex, for example they will involve the examination of large numbers of victims, witnesses or documents. They may also involve new issues of international law, as many of these crimes do not exist under Iraqi criminal law. Many of those involved in the Tribunal have benefited from training programmes by various institutions, which drew on the experience of other special tribunals and increased their understanding of the development of international law on crimes under the jurisdiction of the Tribunal. However, it is not clear if there is a coordinated, long-

¹⁸ On 19 April 2005, the UN Commission on Human Rights approved a resolution on the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". Refer to the principles on reparation as adopted by the Commission. See E/CN.4/2005/L.48, 13 April 2005.

¹⁹ See *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction*, Occasional Papers Series, May 2004, International Centre for Transitional Justice.

term and coherent programme to identify and address the needs of those involved in the Tribunal, particularly judges and prosecutors.

4. OVERVIEW OF THE STRUCTURE OF THE TRIBUNAL

The Tribunal is a self-contained special court which is not part of the Iraqi ordinary court system. It has not been established by the UN, but has a number of international elements. The Tribunal will consist of a Presidency, the Tribunal investigative judges, a Prosecutions Department, Trial and Appeals Chambers and an Administrative Department. It will have jurisdiction over genocide, crimes against humanity, and war crimes, as well as some crimes under Iraqi law. According to Article 35 of the Tribunal Statute the “expenses of the Tribunal shall be borne by the regular budget of the Government of Iraq.”

4.1 The Presidency

The Presidency consists solely of the President of the Special Tribunal. Members of the Appeals Chamber elect one of their members to be President of the Appeals Chamber and that person is *ex-officio* the President of the Special Tribunal (Articles 4(c)(ii) and 6(a)(1)). The President is responsible for the assignment of judges and reserve judges to particular Trial Chambers and has overall responsibility for the administration and finance of the Tribunal and for the appointment of non-Iraqi nationals as advisers or observers (Articles 4(c)(ii), 6(a)(2-4) and 6(b)). The President is required to submit to the Iraqi Governing Council or the successor government an annual report about the Tribunal (Article 36), but there is no requirement that this report be made public or that there be supplementary reports published on a more frequent basis.

4.2 Tribunal investigative judges

Investigations will be conducted by up to 20 permanent investigative judges, who serve three-year terms, and up to 10 reserve investigative judges (Articles (1) and 7(c)). The Tribunal Statute does not state whether these terms are renewable.

One of the investigative judges serves as the Chief Tribunal Investigative Judge (Article 7(e)) with responsibility for assigning cases to individual tribunal investigative judges (Article 7(f)). Neither the Tribunal Statute nor the Rules set out a procedure for analyzing information to determine what cases need to be assigned.

Investigative judges must be Iraqi nationals (Article 28), but the Chief Tribunal Investigative Judge is required to appoint non-Iraqi nationals as advisers to assist investigative judges in examining and prosecuting cases, and as observers to monitor investigative judges' compliance with general due process standards (Article 7(n)).

Rule 11 states that a judge who deals with a case in one capacity cannot deal with the same case if moved to another chamber, an important provision in ensuring judicial impartiality.

4.3 The Prosecutions Department

The Prosecutions Department is "responsible for the prosecution of persons responsible for crimes within the jurisdiction of the Tribunal" (Article 8(a)). The Prosecutions Department consists of up to 20 prosecutors (Article 8(c)) nominated and appointed by the Governing Council, after consultation with the Judicial Council (Article 8(d)). It is headed by a Chief Prosecutor who is to be selected from among the prosecutors (Article 8(e)).²⁰

Prosecutors must be Iraqi nationals (Article 28), but the Chief Prosecutor is required to appoint non-Iraqi advisers to assist the prosecutors and non-Iraqi observers to monitor the performance of the prosecutors (Article 8(j)). Each prosecutor will serve a three-year term.

Instead of a single prosecution office, each prosecutor will have an office with such other qualified staff as are required (Article 8(g)). It is not clear, therefore, from the Tribunal Statute or the Rules how the prosecution can pursue a common strategy or how prosecutors will be able to benefit from information emerging from cases being pursued separately by other prosecutors.

4.4 The Trial Chambers

The Tribunal will have one or more Trial Chambers consisting of five permanent judges and an unspecified number of reserve judges (Articles 3 (a)(1) and 4(a) and (b)). The permanent and reserve judges are normally to be Iraqi nationals (Article 28), but the Governing Council may also, if it deems it necessary, appoint non-Iraqi judges "who have experience in the crimes encompassed by this Statute" (Article 4 d)). No

²⁰ The Iraqi Judicial Council (also known as the Council of Judges) existed by virtue of the Iraqi Law of Judicial Organisation number 16 of 1979. The Council was re-established and given duties by virtue of Coalition Provisional Authority (CPA) Order number 35 on the Re-Establishment of the Council of Judges.

member of a Trial Chamber can simultaneously be a member of the Appeals Chamber or an investigative judge (Article 4(c)).

4.5 The Appeals Chamber

The Tribunal will have an Appeal Chamber consisting of nine permanent judges, but, apparently, no reserve judges (Article 4 (c) (i)). The permanent judges serve five-year terms (Article 5 (e)), but it is not clear if these terms are renewable. The permanent judges are normally to be Iraqi nationals (Article 28). As with the trial judges, the Governing Council may also, if it deems it necessary, appoint non-Iraqi judges for the Appeals Chambers "who have experience in the crimes encompassed by this Statute" (Article 4 (d)). The role of the Appeal Chambers is "to review the decisions of the Trial Chambers" (Article 3 (a) (2)), but it also has the power to hear appeals of decisions or orders of investigative judges (Article 7 (k)).

4.6 The Administration Department

The Administration Department is headed by a Director (Article 9(a)) and is "responsible for the administration and servicing of the Tribunal and the Prosecutions Department" (Article 9(b)). Initially the Director of the Administration Department is to be appointed by a political body (the Governing Council) without any requirement that it consults with the Judicial Council or the judges. The Director serves a renewable three-year term, appoints the staff of the Administration Department (Article 9(c)) and must appoint a public relations expert to the position of spokesperson for the Tribunal who "shall give regular briefings to the press and the public at large with respect to developments relating to the Tribunal".

5. AMNESTY INTERNATIONAL'S CONCERNS ABOUT THE TRIBUNAL STATUTE AND THE RULES

There are important areas where the Tribunal Statute and the Rules are not consistent with international law and important principles of international law have been omitted. Despite a number of positive elements, the Tribunal Statute ignores some of the most important developments in international justice of the past decade. In particular, it fails to incorporate many of the positive organizational advances reflected in the International Criminal Court (ICC) and the other special tribunals.

These failings are particularly troubling because the Tribunal has the power to impose the death penalty. This runs counter to the worldwide trend towards abolition

of this cruel, inhuman and degrading punishment and the specific international community's exclusion of capital punishment for genocide, crimes against humanity and war crimes in other international courts and tribunals.

These fundamental flaws and omissions must be rectified to ensure that the Tribunal's judgments are fair and seen to be fair and that victims and their families obtain justice and reparations.

5.1 Independence and impartiality of judges and prosecutors

5.1.1 Criteria for appointing, investigating and removing judges and prosecutors

The criteria for appointing judges do not ensure that people from all backgrounds will be considered and that there will be a fair representation of men and women.²¹ In addition, it does not ensure that judges have specialist legal expertise in the issues before the Tribunal, including human rights law and standards, international humanitarian law and crimes involving violence against women and children.²²

According to Articles 5(a) and 7(d) of the Tribunal Statute, permanent and reserve judges must be:

"persons of high moral character, impartiality and integrity who possess the qualifications required for appointment to the highest judicial offices. In the selection of investigative judges, due account shall be taken of the experience of the judges in criminal law and trial procedures."

²¹ Article 36(8)(a) of the Rome Statute of the ICC provides that: "The States Parties shall, in the selection of judges, take into account the need within the membership of the Court, for: (iii) A fair representation of female and male judges;" Article 13 *ter* (1)(b) of the Statute for the International Criminal Tribunal for the former Yugoslavia (ICTY) and Article 12 *ter* (1)(b) of the International Criminal Tribunal for Rwanda (ICTR) Statute provide that: "each state may nominate up to four candidates, ... taking into account the importance of a fair representation of female and male candidates."

²² Article 36(3)(b)(ii) of the Rome Statute of the ICC provides that at least five of the 18 judges of the ICC must have "established competence in relevant areas of international law such as international humanitarian law and the law of human rights"; Article 36(8)(b) provides that: "States Parties shall take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children." Article 13 of the ICTY Statute and Article 12 of the ICTR Statute provide that: "due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law." Article 13 of the Statute of the Special Court of Sierra Leone provides that: "In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice."

Candidates to be permanent and reserve judges of the Trial Chambers need not be serving judges, but “could be lawyers and jurists (who should also have the necessary experience and qualifications)” (Article 5(b)). On the other hand, judges in the Appeals Chamber must be serving or former judges (Article 5(b)).

Article 4(d) permits the Governing Council,²³ “if it deems it necessary, [to] appoint non-Iraqi judges who have experience in the crimes encompassed in this Statute, and who shall be persons of high moral character, impartiality and integrity.” While this is a welcome provision, the requirement of “experience in the crimes encompassed in this Statute” does not expressly stipulate that the experience be in trials or appeals.

The fact that such professional background or experience has been omitted from the essential criteria for the appointment of investigative judges and judges of the Trial and Appeals Chambers is inconsistent with recent developments in international law and standards. The lack of more stringent standards is particularly troubling because a substantial number of the trials will involve questions of international law and the management of large volumes of complex evidence. The Rome Statute of the ICC has more stringent criteria for appointing judges. Article 36(3) b) provides that in addition to choosing judges “from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices” shall: “(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court”.²⁴

Reports indicate that about 30 judges have been specially appointed to the Tribunal. For security reasons, their identity has not been disclosed. There are also about 400 other people said to be involved in the Tribunal, including international lawyers working in an advisory role, investigators and researchers.²⁵ This composition highlights the importance of ensuring the presence of international judges, advisers and observers to compensate for any lack of expertise among the staff of the Tribunal in issues pertaining to the crimes under its jurisdiction. Although the provisions allowing for international advisors and monitors are positive steps in that direction,

²³ This is to be understood in the current context to refer to subsequent Interim Government of Iraq.

²⁴ See also Article 13 of the ICTY Statute, Article 12 of the ICTR Statute and Article 13 of the Statute of the Special Court for Sierra Leone.

²⁵ See for example “Trials loom for Iraq’s former rulers” by Kathryn Westcott, *BBC News*, 6 April 2005.

however, their role is limited and they can not make binding recommendations to the Tribunal (see further section 5.3 below).

5.1.2 Flawed criteria for excluding candidates

The Tribunal Statute does not include any provisions that require or allow a judge to be excused from proceedings where their impartiality is or may reasonably be perceived to be affected.²⁶

It is a matter of concern that the Tribunal Statute bans former members of the Ba'ath party from becoming judges or prosecutors, solely on the basis of their previous membership of the party. Article 33 of the Tribunal Statute states that: "[n]o officer, prosecutor, investigative judge, [trial] judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party." AI believes that mere past membership of the Ba'ath party should not in itself constitute sufficient grounds for preventing someone from holding a position in the Tribunal.

AI understands the need to ensure that judges and prosecutors are independent from the previous government. However, there should similarly be guarantees to ensure the independence of judges and prosecutors from any political organization or government.²⁷

It is equally important that a vetting system is established to ensure that judges and prosecutors appointed to the Tribunal have not been involved in past gross violations of human rights and humanitarian law, including those cases being investigated by the Tribunal.

5.1.3 Independence and impartiality of judges

The Rules compensate for some of the important omissions in the Tribunal Statute regarding safeguards for the independence and impartiality of Tribunal judges. In addition to stating that judges must not sit on the same case when acting in another capacity in a different Chamber of the Tribunal (Rule 11(4)), the Rules also state that each Tribunal judge "shall act independently and he shall not be submitted to or respond to the instructions or the directions issued by the presidency of the republic or

²⁶ UN Basic Principles on the Independence of the Judiciary and Guidelines 21-22 of the UN Guidelines on the Role of Prosecutors.

²⁷ Principle 8 of the UN Basic Principles on the Independence of the Judiciary states that: "members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

the cabinet or from any Government Department, or from any other source.” (Rule 11 (1))²⁸

The Tribunal Statute and the Rules do not expressly state that judges should decide matters impartially, making decisions solely by applying law (consistent with international law) to the facts adduced through evidence lawfully obtained in a manner consistent with international standards. Principle 2 of the Basic Principles on the Independence of the Judiciary states that: “[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law”.

The Tribunal Statute and the Rules also do not have an express provision requiring judges to carry out their duties without discrimination of any kind, including on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 2(1) of the ICCPR prohibits discrimination, and Article 14(1) states that: “[a]ll persons shall be equal before the courts and tribunals”.

Further, according to Article 9(c) of the Tribunal Statute, the Director of the Administration Department (in effect, the registrar) is a political appointment of the Governing Council or the Successor Government, made without consultation with the Judicial Council or civil society. He or she is appointed for a three-year renewable term. Thus, the Director could be subject to improper political pressure.

5.1.4 Qualifications and independence of prosecutors

Neither the Tribunal Statute nor the Rules spell out any qualifications for prosecutors. There is no requirement that they be lawyers, much less that they have experience in complex criminal cases or the prosecution of the crimes under the jurisdiction of the Tribunal. The only criterion mentioned in the Tribunal Statute is that non-Iraqis may not be prosecutors (Article 28). No reason is given for excluding prosecutors from the provision in Article 4(d) of the Tribunal Statute, which allows for the appointment of non-Iraqis judges, if this is deemed necessary. This omission is a matter of particular concern given that the Tribunal Statute provides that prosecutors are nominated and appointed by a political body, the Governing Council or successor governments, after consultation in a non-transparent process that is limited to the Judicial Council and excludes civil society (Article 8 (d)).

In contrast, Article 42(3) of the Rome Statute of the ICC provides that:

²⁸ This complements the similar provision that exists in the Tribunal Statute in Article 7(j) which is limited to investigative judges without including a general provision applying to all the judges.

"[t]he Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases."

Neither the Statute nor the Rules have provisions requiring prosecutors to be impartial, although there are provisions requiring the impartiality of the judges as discussed above (Rule 11). Similarly, there is no provision expressly prohibiting prosecutors from taking part in any case in which their impartiality is or could be seen to be in doubt, including cases in which they were previously involved at national level; where they have or have had a personal, professional or financial relationship with any of the parties or witnesses; or when they have expressed opinions in public that call into question their impartiality.²⁹ Neither the Tribunal Statute nor the Rules expressly authorize prosecutors to amend indictments or to decline to proceed on the basis of a flawed indictment prepared by an investigative judge. They also fail to require prosecutors not to proceed with a prosecution if it is based on improperly obtained evidence. Guideline 14 of the Guidelines on the Role of Prosecutors states that "[p]rosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded." Further, Guideline 16 provides that:

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

5.1.5 Disqualification or removal

The criteria and procedures for the disqualification of investigative judges, judges of the Trial and Appeals Chambers and prosecutors are not fully consistent with international standards. Article 5(f) of the Tribunal Statute provides that a judge:

"shall be disqualified for any of the following reasons:

- i. He or she has a criminal record including a felony unless the felony is a political or false charge made by the Ba'ath Party regime;
- ii. He or she has made a material misrepresentation; or

²⁹ Guideline 13(a) of the UN Guidelines on the Role of Prosecutors requires prosecutors to "[c]arry out their duties impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination."

iii. He or she fails to carry out his or her duties without good reason.”³⁰

Article 5 (f)(3) of the Tribunal Statute states that “The decision to disqualify the President shall be taken by the Governing Council or the Successor Government.” The possibility of misuse of this provision is of particular concern with regard to the President because he or she can be removed by a political body.

Further, the Rules seem to confuse disqualification of a judge from a particular case and the permanent removal of the judge from the Tribunal. Rule 12 deals with disqualification of judges, concluding that: “[i]f the grounds for disqualification from the Tribunal Statute of the Special Tribunal are applicable, a Judge is disqualified from acting in any judicial capacity for the Tribunal.” Rule 13, on the other hand, states that: “[i]f the grounds for disqualification contained above in Article 11 [regarding independence and impartiality of judges] are applicable, a Judge shall be disqualified from sitting on that particular case.” Both the Arabic and English versions use the same terms for disqualification and removal.³¹

Disqualification, suspension or removal of judges or prosecutors should be consistent with Principle 18 of the UN Basic Principles on the Independence of the Judiciary which states that: “[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”³²

Further, Article 46(1) of the Rome Statute of the ICC is more precise. It states that judges, prosecutors, registrar, or other officials can be removed from office in cases where “that person: (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or (b) Is unable to exercise the functions required by this Statute.” The criteria in the Rome Statute are less susceptible to abuse, for example with respect to determining what political crime is.

³⁰ The grounds for removal (although the Tribunal Statute speaks of disqualification, it apparently means removal from office, not disqualification from sitting in a particular case) for investigative judges (Article 7(m)(1)) and prosecutors are the same. (Article (8)(f)) Principle 18 of the UN Basic Principles on the Independence of the Judiciary states that judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

³¹ These rights are recognized for judges in Principles 17-20 of the UN Basic Principles on the Independence of the Judiciary and for prosecutors in Guidelines 21-22 of the UN Guidelines on the Role of Prosecutors, and Article 46(6) of the Rome Statute of the ICC.

³² Article 41(2)(a) of the Rome Statute of the ICC states: “A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.”

5.2 Privileges and immunity

The Tribunal Statute provides limited legal protection for investigative judges, judges of the Trial and Appeals Chambers, prosecutors and the Director of the Administration Department and Special Tribunal staff. Article 31 of the Tribunal Statute provides that they have immunity from civil suits for their official acts. It does not, however, provide them with any immunity from criminal prosecution for their official acts. The Tribunal Statute also does not provide any legal protection for others whose involvement with the work of the Tribunal is essential, including counsel for suspects and accused, counsel for victims, victims, and witnesses. In contrast, Article 48 of the Rome Statute of the ICC and the Agreement on Privileges and Immunities of the ICC provide extensive legal protections for the ICC itself, its officials and staff, defence counsel and counsel for victims, victims, witnesses and others.

5.3 Observers and advisers

The provisions of the Tribunal Statute requiring the appointment of non-Iraqis as advisers and observers is a positive step towards improving the fairness and effectiveness of the Tribunal. Article 6(b) of the Tribunal Statute requires the President of the Tribunal to appoint non-Iraqi nationals as advisers or observers. The role of the non-Iraqi nationals is:

“to provide assistance to the judges with respect to international law and the experience of similar tribunals (whether international or otherwise), and to monitor the protection by the Tribunal of general due process of law standards. In appointing such non-Iraqi experts, the President of the Tribunal shall be entitled to request assistance from the international community, including the United Nations.”

However, the roles of advisers and observers are not clearly differentiated and they do not confer sufficient authority in themselves to ensure that the Tribunal is able to deal effectively with complex cases and any new questions of international law and standards which may arise.

This is also true of the roles of advisers and observers attached to the Trial and Appeal Chambers. In contrast, the role of those acting as advisers and observers in relation to prosecutors is to monitor “the performance of the Prosecutor”, rather than the application of international standards of fair trial.

Rule 39 of the Rules provides some details on the role of the observers and advisers. Advisers and observers appointed to the Defense Office “shall assist in the overall administration of the Defense Office” (Rule 39 (1)), while those assigned to investigative judges, a Trial Chamber or the Appeals Chamber or to the Prosecutions

Department “will provide non-partisan, confidential, non-binding expert advice and recommendations.” (Rule 39 (4))

However, neither the Tribunal Statute nor the Rules give precise details of what observers and advisers are allowed to do. For example, it is not clear if they will be allowed to issue public reports of their observations. It is also unclear at what stages and how the relevant bodies of the Tribunal are required to take on board the advice and observations made, or who is responsible for following up on such advice or observations.

5.4 Flawed definition of crimes

According to the Tribunal Statute, not all crimes under international law come under the jurisdiction of the Tribunal. The Statute also defines a number of crimes in ways which are not consistent with international law.

The Tribunal Statute omits any reference to the Elements of Crimes, adopted as a supplementary instrument to the Rome Statute to assist the ICC in interpreting the definitions of the crimes. The failure to include such a document is of particular concern given that many of the crimes under the jurisdiction of the Tribunal do not exist in Iraqi penal law and there are, therefore, no precedents in the national courts to assist the Tribunal in defining the elements of crimes. Indeed, some of the crimes under national law included in the Tribunal Statute are defined in ways that are inconsistent with the principle of legality.

It is possible that certain crimes under international law have been omitted from the jurisdiction of the Tribunal because it is assumed that these crimes are not relevant to the specific situation of Iraq. However, the consequence is that Statute predetermines the relevant crimes before the investigation and prosecution have taken place and therefore prejudices the outcome. It is of paramount importance that the Tribunal Statute and the Rules include all crimes under international law.

According to Article 10 of the Tribunal Statute, the Tribunal has jurisdiction to try the following crimes:

- a) genocide;
- b) crimes against humanity;
- c) war crimes; or
- d) violations of certain Iraqi laws.

Genocide: The definition of the crime of genocide contained in Article 11(a) of the Tribunal Statute is identical to that in customary international law.³³

Crimes against humanity: The Tribunal Statute includes most, but not all, conduct that is recognized under international law as amounting to crimes against humanity. Article 12(a) of the Tribunal Statute states that the Tribunal has jurisdiction over certain acts listed in that article “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Article 12(b) of the Tribunal Statute defines the different crimes against humanity under the jurisdiction of the Tribunal in a way identical to those in Article 7 (Crimes against Humanity) of the Rome Statute of the ICC.

However, Article 12(a)(7) omits the crime against humanity of enforced sterilization,³⁴ apartheid,³⁵ and forced pregnancy.³⁶

Further, Article 12(a)(8) of the Tribunal Statute includes a definition of the crime against humanity of persecution on the grounds of gender also found in Article 7(1)(h) of the Rome Statute of the ICC. However, it omits the definition of gender contained in Article 7(3) of the Rome Statute.³⁷ There is some concern that this omission coupled with the absence of an express reference to the UN definition could lead to the Tribunal adopting a more restrictive definition.

War crimes: Most of the war crimes in the context of both international and non-international armed conflict which were included in the Rome Statute of the ICC are also listed in Article 13 of the Tribunal Statute. However, some have been omitted. In

³³ The definition of genocide, which is considered customary international law, is contained in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and Article 6 of the Rome Statute of the ICC.

³⁴ This crime is also omitted from the war crimes of sexual violence set out in Article 13(b)(22) dealing with international armed conflict and Article 13(d)(6) dealing with war crimes of sexual violence in non-international armed conflict

³⁵ Apartheid was recognized three decades ago as a crime against humanity in the 1973 International Convention for the Prevention and Suppression of the Crime of Apartheid. It is included as a crime against humanity in Article 7(1)(j) of the Rome Statute of the ICC. The definition of apartheid contained in Article 7(2)(h) is significant in that it extends the term to systems of racial discrimination beyond the former apartheid system in South Africa.

³⁶ The crime against humanity of forced pregnancy set out in Article 12(a)(7) omits the carefully crafted definition of this crime included in Article 7(2)(f) of the Rome Statute of the ICC. This defines forced pregnancy as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law”.

³⁷ Article 7 (3) of the Rome Statute of the ICC states that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.

addition, other war crimes which were not included in the Rome Statute but which are part of customary or conventional international law have also been omitted from the Tribunal Statute.

Some of the definitions of war crimes in the Tribunal Statute are inconsistent with international law. Article 13(b)(4) (prohibiting environmental damage) and Article 13(b)(5) (protecting civilians and civilian objects) of the Tribunal Statute are based on Article 8(2)(b)(iv) of the Rome Statute of the ICC. However, these definitions are a much weaker version of Articles 55(1) and 57(2)(b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Article 57(2)(b) of Protocol I requires that:

“an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

Article 55 (1) of Protocol I requires that: “[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage” and prohibits “the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population”.

The Rome Statute of the ICC combined these Protocol I articles, but circumscribed the environmental damage prohibition. The ICC Statute changes the phrasing “concrete and direct military advantage” of Protocol I to “concrete and direct overall military advantage”. The addition of the qualifier “overall” could easily lead to abuse.

Although the Tribunal Statute addresses the two provisions in separate paragraphs, they are not consistent with Protocol I.³⁸

As a result of opposition by Iraq and some other states at the Rome Diplomatic Conference, the use of chemical and biological weapons as a war crime in international and non-international armed conflict was excluded from the Rome Statute, except insofar as they had already been prohibited in Article 8(2)(b)(xvii) (prohibition of the use of poison or poisoned weapons in international armed conflict)

³⁸ Further, Article 8(2)(b)(xx) of the Rome Statute of the ICC includes the war crime of employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, in violation of international law.

and Article 8(2)(b)(xvii) (prohibition of the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices in international armed conflict).

Considering past events in Iraq like the Halabja and Anfal massacres, where chemical weapons were apparently used, the omission of the provisions about chemical weapons is a serious omission.

Crimes under Iraqi law: The Tribunal Statute gives the Tribunal jurisdiction over crimes under Iraqi law that are so vaguely defined that they violate the fundamental principle of legality. Article 14 of the Tribunal Statute includes the following crimes under Iraqi law:

- “a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, inter alia, of the Iraqi interim constitution of 1970, as amended;
- b) The wastage of national resources and the squandering of public assets and funds, pursuant to, inter alia, Article 2(g) of Law Number 7 of 1958, as amended; and
- c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.”

In each case, Iraqi law fails to provide sufficiently clear definitions of what actions would constitute a crime. In addition, they are so broadly drafted that they lend themselves to arbitrary application.

5.5 Criminal responsibility and defence

The Tribunal Statute includes a number of important principles, recognized under international law, regarding individual criminal responsibility. For example, the official position of any accused person does not relieve them of criminal responsibility nor mitigate punishment (Article 15 (c)). The Tribunal Statute also states that no one, regardless of status, has immunity from prosecution for crimes and it excludes some, but not all, of the defences prohibited by international law (see below).

Article 15(c) of the Tribunal Statute is modelled on Article 7 of the Nuremberg Charter. This is now part of customary international law and is recognized in numerous international instruments. Article 15 of the Tribunal Statute includes a number of principles of individual criminal responsibility that are consistent with international law. Paragraphs (a) and (b) of Article 15 of the Tribunal Statute, which define individual criminal responsibility, are modelled on Article 25 (Individual criminal responsibility) of the Rome Statute of the ICC. Article 15(d) of the Tribunal

Statute imposes a single strict standard of superior responsibility applicable to both military commanders and civilian superiors in line with Article 87(1) of Protocol I of the Geneva Conventions. The Tribunal Statute states that:

“The fact that any of the acts referred to in Articles 11 to 14 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to submit the matter to the competent authorities for investigation and prosecution.”

However, other important elements have been omitted from the Tribunal Statute, which largely relies on principles of individual criminal responsibility under Iraqi law, some of which are inconsistent with international law. Article 30 of the Rome Statute of the ICC states that, in the absence of provisions to the contrary, crimes must be committed with intent and knowledge. By contrast, the Tribunal Statute makes no reference to this “mental element”. The Tribunal Statute states that the defence that the accused was ordered to commit a crime by a superior officer is not admissible (Article 15(e)). However, in contrast to the Rome Statute (Article 31), it does not strictly define the grounds on which criminal responsibility can be excluded.

The Tribunal Statute includes a very positive provision to address the fact that Iraqi law may allow for lines of defences that are inconsistent with international law. Article 17(c) of the Tribunal Statute provides that:

“[g]rounds for exclusion of criminal responsibility under the said Iraqi Criminal Code shall be interpreted in a manner consistent with the Tribunal Statute and with international legal obligations concerning the crimes within the jurisdiction of the Tribunal.”

Similarly, Article 17(b), provides that in the interpretation of the crime of genocide, crimes against humanity, and war crimes, the Tribunal “may resort to the relevant decisions of international courts or Tribunals as persuasive authority for their decisions.” However, this Article does not require the Tribunal to interpret these crimes in a manner that is fully consistent with international law, including international human rights law and international humanitarian law.³⁹

³⁹ A previous draft (the fourth draft) of the Tribunal Statute stated that: “Whenever the provisions of the said Iraqi Criminal Code are insufficient or unclear as to the elements of criminal responsibility and general principles of criminal responsibility, the Trial Chambers and the Appellate Chamber may resort to the Elements of Crimes as promulgated by the International Criminal Court, ‘general principles’ of criminal law recognized by the world’s major legal systems, as well as other sources of international law as described in Article 38 of the Tribunal Statute of the International Court of Justice.”

Regrettably Article 17(b) of the Tribunal Statute does not apply to crimes under Iraqi law (included in Article 14) or require that the interpretation of those crimes be fully consistent with international law, including international human rights law and international humanitarian law.

5.6 Inadequate guarantees of the right to fair trial

In a number of important respects, the Tribunal Statute fails to comply with international standards of fair trial. Although the Tribunal Statute contains a number of important guarantees of the right to a fair trial, set out in Article 14 of the ICCPR and Articles 55 and 67 of the Rome Statute of the ICC,⁴⁰ other essential guarantees are omitted and some statutory provisions are not consistent with international law and standards. Such guarantees are essential to ensure fair trials, especially given the absence of equivalent provisions in Iraqi criminal law.

Such flaws in the Tribunal Statute coupled with the denial of suspects' rights by the occupying powers, the MNF-I, and the Iraqi police and security forces, increase the risk that trials will be unfair. This is of particular concern given that the Tribunal can impose the death penalty. Executions after an unfair trial would violate the non-derogable right not to be arbitrarily deprived of life, guaranteed by Article 6 of the ICCPR.⁴¹

5.6.1 Prohibition of torture and ill-treatment

The Tribunal Statute and the Rules do not prohibit the use of any form of torture, coercion, duress or threat, or any other form of cruel, inhuman or degrading treatment or punishment during the pre-trial arrest and investigation period.

Rule 79(1) requires the Tribunal to apply the rules of evidence set forth in the Rules and in the Iraqi Code of Criminal Procedure. It adds that the Tribunal is not bound by any rules set in any other forum. The Tribunal therefore does not benefit from the rules of evidence developed in other specialized tribunals or the ICC, or important principles regarding rules of evidence set out in international law.

This is particularly troubling because Iraqi penal law does not expressly prohibit the use of torture or ill-treatment. Although Article 127 of the Iraqi Code of

⁴⁰ Many of these guarantees are also included in Rule 42 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 42 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and Rule 42 of the Rules of Procedure and Evidence of the Special Court of Sierra Leone.

⁴¹ Iraqi law allows for the imposition of the death penalty for many crimes, including murder. This penalty is unfortunately maintained by the Iraqi Special Tribunal. (See Chapter 6 on the death penalty).

Criminal Procedure prohibits the use of “any illegal method to influence the accused and extract a confession from him... Mistreatment, threats, injury, enticement, promises, psychological influence or use of drugs or intoxicants [are] considered illegal methods,” it does not prohibit torture as such. There is also no clear prohibition of torture or cruel, inhuman or degrading treatment elsewhere in the Code of Criminal Procedure that is consistent with international law, including Article 7 of the ICCPR.

According to Article 70 of the Iraqi Code of Criminal Procedure, an investigator may compel the defendant to cooperate in a physical examination “or the taking of photographs, fingerprints, samples of his blood, hair or nails, or other”, for the purposes of the investigation. AI is concerned that some practices ordered under this Article may constitute cruel, inhuman or degrading treatment, prohibited by international law. For example, the inclusion of the phrase “or other” could be interpreted to include abusive forms of body searches.

Article 70 also states that the search of a woman or girl should be conducted by another female as far as possible, but does not make this compulsory. The Human Rights Committee has stated that people “being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex”.⁴²

No exclusionary rule

Article 18(a) of the Tribunal Statute states that the investigative judge “shall assess the information received or obtained and decide whether there is sufficient basis to proceed.” However, there is no express prohibition on the admission as evidence of any statement which is established to have been made as a result of torture or ill-treatment, except against a person accused of torture.

The Human Rights Committee has stated that: “the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment”.⁴³ Article 69(7) of the Rome Statute of the ICC provides that: “[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if the violation casts substantial doubt on the reliability of the evidence; or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.” In contrast, Rule 79(5) of the Rules states that one of the factors to be considered

⁴² General Comment No. 16 of the Human Rights Committee refers to: “The right to respect of privacy, family, home and correspondence, and protection of honour and reputation”, 8 April 1988, para. 8. The Human Rights Committee is the UN body of experts responsible for overseeing the implementation of the ICCPR.

⁴³ General Comment No. 20: “Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment”, 10 March 1992, para. 12.

when determining the admissibility of evidence is “the voluntarism of any statement and any circumstances that might verify or impugn the statement” and “whether the means by which the evidence obtained casts substantial doubt on its reliability.”

Article 213 (c) of the Code of Criminal Procedure states that a court may accept a confession if it is satisfied with it and if there is no evidence which proves it to be untrue, but it does not require exclusion of a confession extracted under torture. Article 218 of the Code of Criminal Procedure permits the admission of confessions by people who have been subjected to physical coercion “if there is no causal link between the coercion and the confession or if the confession is corroborated by other evidence which convinces the court that it is true or which has led to uncovering a certain truth”.⁴⁴

The failure of the Tribunal Statute and Rules to expressly prohibit the admission as evidence of information extracted under torture is of particular concern given the compelling evidence of the use of torture and ill-treatment in Iraq both by the Iraqi police and security forces, by the occupying powers and by the MNF-I.⁴⁵

5.6.2 The right to legal counsel

Article 18(c) of the Tribunal Statute provides that:

“If questioned by a Tribunal Investigative Judge, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to him or her without payment by him or her in any such case if he or she does not have sufficient means to pay for it.”

Article 18(c) expressly applies only to investigative judges, not to the police, security forces or prosecutors. In addition, the right to be informed of these rights is not guaranteed by the Tribunal Statute. It is also not clear if the right to legal counsel applies during all the stages of the proceedings.

However, in a very positive step to redress this apparent omission, the Rules establish a Defence Office to ensure the rights of the accused, according to the

⁴⁴ Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

⁴⁵ See for example Amnesty International's documents: *Iraq: One year after Abu Ghraib, torture continues*, 28 April 2005; *United Kingdom: Briefing for the Committee against Torture*, AI Index: EUR 45/029/2004, 26 November 2004; and *Iraq: Torture not isolated -- independent investigations vital*, AI Index: MDE 14/017/2004, 30 April 2004. See also Human Rights Watch: *The Road to Abu Ghraib* June 2004; and *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees*, April 2005 Vol. 17, No. 1(G).

English version of the Rules, or of the suspect, according to the Arabic version (Rule 49).

Article 20(d)(2) of the Tribunal Statute states in the English version that the accused person shall have "adequate time and facilities for the preparation of his defence and to communicate freely with counsel of his own choosing in confidence." The Arabic version gives that right to the suspect under the same article. The confusion about which rights are guaranteed to suspects or accused resulting from inconsistencies in the translation are significant, especially as non-Iraqi lawyers and judges may be involved in the proceedings of the Tribunal, as discussed above.

The Tribunal Statute and Rules also do not expressly state that the right to legal counsel applies at all the stages of the criminal proceedings, nor do they expressly set out the right to communicate with a lawyer promptly and confidentially, the right to have the lawyer present during questioning by the authorities, and the right to be informed of these rights.

5.6.3 The right to silence

The right to silence of anyone arrested on a criminal charge is guaranteed in Article 20(d)(6) of the Tribunal Statute. Further, Rule 46(c) provides for the right to silence during investigation by an investigative judge. However, these provisions do not expressly guarantee this right from the moment when there are grounds to believe that a person has committed a crime and is about to be questioned and throughout subsequent proceedings. Article 126(b) of the Iraqi Code of Criminal Procedure states that an accused person does not have to answer questions during an investigation, but it does not expressly guarantee this right to suspects. Rule 46(c) clearly states that a suspect or an accused person must be informed of this right and that whatever he or she says could be used against him or her during their trial.⁴⁶

5.6.4 Standards of proof

Neither the Tribunal Statute nor the Rules require the prosecution to prove guilt beyond reasonable doubt in order to secure a conviction -- the standard of proof required by international law. This is particularly troubling given that many of those appearing before the Tribunal could face the death penalty if convicted.

Article 14(2) of the ICCPR states that: "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". Commenting on this provision, the Human Rights Committee explained:

⁴⁶ Rome Statute of the ICC, Article 55(2)(b).

“No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.”⁴⁷

Article 66 of the Rome Statute of the ICC expressly requires proof beyond reasonable doubt in order to secure a conviction. In contrast, Rule 79(1) states that the Tribunal shall apply the rules of evidence set out in the Tribunal Rules and in the Iraqi Code of Criminal Procedure, which has a lower standard of proof. Article 182 of the Iraqi Code of Criminal Procedure states that:

“if the trial has been conducted in accordance with the law, and the court is satisfied that the defendant has committed the offence, it issues the verdict of guilt and rules on the penalty to be applied. If, however, it becomes clear to the court that there is not sufficient evidence to condemn him, the charges are dropped and he is released.”

Rule 79 (5) of the Rules of Procedures and Evidence states that:

“The following factors should be considered when determining the admissibility of evidence under this rule:

The authenticity of evidence obtained out of court;

The voluntariness of any statement and any circumstances that might verify or impugn the statement;

The extent to which evidence involves hearsay regarding a material issue before the Chamber and, with respect to such hearsay, the extent to which the declarant could be made available to testify and the extent to which the hearsay is attended by circumstantial guarantees of trustworthiness; and

Whether the means by which the evidence [was] obtained casts substantial doubt on its reliability.”

This does not expressly require proof of guilt beyond reasonable doubt, although the fourth provision above is positive as it allows for certain pieces of evidence to be discarded if there is substantial doubt on its reliability.

5.6.5 The right to appeal and to compensation

Article 25(a) of the Tribunal Statute provides only three grounds for an appeal by either the Prosecutor or by the convicted person: an error on a question of law

⁴⁷ Human Rights Committee, General Comment 13, para 7.

invalidating a decision; a procedural error; or an error of material fact that has occasioned a miscarriage of justice.

Article 81 of the Rome Statute of the ICC, by contrast, allows a convicted person to appeal a conviction or sentence on four grounds: procedural error, error of fact, error of law and any other ground that affects the fairness or reliability of the proceedings or decision.

Additionally, Article 14(5) of the ICCPR requires that: "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Article 25(b) of the Tribunal Statute states that: "[t]he Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers." While the Tribunal Statute guarantees the right to appeal, though in a limited way, it is not clear from this if appeal is for both conviction and sentence.

Neither the Tribunal Statute nor the Rules contain provisions for compensation for unlawful arrest or detention or for miscarriages of justice. In contrast, Article 85(1) of the Rome Statute of the ICC provides that: "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". Both Article 14(6) of the ICCPR and Article 85(2) and (3) of the Rome Statute guarantee the right to compensation for miscarriages of justice.

5.6.6 Provisions for juveniles

The Rome Statute of the ICC and other special tribunals expressly state that they do not have jurisdiction over people under the age of 18. Article 26 of the Rome Statute states that: "the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime". However, there is no such provision for the Tribunal.⁴⁸

Although Rule 71 allows for sessions to be closed to protect privacy in cases involving children, the Tribunal Statute contains no provisions concerning the treatment of juvenile suspects or accused. Coupled with the absence of a policy

⁴⁸ The Convention on the Rights of the Child is silent on the age of criminal responsibility. However, while the Committee on the Rights of the Child has not specified an appropriate age for criminal responsibility, it has expressed concern that it is fixed at a low level in some states (seven, eight, 10 or even 13 years have been considered to be low). See for example the following Concluding Observations of the Committee on the Rights of the Child expressing concern about Gambia, (CRC/C/111), 2001, para. 464, and Lebanon, (CRC/C/114), 2002, para. 50; Kenya (CRC/C/111), 2001, para. 103; and Cameroon, (CRC/C/111), 2001, para. 391. In the case of Poland, the Committee recommended that the age of 13 years should be established as the minimum age for criminal responsibility in all cases, below which children cannot be sentenced to either correctional or educational measures." Poland, (CRC/C/121), 2002, para 519.

decision not to exercise such jurisdiction, this is a cause of particular concern, especially as the age of criminal responsibility in Iraqi criminal law is seven.⁴⁹ It is however positive that according to the Iraqi Penal Code, no juvenile can be sentenced to death.⁵⁰

5.6.7 The right to translation or interpretation

The Tribunal Statute, the Rules and Iraqi law do not guarantee the right of the accused to be informed of the nature, cause and content of the charges in a language which they fully understand. Rule 46 guarantees the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language used during questioning by an investigative judge only. There is no such guarantee during the interrogation period or during other stages of the trial. This is an essential right recognized in Article 14(3)(a) of the ICCPR and Article 67 (1)(a) of the Rome Statute. Similarly, the right recognized in Article 14(3)(f) of the ICCPR and Article 67(1)(f) of the Rome Statute to have the free assistance of a competent interpreter, and translation if any of the proceedings or documents of the court are not in a language the accused fully understands and speaks, is not included in the Tribunal Statute or in Iraqi law.

The right to competent interpretation and translation is essential, even if the majority of the population of Iraq are fluent Arabic speakers. Firstly, in some regions of Iraq, Arabic is a second language and not all Iraqis and Iraqi residents are sufficiently fluent in Arabic to follow complex legal proceedings. Secondly, it is possible that some of the non-Iraqi judges that will be appointed by the Governing Council or successive governments to sit as judges pursuant to Article 4(d) of the Tribunal Statute will not speak Arabic. It is, therefore, quite possible that parts of the trial will be conducted in a language other than Arabic. The Human Rights Committee has stated that:

⁴⁹ The Committee on the Rights of the Child expressed concern "at the situation with respect to the administration of juvenile justice and in particular its incompatibility with the Convention, as well as other relevant United Nations standards. The Committee recommends that the State party consider taking additional steps to reform the system of juvenile justice in the spirit of the Convention ... Particular attention should be paid to considering deprivation of liberty only as a measure of last resort and for the shortest possible period of time, to the protection of the rights of children deprived of their liberty, to due process of law and to the full independence and impartiality of the judiciary." CRC/C/15/Add.94, para 29.

⁵⁰ The Penal Code provides that if a juvenile commits a felony punishable by death or life imprisonment and is below 15 years of age at the time of the offence, he or she must be sentenced to detention in a reform school for a period of not less than two years and not more than five years. If they were over 15 years of age but below 18 at the time of the crime, they must be sentenced to detention in an institution for juvenile offenders for a period of between two and 15 years.

“[t]his right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.”⁵¹

5.6.8 Trials in absentia

Rule 56 of the Rules allows for trials and other procedures to be carried out in the absence of the accused in conformity with the Iraqi Code of Criminal Procedure. The Rules however do not give any further details of when such trials are allowed. Article 147(a) of the Code of Criminal Procedure allows for trials in absentia if the accused has absconded or is absent without legal excuse, despite having been informed of the trial.⁵² Neither the Code of Criminal Procedure or the Rules, however, specify what legal excuses are permissible.

Both the Rome Statute and the Rules of Procedure of the ICC are more specific and allow for trials in absentia only if the person concerned waives the right to be present, has fled or cannot be found and all reasonable steps have been taken to secure his or her presence. The requirement that all reasonable steps be made is essential to guard against possible abuse of power. If the person concerned is available to the court but wishes to waive the right to be present at the hearing, they have to do so by submitting a written application. The court has the right to reject that application and decide to hold hearings in the presence of the person concerned (Rule 125).

Article 14(3)(d) of the ICCPR states that: “[i]n the determination of any criminal charge against him, everyone shall be entitled... to be tried in his presence and to defend himself in person or through legal assistance of his own choosing”. The Human Rights Committee has emphasized the importance of ensuring that trial in absentia is the exception. It has also stressed that: “When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.”⁵³

6. THE DEATH PENALTY

⁵¹ Human Rights Committee, General Comment 13, para. 13.

⁵² Article 149 of the Iraqi Code of Criminal Procedure provides details of how trials in absentia are conducted and notification of judgments.

⁵³ Human Rights Committee, General Comment 13, para. 11.

Amnesty International is concerned that the Tribunal is empowered to impose the death penalty and the Tribunal Statute fails to provide essential safeguards for people facing a possible death sentence. AI believes that the death penalty violates the right to life and is the ultimate cruel, inhuman and degrading punishment and so is contrary to Articles 3 and 5 of the Universal Declaration of Human Rights. The most recent statistics indicate that 84 countries across the world have abolished the death penalty for all crimes.⁵⁴

The disbanded Coalition Provisional Authority (CPA) imposed a moratorium on the death penalty on 10 June 2003. However, on 8 August 2004 -- despite strong opposition from abroad, namely the European Union -- the death penalty was reinstated by the Interim Government of Iraq for certain crimes including murder, kidnapping, rape and drug trafficking.

In a positive step, Iraq's new President, Jalal Talabani, said on 18 April 2005 that he would refuse to sign Saddam Hussein's death warrant if the latter was convicted by the Tribunal.

The international community has excluded the death penalty as an appropriate penalty for genocide, crimes against humanity and war crimes from the Statutes of the ICC, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the Special Court for Sierra Leone, the Special Panels for East Timor, the special panels in Kosovo and the Extraordinary Chambers in Cambodia.⁵⁵

Although the Iraqi Code of Criminal Procedure allows for the imposition of the death penalty, it also provides for the possibility of commutation. Article 286 of the Iraqi Code of Criminal Procedure states that the President of the Republic of Iraq has the power to commute a death sentence or issue a pardon. This is consistent with the ICCPR which requires that: "anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases" (Article 6(2) of the ICCPR).

International standards state that the death penalty may be imposed "only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts."⁵⁶ As stated earlier, the Tribunal Statute and the Rules do not require proof of guilt beyond reasonable doubt. Further, the death penalty can be carried out only "pursuant to a final judgement

⁵⁴ See "Death Penalty: Facts and Figures", Amnesty International:

<http://web.amnesty.org/pages/deathpenalty-facts-eng>. This information is updated regularly.

⁵⁵ Although the death penalty is prescribed as a punishment in the Iraqi Penal Code for some crimes that are part of the jurisdiction of the Tribunal, the CPA suspended the imposition of this penalty for the duration of its existence.

⁵⁶ "UN Safeguards guaranteeing protection of the rights of those facing the death penalty", Safeguard 4

rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings"; and that anyone sentenced to death "shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory."⁵⁷ Again, as stated earlier, some of the guarantees to fair trial set out in Article 14 of the ICCPR are missing from the Tribunal Statute and the Rules. Further, it is not clear that the Tribunal guarantees the right to appeal against a sentence or only against conviction.

AI calls on the Interim Government of Iraq and any future Iraqi government to abolish the death penalty. Pending this, the organization calls for all death sentences which may be imposed by the Tribunal to be commuted. Any court with the power to impose the death penalty must ensure that its procedures comply with all essential safeguards, including those in Article 6 of the ICCPR and the 1984 UN Safeguards guaranteeing protection of the rights of those facing the death penalty.

7. THE RIGHTS OF VICTIMS AND WITNESSES

The Rules contain some very important measures to protect victims and witnesses, including provisions that guarantee their privacy and safety. The Rules also establish a Victims and Witnesses Unit which will include staff with expertise in trauma, including trauma related to crimes of sexual violence. The Unit can, among other things, recommend the adoption of protection and security measures to the Tribunal and provide victims and witnesses with adequate protective measures and security arrangements (Rule 31). This is a very welcome step.

However, the Rules do not contain an important provision which can be found in Rule 17(2)(a)(iii) of the Rules of Procedures and Evidence of the Rome Statute of the ICC. This sets out the key importance of making "available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality." A similar provision should be included in the Rules.

7.1 Inadequate definition

The Rules states that a victim is a "person against whom a crime over which the Special Tribunal has jurisdiction has allegedly or has been found to have been

⁵⁷ *Ibid*, Safeguards 5 and 6.

committed" (Rule 1(16)). This definition only applies to direct victims of the crimes and does not appear to cover family members or others directly affected by the crime (including those that intervene to assist victims). According to international definitions these should be recognized as victims because they will have suffered as a result of the crime.

In contrast, Rule 80 of the Rules of Procedures and Evidence of the Rome Statute of the ICC, is more inclusive. It defines victims as "persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." It is encouraging, however, that Rule 31 extends assistance of the Victims and Witnesses Unit to "others who are at risk on account of testimony given by such witnesses."

7.2 Lack of guarantees for participation

AI is concerned that Article 18(b) of the Tribunal Statute does not guarantee the right of victims and witnesses to have a lawyer present during questioning by an investigative judge. The presence of victims' representatives is essential to ensure that victims receive legal advice and support and above all to make sure that someone is present who has a knowledge of the proceedings and can act in their best interests. The presence of counsel ensures that victims are allowed to express their views and concerns at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.⁵⁸ The recognition by the ICC of the right of victims to representation at all stages of the proceedings was a major advance and provides an important precedent which should be followed by the Tribunal.⁵⁹

7.3 The right to full reparations

The Tribunal Statute and the Rules do not provide for reparations to victims and their families or establish a trust fund for victims.

Victims and their families have a right to reparations -- including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition -- for genocide, crimes against humanity and war crimes.⁶⁰ This right is reflected in many

⁵⁸ As guaranteed by Principle 6(b) of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

⁵⁹ See Articles 90 and 91 of the Rules of Procedures and Evidence of the ICC.

⁶⁰ Principle 12 provides: "Remedies for gross violations of international human rights and serious violations of humanitarian law include the victim's right to the following, whose contents are described below, namely: (b) Reparation for harm suffered and other appropriate remedy".

international human rights treaties, international standards and in the jurisprudence of international courts and treaty-monitoring bodies. For example, Article 2 of the ICCPR guarantees the right to a remedy. The Human Rights Committee has stated that:

“Article 2, paragraph 3, [of the ICCPR] requires that States parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”⁶¹

Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that the:

“victim of an act of torture [should obtain] redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

Article 75(2) of the Rome Statute provides that the ICC may order a convicted person to provide reparations to, or in respect of, victims including restitution, compensation and rehabilitation.

7.4 Separation of services for prosecution and defence witnesses

The Tribunal Statute and the Rules do not provide for any separation of services for prosecution and defence witnesses. In contrast, the Rules of Evidence and Procedure for the ICC requires its Victims and Witnesses Unit to “respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses” and to “act impartially when cooperating with all parties and in accordance with the rulings and decisions of

⁶¹ Human Rights Committee: General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (CCPR/C/74/CRP.4/Rev.6) 21 April 2004, para. 16.

the Chambers” while recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses. (ICC Rule 18 (b)).

7.5 Rules of evidence in cases of sexual assault

Rule 83 regarding Rules of Evidence in Cases of Sexual Assault requires that in such cases, and if there is reasonable cause, no corroboration of the victim's testimony shall be required. It further requires that consent shall not be allowed as a defense if the victim has been subjected to or threatened with or has had reason to fear violence; or that the evidence submitted by the accused should prove the victim's consent without shortcomings. AI welcomes the draft rules relating to assessment of evidence - particularly on the rule regarding corroboration. However, AI believes that these Rules should be further strengthened in order to be in accordance with international standards. Firstly, no prior sexual history of the victim should be admitted as evidence. Secondly, consent should not be inferred where a victim is incapable of giving genuine consent, or because of the silence or lack of resistance of the victim.

8. CONFUSION IN THE RULES OF PROCEDURE AND EVIDENCE

As stated earlier, until the end of February 2005, no rules of procedures or evidence or any other supplementary document to the Tribunal Statute had been adopted or made public, although the conclusion of the investigative stage for four people who are to be brought to trial was announced on 28 February 2005.

There has been considerable confusion surrounding the drafting of the Rules. Despite AI's repeated attempts to obtain drafts of the Rules for comment, none was made available. AI is aware that an earlier version of the Rules was made available to some individuals outside Iraq, but this was not done in a transparent way.⁶² It is not clear also what happened to the comments that were submitted to the Tribunal on the draft Rules.

At one stage, two separate versions of the Rules appear to have been presented as the final one. One version, drafted in Arabic and consisting of 90 rules, states that it was adopted on 23 December 2004. A second English version does not have an adoption date and consists of 93 rules. These two versions were posted on the Tribunal's website as the official versions of the Rules, despite the inconsistencies between the Arabic and English versions. At the time of writing, there were three

⁶² See for example *Journal of International Criminal Justice*, 2 (2004) pages 855-865).

versions of the Rules on the website. An official Arabic version (which was drafted originally in Arabic) consisting of 90 rules and two English versions. One of the English versions, which consists of 90 rules, is very similar to the Arabic one, although it has some translation inconsistencies as will be detailed below. The other English version consists of 93 Rules and is different from the other versions. This lack of clarity is worrying especially given that the Tribunal allows for non-Iraqi defence lawyers, non-Iraqi judges, and non-Iraqi observers and monitors who will find it difficult to carry out their responsibilities adequately without access to an official and accurate version of the Rules in English, if they are not fluent in Arabic.

According to Article 16 of the Tribunal Statute, the President of the Tribunal has the authority to draft the Rules of Procedure and Evidence for:

- the conduct of the pre-trial phase of the proceedings;
- the admission of evidence in trials and appeals;
- the protection of victims and witnesses;
- other appropriate matters (including regulations for the disqualification of judges or prosecutors), where the applicable law, including the Statute, does not adequately provide for the specific situation.

The Tribunal Statute requires that in fulfilling these responsibilities the President of the Tribunal be guided by the Iraqi Code of Criminal Procedure, but not by international law or precedents from similar rules of procedures of other international or internationalized tribunals. The Tribunal Statute requires that such rules shall be adopted by a majority of the permanent judges of the Tribunal (Section Five, Article 16).

While the Rules undoubtedly filled many of the major gaps in the Tribunal Statute, there are many areas where the Rules remain inconsistent with international law, as shown above. Further, the Rules fail to add clarity to the Tribunal in many areas. For example, the definition section of the Rules generally defines terms by referring to provisions in the Tribunal Statute.

There are also important inconsistencies and inaccuracies in the translation of versions of the Rules. For example, while Rule 46 in the Arabic, concerning the rights of suspects during questioning by an investigative judge, uses the term "suspect" throughout, the English uses the terms "suspect" and "accused" interchangeably and inconsistently throughout. This is a serious confusion because it is not clear whether certain rights are guaranteed throughout the process of investigation, or only from the point at which they are accused.

It had been hoped that the Rules would clarify how the evidence collected so far during the investigative period would be used in the trials. The lack of information on this threatens to undermine the fairness of forthcoming trials.

Rule 60 states that the Prosecutor shall "at least 45 days prior to the commencement of trial, disclose to the Defence copies of statements of all witnesses and all evidence." However, a great deal of evidence collected before the establishment of the Tribunal -- mainly during the occupation, including during the excavation of graves -- is very likely to be transferred to the Tribunal. Amnesty International is therefore concerned that 45-days may not be sufficient for the defence to review all the evidence. If this proves to be the case, then the proceedings would not be consistent with the requirement in international law of equality of arms.

9. CONCLUSIONS AND RECOMMENDATIONS

The Statute of the Iraqi Special Tribunal currently in place is not consistent with international law in several respects. The many gaps and omissions in the Tribunal Statute were meant to be addressed by the Rules of Procedures and Evidence. However, current versions of the Rules do not adequately remedy the shortcomings of the Tribunal Statute.

AI recommends that:

- Trials and further investigations should not proceed further until the concerns outlined in this report and those submitted by other human rights organisations have been adequately addressed by amendments to the Tribunal Statute or the Rules, or by the adoption of other supplementary documents.⁶³
- The Rules of Procedures and Evidence must be issued and made available to the public and to the defence well before the start of trials before the Tribunal.
- Trials should not start before the prosecution and defence lawyers have been allowed adequate time to study these rules in order to prepare for their cases.
- Steps must be taken to ensure the following guarantees of fair trials, given that equivalent provisions are not contained either in Iraqi criminal law or the Tribunal Statute:
 - the right to be presumed innocent;
 - the right to silence and not to be compelled to testify against oneself;
 - the right not to be subjected to torture or to any other form of cruel,

⁶³ The ICC has several supplementary documents to the Rome Statute. These include the Rules of Procedures and Evidence, the Elements of Crimes, and the Regulations of the Court. These documents include provisions that relate to many of the areas of concern that are addressed in this report.

- inhuman or degrading treatment or punishment;
 - the exclusion of evidence obtained as a result of torture or other ill-treatment;
 - the right of those arrested, charged or detained to be informed of their rights, including the right to legal counsel;
 - the right of those arrested, charged or detained to the assistance of legal counsel, including the right not to be questioned in the absence of their counsel;
 - the prohibition of arbitrary arrest and detention in all situations;
 - the right of those arrested or detained to be brought promptly before a judge;
 - the right to challenge the lawfulness of detention;
 - the right to be represented by a lawyer of one's choice without unnecessary restrictions, such as the exclusion of non-Iraqi lawyers to be the lead defence counsel;
 - the requirement that the prosecution be required to prove guilt beyond reasonable doubt in order to secure a conviction;
 - clear and strict criteria for closing a hearing to the public;
 - the prohibition of trials in absentia;
 - the right to appeal one's sentence, recognizing the full range of grounds for appeal;
 - the right to compensation for arbitrary arrest or detention;
 - the right to compensation for a miscarriage of justice;
 - adequate provisions governing trials of juveniles; and
 - the right to effective translation and interpretation at all stages of the proceedings
- Both advisers and observers be appointed and that their roles be distinct and clearly defined in the Rules. Observers should monitor and evaluate proceedings according to international human rights standards for fair trial, including the protection of victims and witnesses. They should play no part in assisting investigative, trial or appellate judges; advisers should be appointed for that purpose. All advisers and observers should have expertise in international fair trial standards, as well as trials for crimes under international law, and expertise in victim and witness protection, including trials involving women or children as victims or witnesses. They should exercise their roles and duties without discrimination of any kind.

- There should be guarantees that the sources of the budget will not compromise the independence and impartiality of the Tribunal. The Tribunal should have an independent budget and fund.
- Non-Iraqi judges should be assigned to the Tribunal in accordance with Article 4(d) of the Tribunal Statute. The role of non-Iraqi judges is essential to ensure the needed expertise in areas of international law and gender considerations for the protection of victims and witnesses. There also should be amendments to allow for non-Iraqi prosecutors to be assigned to the Tribunal.
- The Tribunal Statute should be amended to remove the death penalty provision in line with the developments in international criminal law and the world trend.

