



## Security Council

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### **Australia, Belgium, Canada, France, Germany, Ireland, Israel, Italy, Lithuania, Malaysia, Netherlands, New Zealand, Philippines, Romania, Spain, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution**

*The Security Council,*

*Reaffirming* its resolution 2166 (2014) of 21 July 2014 on the downing of Malaysia Airlines flight MH 17 on 17 July 2014 in Donetsk Oblast, Ukraine concerning the tragic loss of 298 lives, in which it demanded that those responsible for this incident be held to account and that all States cooperate fully with efforts to establish accountability,

*Recalling* its resolution 2202 (2015) of 17 February 2015, which reaffirmed resolution 2166,

*Noting* the Preliminary Report into the cause of the crash by the Dutch Safety Board entrusted with the investigation in accordance with Annex 13 of the Convention on International Civil Aviation, issued on 9 September 2014, which identified that the aircraft was destroyed by a large number of high energy objects that penetrated the aircraft from the outside, recalling the briefing of the Council on 19 September 2014 and *noting also* the resolution on MH17 adopted by the Council of the International Civil Aviation Organisation on 28 October 2014,

*Reaffirming* the rules of international law that prohibit acts of violence that pose a threat to the safety of international civil aviation and in this regard deploring all other acts of violence against civilian aircraft,

*Noting also* the letters addressed to this Council by the Government of the Netherlands dated 16 December 2014 (S/2014/903) and 20 July 2015 (S/2015/551), respectively announcing the creation of a Joint Investigation Team to coordinate the international criminal investigation, with the aim of bringing the perpetrators to justice, and providing an update in relation to the status of that investigation, as well as the recovery and repatriation mission and the international technical investigation into the cause of the crash,

*Deeply concerned* by all acts of violence that pose a threat to the safety of civil aviation,

*Determining* that this violent act and its implications for the safety of civil aviation constitute a threat to international peace and security,



*Determined* to deter future attacks on civil aircraft and to take effective measures to bring to justice the persons who are responsible for this incident,

*Believing* that the establishment of an international tribunal and the prosecution of persons responsible for this incident will contribute to the safety of civil aviation and to maintenance of international peace and security,

*Convinced* that in the particular circumstances of this incident, the establishment of an international tribunal would be an effective guarantee for an independent and impartial accountability process in accordance with international standards,

*Referring* to the letter from the Governments of Australia, Belgium, Malaysia, The Netherlands and Ukraine dated 10 July 2015 (S/2015/528), and *acknowledging* their commitment to ensuring the effective functioning of an international tribunal, which will build upon the work of the Joint Investigation Team,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Reiterates* its deepest sympathies and condolences to the families of the victims of this incident and to the people and governments of the victims' countries of origins;

2. *Demands* that all States and other actors refrain from acts of violence directed against civilian aircraft;

3. *Calls upon* all States and actors in the region to accord full cooperation in the conduct of the international investigation of this incident as required by Resolution 2166 (2014);

4. *Requests* the States working together in the Joint Investigation Team to continue to keep the Council fully and regularly informed of the progress of its investigation as appropriate and without prejudice to the confidentiality of the criminal investigation;

5. *Urges* the earliest possible finalization of the international technical investigation into the cause of the crash and the criminal investigation, without prejudice to the quality of those investigations;

6. *Decides* to establish an international tribunal for the sole purpose of prosecuting persons responsible for crimes connected with the downing of Malaysia Airlines flight MH17 on 17 July 2014 in Donetsk Oblast, Ukraine, and to this end adopts the Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 annexed hereto;

7. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal, and that consequently, all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued in accordance with the Statute of the International Tribunal, and requests States to keep the Secretary-General informed of such measures;

8. *Decides* that the International Tribunal shall be funded through voluntary contributions and *encourages* States and intergovernmental and non-governmental

organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

9. *Decides* that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;

10. *Decides* also that the work of the International Tribunal shall be carried out without prejudice to the existing right of the families of victims to seek, through appropriate means, compensation;

11. *Requests* the Secretary-General to implement this resolution urgently, and in particular, to make all practical arrangements, when appropriate in coordination with the Governments of Australia, Belgium, Malaysia, The Netherlands and Ukraine, for the effective functioning of the International Tribunal at the earliest time and to report to the Council periodically on the implementation of this resolution;

12. *Decides* to remain actively seized of the matter.

## **Annex**

# **Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 (ICTMH17)**

## **Statute**

### **International Criminal Tribunal for Malaysia Airlines Flight MH17**

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for Malaysia Airlines Flight MH17 (hereinafter referred to as “the Tribunal”), shall function and exercise its jurisdiction in accordance with the provisions of the present Statute.

#### **Section I Jurisdiction of the Tribunal**

##### **Article 1 Crimes within the jurisdiction of the Tribunal**

1. The Tribunal shall have jurisdiction over persons responsible for crimes connected with the downing of Malaysia Airlines flight MH17 on 17 July 2014.
2. Subject to paragraph 1, the Tribunal has jurisdiction in accordance with this Statute with respect to the following crimes:
  - (a) War crimes, as defined in article 2;
  - (b) Crimes against the safety of civil aviation, as defined in article 3; and
  - (c) Crimes under the Criminal Code of Ukraine, as defined in article 4.

##### **Article 2 War crimes**

For the purpose of this Statute, war crimes means:

- (a) The following grave breach of the Geneva Conventions of 12 August 1949, namely, wilful killing when committed against a person protected under the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
  - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

- (c) In the case of an armed conflict, not of an international character, serious violations of Article 3 common to the Geneva Conventions of 12 August 1949, namely, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture committed against persons taking no active part in armed hostilities.
- (d) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

**Article 3**  
**Crimes against the safety of civil aviation**

For the purpose of this Statute, crimes against the safety of civil aviation means destroying, damaging or endangering the safety of aircraft as defined in section 9 of the Aviation Offences Act 1984 of Malaysia.

**Article 4**  
**Crimes under the Criminal Code of Ukraine**

For the purpose of this Statute, crimes under the Criminal Code of Ukraine means:

- (a) Murder as defined in Article 115;
- (b) Negligent homicide as defined in Article 119;
- (c) Wilful destruction of, or damage to, property as defined in Article 194;
- (d) Smuggling as defined in Article 201;
- (e) Crimes against public safety as defined in Articles 258 and 258-3 to 258-5;
- (f) Unlawful handling of weapons, ammunition or explosives as defined in Article 263;
- (g) Concealment of a criminal offense as defined in Article 396;
- (h) Trespass against life of a foreign state representative as defined in Article 443.

**Section II**  
**Provisions applicable to all Crimes**

**Article 5**  
**Personal jurisdiction**

The Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

**Article 6**  
**Exclusion of jurisdiction over persons under eighteen**

The Tribunal shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

**Article 7**  
**Irrelevance of official capacity**

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Tribunal from exercising its jurisdiction over such a person.

**Article 8**  
**Statutes of limitation**

The crimes defined in article 2 shall not be subject to any statute of limitation. Where a statute of limitation applies under national law, the statute of limitation for crimes defined in articles 3 and 4 is extended by 15 years.

**Article 9**  
**Individual criminal responsibility**

A person who commits a crime within the jurisdiction of the Tribunal shall be individually responsible and liable for punishment in accordance with this Statute.

**Article 10**  
**Concurrent jurisdiction**

1. The Tribunal and national courts shall have concurrent jurisdiction over persons responsible for crimes connected with the downing of Malaysia Airlines flight MH17 on 17 July 2014.
2. The Tribunal shall have primacy over national courts. At any stage of proceedings before a national court, the Tribunal may formally request that national court to defer to the competence of the Tribunal in accordance with this Statute and the Rules of Procedure and Evidence, if the interests of justice so require.
3. The Tribunal shall have the authority to refer a case to a national court where the interests of justice so require.

**Article 11**  
***Ne bis in idem***

1. Except as provided in this Statute, no person shall be tried before the Tribunal with respect to conduct that formed the basis of crimes for which the person has been convicted or acquitted by the Tribunal.
2. No person shall be tried by another court for a crime referred to in article 1(2) for which that person has already been convicted or acquitted by the Tribunal.
3. No person who has been tried by another court for conduct referred to in article 1(2) shall be tried by the Tribunal with respect to the same conduct unless the proceedings in the other court:

- a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Tribunal; or
- b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

**Article 12**  
**Amnesty**

An amnesty granted to any person for any crime falling within the jurisdiction of the Tribunal shall not be a bar to prosecution or punishment.

**Section III**  
**Provisions applicable to crimes defined in Article 2**

**Article 13**  
**Individual criminal responsibility for crimes defined in article 2**

A person shall be criminally responsible and liable for punishment for war crimes if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
  - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Tribunal; or
  - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

**Article 14**  
**Responsibility of commanders and other superiors**

In addition to other grounds of criminal responsibility under this Statute, in relation to war crimes:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Tribunal committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Tribunal committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

**Article 15**  
**Grounds for excluding criminal responsibility for war crimes**

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible for a war crime if, at the time of that person's conduct:

- (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
- (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such



circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Tribunal;

- (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
- (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Tribunal has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
  - (i) Made by other persons; or
  - (ii) Constituted by other circumstances beyond that person's control.

#### **Article 16**

##### **Mistake of fact or mistake of law**

1. A mistake of fact shall be a ground for excluding criminal responsibility for a war crime only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a war crime shall not be a ground for excluding criminal responsibility.

#### **Article 17**

##### **Superior orders and prescription of law**

The fact that a war crime has been committed by a person pursuant to an order of a government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

## **Section IV**

### **Provisions applicable to crimes defined in articles 3 and 4**

#### **Article 18**

##### **Provisions applicable to crimes defined in article 3**

With respect to crimes defined in article 3, the Tribunal shall apply section 13 of the Aviation Offences Act 1984 of Malaysia, and Chapters IV (General Exceptions), V (Abetment) and VA (Criminal Conspiracy) of the Penal Code of Malaysia and other provisions of the substantive criminal law of Malaysia considered relevant by the Tribunal in the context of the specific criminal proceedings, and compatible with this Statute and internationally recognised norms and standards.

#### **Article 19**

##### **Provisions applicable to crimes defined in article 4**

With respect to the crimes defined in article 4, the Tribunal shall apply Chapters III (Criminal offense, its types and stages), V (Guilt and its forms), VI (Complicity), and VIII (Circumstances excluding criminality of an action) of the Criminal Code of Ukraine and other provisions of the substantive criminal law of Ukraine considered relevant by the Tribunal in the context of the specific criminal proceedings, and compatible with the Statute and internationally recognised norms and standards.

## **Section V**

### **Organization of the Tribunal**

#### **Article 20**

##### **Organs of the Tribunal**

The Tribunal shall consist of the following organs:

- (a) The Chambers, comprising a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber;
- (b) The Prosecutor;
- (c) The Registry.

#### **Article 21**

##### **Composition of the Chambers**

1. The Chambers shall be composed as follows:
  - (a) One Pre-Trial Judge;
  - (b) A Trial Chamber composed of three (3) judges;
  - (c) An Appeals Chamber composed of five (5) judges;
  - (d) Two (2) alternate judges.
2. The judges of the Trial Chamber and the judges of the Appeals Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected.

3. The presiding judge of the Appeals Chamber shall be President of the Tribunal.
4. The President of the Tribunal may, in the interests of justice, assign an alternate judge to replace a judge, if that judge is unable to continue sitting.
5. A judge shall serve only in the Chamber to which he or she was assigned.

**Article 22**  
**Qualifications of judges**

1. The judges shall be chosen 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. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.
2. Every nominee for the position of judge of the Tribunal shall have established competence in criminal law and procedure, taking into account the need for the Tribunal to apply international law as well as the domestic laws of Malaysia and Ukraine, and shall preferably have relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings.
3. Every nominee for the position of judge of the Tribunal shall have an excellent knowledge of and be fluent in the working language of the Tribunal.

**Article 23**  
**Appointment of judges**

1. At the invitation of the Secretary-General of the United Nations, States may nominate candidates for the position of judge of the Tribunal.
2. The Secretary-General shall appoint judges, as and when the functioning of the Tribunal so requires. Appointments are made upon the recommendation of a selection panel he or she has established after indicating his or her intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international criminal tribunal, and a representative of the Secretary-General.
3. No two judges of the same nationality shall be appointed.
4. The judges shall be appointed for a five-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General.

**Article 24**  
**Powers of the President of the Tribunal**

1. The President of the Tribunal shall be responsible for ensuring the efficiency and effectiveness of the Tribunal.
2. In addition to his or her judicial functions, the President of the Tribunal shall represent the Tribunal.
3. The President of the Tribunal shall submit an annual report of the Tribunal to the Security Council and to the General Assembly.

**Article 25**  
**The Prosecutor**

1. The Prosecutor shall be responsible for investigations, taking into account the investigation by the Joint Investigation Team referred to in letter S/2014/903 dated 16 December 2014 (Joint Investigation Team), and for the prosecution of persons responsible for the crimes falling within the jurisdiction of the Tribunal.
2. The Prosecutor shall act independently as a separate organ of the Tribunal. He or she shall not seek or receive instructions from any government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required. With regard to the composition of the staff the Prosecutor shall take into account the need to liaise effectively with the next of kin of victims.
4. At the invitation of the Secretary-General, States may nominate candidates for the position of Prosecutor of the Tribunal. The Prosecutor shall be appointed by the Secretary-General.
5. The Prosecutor shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a five-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
6. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

**Article 26**  
**The Registry**

1. The Registry shall be responsible for the administration and servicing of the Tribunal.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Tribunal. He or she shall serve for a five-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.
5. The Registry shall include within it a Defence Office, which will administer, on behalf of the Registrar, a list of Defence Counsel eligible to practice before the Tribunal, as well as a system of legal aid for representation of indigent or partially indigent accused before the Tribunal.

6. The Registry shall include within it a Witness Protection and Support Office, which shall implement, in consultation where appropriate with the Prosecutor's Office or Defence Counsel, court ordered or otherwise necessary protective measures and security arrangements, counselling and other appropriate assistance for witnesses and others who are at risk on account of testimony given by witnesses.

**Article 27**  
**Working language**

The working language of the Tribunal shall be English.

**Article 28**  
**Rules of Procedure and Evidence**

The judges of the Tribunal shall, as soon as practicable after taking office, adopt rules of procedure and evidence for the conduct of the trials and appeals, the admission of evidence, the protection of witnesses and other appropriate matters, and may amend them as appropriate.

**Section VI**  
**Investigation and prosecution**

**Article 29**  
**Joint Investigation Team**

The Prosecutor shall receive and consider evidence collected by the Joint Investigation Team.

**Article 30**  
**Investigation and preparation of indictment**

1. The Prosecutor shall initiate investigations *proprio motu* or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations, as necessary and appropriate, taking into account the investigation conducted by the Joint Investigation Team. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor may:
  - (a) Collect and examine evidence;
  - (b) Request the presence of and question persons being investigated and witnesses;
  - (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence or mandate;
  - (d) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

- (e) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.
3. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under this Statute. The indictment shall be transmitted to the Pre-Trial Judge.

**Article 31**  
**Review of the indictment**

1. The Pre-Trial Judge to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the Pre-Trial Judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

**Section VII**  
**Rights of the accused and other persons**

**Article 32**  
**Rights of persons during an investigation**

1. In respect of an investigation under this Statute, a person:
  - (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
  - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
  - (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
  - (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Tribunal and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made by the Tribunal, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
  - (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Tribunal;

- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

**Article 33**  
**Rights of the accused**

1. Everyone shall be presumed innocent until proven guilty before the Tribunal. The onus is on the Prosecutor to prove the guilt of the accused. In order to convict the accused, the Tribunal must be convinced of the guilt of the accused beyond reasonable doubt.
2. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
  - (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
  - (c) To be tried without undue delay;
  - (d) Without prejudice to article 38, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Tribunal in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
  - (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Tribunal are not in a language which the accused fully understands and speaks;
  - (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

- (h) To make an unsworn oral or written statement in his or her defence; and
  - (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
3. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Tribunal shall decide.

**Article 34**  
**Protection of witnesses**

1. The Tribunal shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of witnesses. In so doing, the Tribunal shall have regard to all relevant factors, including age, gender and health, and the nature of the crime. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 36(4) the Chambers of the Tribunal may, to protect witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.
3. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

**Article 35**  
**Confidential information**

A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

**Section VIII**  
**Conduct of proceedings**

**Article 36**  
**Commencement and conduct of trial proceedings**

1. The Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of witnesses.



2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the Tribunal.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with article 34(2) and its Rules of Procedure and Evidence.

**Article 37**  
**Powers of the Chambers**

1. The Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.
2. A Chamber may admit any relevant evidence that it deems to have probative value and exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
3. A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.
4. A Chamber shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.
5. A Chamber shall not require proof of facts of common knowledge but may take judicial notice of them.
6. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
  - (a) The violation casts substantial doubt on the reliability of the evidence; or
  - (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.
7. When deciding on the relevance or admissibility of evidence collected by a State, the Chamber shall not rule on the application of the State's national law.
8. In cases not otherwise provided for in the Rules of Procedure and Evidence, a Chamber shall apply rules of evidence that will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

**Article 38**  
**Trials *in absentia***

1. The Tribunal may conduct trial proceedings in the absence of the accused, if he or she:
  - (a) Has not been handed over to the Tribunal by the State authorities concerned; or

- (b) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Tribunal.
2. When hearings are conducted in the absence of the accused, the Tribunal shall ensure that:
  - (a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;
  - (b) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;
  - (c) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Tribunal with a view to ensuring full representation of the interests and rights of the accused.
3. In case of conviction *in absentia*, the accused shall have the right to be retried in his or her presence before the Tribunal, unless he or she accepts the judgment or had waived expressly and unequivocally his or her right to be present at the trial.

**Article 39**  
**Plea agreement**

1. The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:
  - (a) apply to amend the indictment accordingly;
  - (b) submit that a specific sentence or sentencing range is appropriate;
  - (c) not oppose a request by the accused for a particular sentence or sentencing range.
2. The Trial Chamber shall not be bound by any agreement specified in paragraph 1 but shall duly consider it, taking into account the importance of an efficient and expeditious criminal procedure.

**Article 40**  
**Offences against the administration of justice**

1. The Tribunal shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
  - (a) Giving false testimony when under an obligation to tell the truth;
  - (b) Presenting evidence that the party knows is false or forged;
  - (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

- (d) Impeding, intimidating or corruptly influencing an official of the Tribunal for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
  - (e) Retaliating against an official of the Tribunal on account of duties performed by that or another official;
  - (f) Soliciting or accepting a bribe as an official of the Tribunal in connection with his or her official duties.
2. The Tribunal shall have jurisdiction over offences against the administration of justice committed by natural persons and legal persons.
3. The principles and procedures governing the Tribunal's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence.
4. In the event of conviction, the Tribunal may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

#### **Article 41** **Judgment**

1. The Trial Chamber's judgment shall be based on its evaluation of the evidence and the entire proceedings. The judgment shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Tribunal may base its judgment only on evidence submitted and discussed before it at the trial.
2. The judges shall attempt to achieve unanimity in their judgment, failing which the decision shall be taken by a majority of the judges.
3. The deliberations of the Trial Chamber shall remain secret.
4. The judgment shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one judgment. When there is no unanimity, the Trial Chamber's judgment shall contain the views of the majority and the minority. The judgment or a summary thereof shall be delivered in open court.

#### **Article 42** **Participation of the next of kin of victims**

The Tribunal shall permit the next of kin of victims to present their views and concerns at the sentencing stage of the proceedings, in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, and in accordance with the Rules of Procedure and Evidence.

#### **Article 43** **Penalties**

1. The Trial Chamber shall impose upon a convicted person imprisonment for a specified number of years which may not exceed a maximum of 30 years or for life when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. In determining the terms of

imprisonment for the crimes provided for in this Statute, the Trial Chamber shall have recourse to international practice regarding prison sentences and, where appropriate, to the practice of the national courts of Ukraine or Malaysia.

2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In imposing a sentence of imprisonment, the Tribunal shall deduct the time, if any, previously spent in detention in accordance with an order of the Tribunal. The Tribunal may deduct any time otherwise spent in detention in connection with conduct underlying the crime.
4. When a person has been convicted of more than one crime, the Tribunal shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with paragraph 1.

#### **Article 44**

##### **Compensation to next of kin of victims**

1. The Tribunal may make an order directly against a convicted person specifying compensation to next of kin of victims. In its order the Tribunal shall determine the scope and extent of any damage, loss and injury in respect of next of kin of victims and shall state the principles on which it is acting, taking into account any other compensation available.
2. Nothing in this article shall be interpreted as prejudicing the rights of next of kin of victims under national or international law.

#### **Article 45**

##### **Appellate proceedings**

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
  - (a) an error on a question of law invalidating the decision; or
  - (b) an error of fact which has occasioned a miscarriage of justice.
2. A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence.
3. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.
4. Article 41 applies *mutatis mutandis*, as appropriate.

#### **Article 46**

##### **Review proceedings**

1. Where a new fact has been discovered that was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which

could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the Tribunal an application for review of the judgment.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:
  - (a) Reconvene the Trial Chamber;
  - (b) Retain jurisdiction over the matter.
3. Article 41 applies *mutatis mutandis*, as appropriate.

**Article 47**  
**Enforcement of sentences**

Imprisonment shall be served in a State designated by the Tribunal from a list of States that have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, and shall be consistent with widely accepted international standards, subject to the supervision of the Tribunal.

**Article 48**  
**Pardon or commutation of sentences**

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Tribunal accordingly. The President of the Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

**Article 49**  
**Transfer of convicted persons upon completion of sentence**

Following the completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State that is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

**Section IX**  
**Co-operation and judicial assistance**

**Article 50**  
**Co-operation and judicial assistance**

1. States shall co-operate with the Tribunal in the investigation and prosecution of persons accused of having committed crimes within the jurisdiction of the Tribunal.
2. States shall comply without undue delay with any request for assistance or an order issued by the Tribunal, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the Tribunal.

#### **Article 51**

##### **Protection of national security information**

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.
2. Nothing in this article shall prejudice the requirements of confidentiality applicable under other articles of this Statute.
3. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.
4. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Judge or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:
  - (a) Modification or clarification of the request;
  - (b) A determination by the Tribunal regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
  - (c) Obtaining the information or evidence from a different source or in a different form; or
  - (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.
5. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Tribunal of the specific reasons for its decision, unless a

specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

6. Thereafter, if the Tribunal determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused and the State denies the request for assistance in whole or in part, the Tribunal may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

#### **Article 52**

##### **Third-party information or documents**

If a State is requested by the Tribunal to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, the State shall seek the consent of the originator to disclose that document or information. The State shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Tribunal, without prejudice to the provisions of article 51.

### **Section X**

#### **Privileges and immunities, seat and expenses**

#### **Article 53**

##### **Privileges and immunities of the Tribunal**

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the Tribunal, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1.
4. Other persons, including the accused, required at the seat of the Tribunal shall be accorded such treatment as is necessary for the proper functioning of the Tribunal.

#### **Article 54**

##### **Seat of the Tribunal**

The Tribunal shall have its seat in the Netherlands.

#### **Article 55**

##### **Expenses of the Tribunal**

The expenses of the Tribunal shall be borne by voluntary contributions from States.