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I. ESTABLISHING AN EFFECTIVE INTERNATIONAL CRIMINAL COURT

The United Nations General Assembly has set mid-1998 as the date for a Diplomatic Conference to create an International Criminal Court (ICC). This court will investigate and prosecute those accused of genocide, crimes against humanity and serious war crimes where national courts are either unavailable or ineffective. The stark failure of domestic judicial systems to hold individuals accountable for these crimes underscores the urgent need for the ICC. Human Rights Watch believes that the early establishment of an *effective* court is critical to strengthening human rights enforcement mechanisms.

Before the preliminary drafting work is completed, the Preparatory Committee on the Establishment of an ICC (PrepCom) will meet two more times at U.N. Headquarters in New York. The question is no longer whether there will be a permanent court but whether the court that emerges from the negotiations will be more than an International Criminal Court in name only. The stakes are extremely high. The upcoming December PrepCom session, focusing on state obligations to comply with ICC requests for evidence, apprehension and transfer, will be a decisive phase.

In February 1997, the PrepCom delegates negotiated the definitions of the crimes to be included within the jurisdiction of the Court and the general principles of criminal law. In August, the negotiators agreed on language enumerating the situations where there is "inability" or "unwillingness" on the state to carry out investigation or prosecution. The delegates also moved towards agreement on a pre-trial chamber that would handle preliminary matters arising from the investigative and indictment phases.

Other outstanding "political" issues debated in August--the independence of the Prosecutor, the relationship between the Court and the Security Council--will not be resolved until the Diplomatic Conference.

In 1996 and 1997, a large bloc of states, the "like-minded" group, joined ranks to press for a strong court. A minority of states, including several Permanent Members of the Security Council, are advocating positions that will subordinate the Court to the Security Council and seriously undermine its independence and credibility. These states seek a court that they can control. If the influence of this small group prevails, the result will be an International Criminal Court in name only. Justice will not be served, the sense of impunity for these crimes will be reinforced and the expansion of the rule of law internationally will be set back. Human Rights Watch believes that it is essential for nongovernmental organizations (NGOs) worldwide to make their views known on key issues and lobby their governments on behalf of a strong and effective court. This will increase pressure on obstructionist governments as well as provide support for

"like-minded" states.

With the start of the Diplomatic Conference only eight months away, time is short. The next several months leading up to the December and March 1998 PrepComs will be critical in determining the relative strength of forces going into the Diplomatic Conference. While NGOs have played an increasingly important role in the process, more involvement is needed to bring broader perspective and diverse experience to the ICC negotiations.

In an effort to stimulate discussion and activism, Human Rights Watch's issues this Action Alert to highlight the key issues affecting the effectiveness of the court--particularly those to be debated at the December Preparatory Committee meeting--and to outline basic suggestions for NGO efforts.

We look forward to learning your organization's views on the ICC, discussing the outstanding issues with you, and exploring possible joint efforts.

II. ESSENTIAL ISSUES FOR THE DECEMBER PREPARATORY COMMITTEE

State Cooperation and Compliance

Issues of state cooperation and compliance with requests from the Court will be the principal focus of the December PrepCom. Since the ICC will lack its own police powers, the Court's authority to make binding requests--for example, for documentary evidence and witnesses as well as apprehension and transfer of accused individuals--is essential to its effectiveness. The fulfillment of requests from the Court and compliance with its decisions, after an appropriate opportunity for challenge, should be one of legal obligation, clearly established by the treaty and freely assumed by State Parties on ratification. We believe that the Court should have the authority to rule on the legitimacy of any challenge to non-compliance.

An underlying question is whether cooperation and compliance should be modeled on existing extradition arrangements as opposed to creating a specific regime that is tailored to the relationship between ICC and states. While arrangements based on an extradition model is relevant to governing relations between equal sovereign states, an extradition model is inappropriate for the specific relationship between State Parties and the Court.

Enforcement in instances of non-compliance must be resolved. For the Court to bring justice to victims and limit impunity it is crucial that the Statute contain meaningful enforcement mechanisms.

Definitions of War Crimes in Internal Armed Conflicts

In December, delegates will revisit the debate on which war crimes, committed in non-international conflicts, will be within the subject matter jurisdiction of the Court. Given the proliferation of internal armed conflicts over the last several decades, including offenses arising in these conflicts within the ICC's subject matter jurisdiction is vital to the Court's credibility and effectiveness. Until now, the United States, the United Kingdom and France have championed a narrow list of crimes.

Among the offenses excluded from the U.S. delegation's February 1997 proposal are clear principles of humanitarian law, including the prohibition on making "the civilian population or

individual civilians the object of attack” and “the starvation of civilians.” Also omitted from the U.S. proposal is the prohibition contained in Additional Protocol I of “[the employment of] weapons ... and methods of warfare of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate.” The American list falls far short of the protections needed for internal conflict.

Criminal Procedure and the Rights of the Accused

Challenges to the admissibility of cases before the Court will also be debated in December. Human Rights Watch believes that standing to challenge admissibility should be limited to the accused, the Court, the custodial state, the territorial state and the state of nationality of the accused. We believe that the term "interested" state in the Draft Statute is too vague. Furthermore, we urge that the timing of challenges be limited to the period before the trial to reduce the possibility of obstruction.

Article 29 (Pre-trial Detention or Release), will also be debated in December. As presently drafted, Article 29(2) of the draft statute provides for detention without charge for 90 days or such longer time as the Presidency may allow. We believe that the 90 period is too long, given the fundamental nature of the suspects right to liberty and security of the person. Moreover, no conditions or restrictions are imposed on the exercise of this apparently unlimited power of the Presidency to extend this period. In the interests of protecting the fundamental rights of the detainee, the Statute must make clear that any extension beyond a 60 period should only be made pursuant to an order of the Pre-trial Chamber, not the Presidency, in exceptional circumstances and for a reasonable period of time.

III. ISSUES CRITICAL TO ENSURING AN EFFECTIVE COURT

The Relationship of the National Courts to the ICC (Complementarity)

The ICC is intended to be complementary to the national criminal justice systems in cases where such trial procedures may not be available or may be ineffective. This provision is intended to ensure that the ICC does not substitute itself for national courts that have the primary responsibility for bringing those accused of these crimes to justice. A correct understanding of complementarity and its expression in the Statute is essential if the Court is to be more than a marginal institution.

The draft text agreed on in August holds that a case is “inadmissible” where it is being or has been investigated or prosecuted by a state with jurisdiction, unless there is “inability” or “unwillingness” on the part of that state to “genuinely” carry out such an investigation or prosecution. This sets a high threshold for court jurisdiction and makes it very difficult for the Court to determine. The Statute should make clear that, while the relevant states may challenge admissibility, they are bound to comply with the decision of the ICC in this respect. No state should be able to subvert the Court by taking unilateral decisions not to cooperate in particular cases on the basis of inadmissibility.

Inherent Jurisdiction

Inherent jurisdiction gives the court the authority to prosecute the crimes within its jurisdiction without consent from other state parties. This is not exclusive jurisdiction. The primary duty to

prosecute criminals remains with the individual states. Inherent jurisdiction is compatible with both the principles of state sovereignty and complementarity.

The current draft statute only gives the court inherent jurisdiction for genocide. For crimes against humanity and serious war crimes, the statute creates an elaborate procedure predicated on the consent of the custodial state and the state on whose territory the crime has been committed. These consent requirements open significant possibilities for delay and obstruction. To function effectively the Court needs inherent jurisdiction over the core human rights crimes within its jurisdiction, and such jurisdiction ought to be conferred on the Court when the state becomes a party to the Statute.

Trigger Mechanism and the Role of the Prosecutor

The current Draft Statute has a restrictive complaint mechanism that precludes the Prosecutor from initiating an investigation other than when the Security Council refers a situation or a State Party that has accepted the jurisdiction of the court files a complaint. Unlike the two Ad Hoc Tribunals, the Prosecutor will simply be an executor of the decisions of the Security Council or of State Parties. Since states and the Security Council may, for a variety of reasons, be reluctant to bring cases to the ICC, failure to broaden the complaint mechanism will restrict the Court's authority and significantly reduce the number of cases that come before it.

The ICC's "trigger mechanism" must be expanded to allow the Prosecutor to initiate an investigation based on his or her own findings, or on information obtained from any source, including individuals and NGOs. The contributions of victims and NGOs will be instrumental in bringing perpetrators to justice.

The Role of the Security Council

Although it is essential that the Security Council maintain its primary authority to determine threats to and breaches of international peace and security, the exercise of the ICC's jurisdiction cannot be dependant on prior decisions by this highly politicized body. The Draft Statute currently prevents the Court from exercising jurisdiction in cases arising in situations being "dealt with" by the Council under its power to maintain international peace and security unless the Security Council expressly allows otherwise. By allowing the Permanent Members to use their veto power to protect potential defendants wherever their countries' interests are involved, the Draft Statute would seriously undermine the Court's independence and credibility.

Procedural Questions, Fair Trial and Rights of the Accused

The ICC must uphold the highest standards of justice. While the judges require clear guidelines on the rules of evidence and procedure, it is impractical and unnecessary to include all the details in the Statute. The Statute should contain the fundamental principles of due process governing arrest and pre-trial detention, the trial, the rights of the accused, evidence and protection of victims and witnesses.

To ensure investigation and prosecution, the principles governing rape, sexual assault and the investigation of sex crimes must be contained in the Statute. The recognition of gender related crimes and of the establishment of a Victim and Witness Protection Unit to ensure the safety of the victims, witnesses and their family members represented significant achievements of the August Preparatory Committee. Children's rights and protection issues now also need to be emphasized,

particularly in terms of forced recruitment of children into armed forces, the age of criminal responsibility, and punishment and imprisonment of children.

IV. WHAT YOU AND YOUR ORGANIZATION CAN DO

The Coalition for the International Criminal Court (CICC), an expanding group of NGOs, includes both international and national organizations. NGO advocacy with government officials, the media and civil society groups has highlighted human rights concerns in the negotiations and influenced the development of state positions. NGO pressure was critical in winning General Assembly approval for the 1998 Diplomatic Conference.

Now that a date for a Diplomatic Conference has been set and the PrepCom debate has shifted from more abstract discussion to actual drafting, NGOs have an even more crucial role to play. By lobbying for their positions, NGOs can strengthen the commitment of the growing number of states that have supported an effective ICC and increase pressure on those few that have been more obstructive.

The next Preparatory Committee meeting is scheduled for December 2-12, 1997 at United Nations Headquarters in New York. Interested organizations can make a vital contribution. We urge your organization:

- * To send observers to the PrepCom sessions. This is an invaluable opportunity to learn the issues firsthand, to lobby and to influence government positions. Some funding is available to defray the expenses of travel to and lodging in New York.

- *To form national coalitions to support a truly effective ICC. Recently, NGOs in several countries North and South have held meetings to launch these national coalitions. The CICC has developed a set of strategy guidelines to facilitate national activities. For instance, using the media, national coalitions can raise awareness of the ICC. It is especially important to mobilize pressure prior to the upcoming December PrepCom to generate support for a strong court.

- * To request meetings with the relevant Foreign Ministry and Justice Ministry officials to stress the importance your organization attaches to these negotiations. Ask these officials for an accounting of the government's position in the negotiations, including the issues cited above.

- * To utilize already existing events, meetings, conferences and seminars to raise the ICC. For example, Human Rights Watch staff members and others have popularized the ICC at meetings of the African Commission on Human and People's Rights and the Union of Arab Lawyers. Incorporate references to the ICC into other areas of concern to your organization

- * Contact the Coalition for an International Criminal Court at (212)599-1320, or via e-mail at wfm@igc.apc.org in order to obtain additional information about the ICC and regular updates about the status of ICC negotiations or join the network of NGOs endorsing the ICC.

Human Rights Watch looks forward to consulting with you on these issues. Please contact Richard Dicker at (212) 972-8400, or via e-mail at dickerr@hrw.org.