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QUESTIONS AND ANSWERS CONCERNING THE PROPOSED PERMANENT INTERNATIONAL CRIMINAL COURT (ICC)

1) What is the ICC and what would it do?

The ICC would be a permanent international criminal court for the 21st century established by a statute (treaty) ratified by states to bring to justice those responsible for the worst crimes in the world: genocide, other crimes against humanity and war crimes.

As a permanent court, it would be different from the four *ad hoc* temporary international criminal courts established in the 20th century for particular geographic areas and limited times: International Military Tribunals at Nuremberg and Tokyo (Nuremberg and Tokyo Tribunals) and the International Criminal Tribunals for the former Yugoslavia and Rwanda (Yugoslavia and Rwanda Tribunals).

As an international court, it would be open to all states to participate, in contrast to the Nuremberg and Tokyo Tribunals, which were established by the victorious Allies at the end of the Second World War. It would complement national courts and would have universal jurisdiction rather than be limited to one or two countries.

2) Why do we need an ICC?

Since the Nuremberg and Tokyo Tribunals completed their work half a century ago, millions have been the victims of genocide, other crimes against humanity and war crimes, but only a handful have ever been brought to justice for these crimes by national courts. An ICC which satisfied Amnesty International's *16 fundamental principles for a just, fair and effective international criminal court* (see *AI Index IOR 40/12/98*) would be able to exercise jurisdiction over genocide, other crimes against humanity and war crimes no matter where they occurred. The ICC would be able to act whenever states were unable or unwilling to bring those responsible for these crimes to justice.

The ICC will have a **deterrent effect**. It will send a clear message that the international community will not tolerate these crimes, and the full weight of the law will be brought to bear on perpetrators. It will be a **catalyst** to prod national prosecutors – who have the primary responsibility to bring those responsible for these crimes to justice – to do so. It will help to **end the cycle of impunity** that has helped fuel continuing violations. People planning to commit these crimes will think again if they know they will be brought to justice. Victims and their families will have the chance to get justice **and truth**, and begin the process of reconciliation.

3) What crimes would it try?

The ICC would have jurisdiction (the power to try) over three core crimes – genocide, other crimes against humanity and war crimes – and possibly a fourth core crime – aggression, if agreement can be reached on a definition and the role of the Security Council in determining whether a case of aggression has occurred. It is unlikely that the statute will include at this time some of the other crimes which have been suggested, such as attacks on UN and associated personnel, attacks on diplomats, hijacking, hostage-taking or drug-trafficking, although these could be added in the future. Amnesty International takes no position on whether these crimes or aggression should be included.

The draft statute provides that the ICC has jurisdiction over *genocide* as defined in the Convention for the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948 by the UN General Assembly. This convention defines genocide as committing any one of a series of acts, such as killing or causing serious harm, to members of a national, ethnical, racial or religious group, with intent to destroy, in whole or in part, that group as such.

The draft statute identifies *crimes against humanity* as murder; extermination; enslavement; deportation (across national frontiers) and forcible transfer of population (within a country); arbitrary detention; torture; rape, enforced prostitution and other sexual abuse; persecution on political, racial or religious grounds; enforced disappearance of persons and other inhumane treatment. However, the definition of some of these crimes remains to be decided and some states are seeking to exclude certain crimes, such as enforced disappearance of persons.

The draft statute provides that the ICC will have jurisdiction over *war crimes* (violations of humanitarian law) whether they are committed during an *international* armed conflict or a *non-international* (internal) armed conflict, the most common type of armed conflict in the world today. However, a small number of states are trying to exclude the latter type of war crimes or to limit the number.

4) Will the ICC ensure justice for women?

AI believes that it is imperative that a gender perspective be fully incorporated into the statute for the ICC, its rules and the way it functions. AI believes that the court should effectively address grave human rights violations against women, including gender-based crimes which amount to genocide, other crimes against humanity and war crimes. The court should take into account the special considerations in investigating crimes involving violence against women. It should also ensure justice for women in the functioning of the court.

5) Who would be brought before the court? Will it be just the soldiers or the leaders as well? Aren't some soldiers just following orders?

If the principles which Amnesty International believes are essential to the ICC's success are incorporated in the statute, the ICC would be able to try *anyone* responsible for such crimes *no matter where the crimes occurred* and *no matter what that person's rank or position*, whether a foot soldier, commander, defence minister, prime minister, president or monarch. The same principle was an integral part of the Charters of the Nuremberg and Tokyo Tribunals. Half a century after Nuremberg and Tokyo all soldiers and, indeed, all adults, should know that superior orders are not a legitimate defence to genocide, other crimes against humanity or war crimes.

6) How will indicted people be brought before it? Look at Radovan Karadi_ – nothing has happened to him, despite the tribunal in the Hague?

All states parties to the statute will have to commit themselves to comply with ICC orders and requests. A failure to fulfil such a solemn commitment will be a violation of international law, subjecting that state to immense pressure to comply. For more than a century, states have complied with almost every judgment issued by international courts they have established by treaty, such as the International Court of Justice at the Hague and the European Court of Human Rights, and the political cost of refusing to do so is usually too high to permit defiance forever. The handful of cases where states fail to comply are front page news.

More than a third (27) of the people indicted by the Yugoslavia Tribunal have been transferred to that tribunal voluntarily or involuntarily from Croatia, Bosnia- Herzegovina (both the Federation and the Republika Srpska) and the Federal Republic of Yugoslavia. Continuing pressure makes it increasingly likely that the remainder will surrender voluntarily or be arrested. Moreover, those who are not yet in custody of the Rwanda and the Yugoslavia tribunals are either in hiding or otherwise excluded from positions of power in their countries.

7) What about “terrorism”?

In contrast to the core crimes of genocide, other crimes against humanity and war crimes, “terrorism” has never been defined in a treaty with widespread international acceptance. Therefore, most states are reluctant to include “terrorism” within the ICC’s jurisdiction.

8) How independent will the court be? Won't it be very political – with certain countries blocking their own people appearing before it so that it is biased?

The current draft statute recognizes the need to guarantee the ICC’s independence, and includes text on the independence of the prosecutor and the manner in which cases are brought to court for example. However, Amnesty International believes that the statute should be clarified to include explicit guarantees of independence, in line with the organization’s *16 fundamental principles*. As explained above, states parties to treaties establishing international judicial institutions usually comply with court orders. As long as the ICC is impartial in selecting cases for investigation and prosecution, it will be seen to be impartial, even if certain states were to block temporarily the surrender of their nationals or members of certain groups.

9) What role will the ICC have in relation to national courts?

The ICC will have concurrent (shared) jurisdiction with national courts. However, the ICC will only act when national courts are unable or unwilling to investigate and, where evidence warrants, bring those responsible to justice.

10) What obligations will states who do not ratify the treaty in Rome have towards the court?

All states, whether parties to the statute or not, are obliged to bring those responsible for genocide, other crimes against humanity and war crimes to justice in their own courts or to extradite them to a state able and willing to do so in a fair trial which is not a sham. Moreover in December 1973, the UN General Assembly adopted the *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* in Resolution

3074, which declares that all states are to cooperate with each other on a bilateral or multilateral basis to bring to justice persons responsible for these crimes.

Non-states parties will have no obligation *under the ICC statute* to cooperate with the ICC, but if they fail to bring persons in their territory or jurisdiction to justice, to extradite them to another state or to transfer them on request to the ICC, or to respond to a request for assistance by the ICC, they will be failing to fulfil an international duty recognized by all states in this resolution.

11) Why isn't the ICC retroactive? What is AI's position on groups like the Khmer Rouge – what should happen to them?

The ICC will have jurisdiction only over crimes committed after the statute receives sufficient ratifications by states so that it can enter into force. Many states believe that this will ensure that the ICC is never accused, as the Nuremberg and Tokyo Tribunals were by some critics, of applying retrospective justice. In addition, it is unlikely that an agreement could be reached on a date earlier than the entry into force of the statute. Some have argued for the ICC to have jurisdiction over crimes committed as far back as the First World War where potential suspects are still alive.

Amnesty International believes that all those who commit genocide, other crimes against humanity and war crimes should be brought to justice, whether in national courts, which have universal jurisdiction over these crimes, or an international criminal court. Thus, the organization has called for all those responsible for such crimes in Cambodia over the past three decades should be brought to justice by national courts or by an international court. However, the court's jurisdiction must include *all* those responsible for such crimes, not just members of a particular group or certain politically selected persons of only a certain rank.

12) How does the ICC relate to amnesties given to perpetrators – such as in Chile, El Salvador, Haiti or by the Truth and Reconciliation Commission in South Africa?

A *national* amnesty, pardon or similar measure for the worst crimes imaginable under *international* law - genocide, other crimes against humanity and war crimes – which prevents the emergence of the truth and accountability before the law has no place in the ICC. Moreover, such measures are inconsistent with the declaration by the General Assembly in the 1973 resolution mentioned previously that “States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.”

Nevertheless, some states have urged that the ICC should take such guarantees of impunity into account in deciding whether to investigate or prosecute persons responsible for such crimes, thus, permitting individual states to insulate those responsible for these crimes from international justice and making the ICC completely ineffective.

13) How will the court be funded?

Amnesty International has argued that the most effective way to fund the court is through the regular UN budget. Despite current problems caused by the refusal of the US government to pay its UN dues and the arrears of other UN members, over the long run, UN funding would be the most reliable and consistent with the role of the ICC acting on behalf of the entire international community.

In contrast, some states have contended that the ICC should be funded solely by state parties. However, this method of funding would discourage ratification by small and less developed states and it

failed as a method of funding the Committee against Torture and the Committee on the Elimination of All Forms of Discrimination. The UN General Assembly has now assumed responsibility for funding these two human rights monitoring bodies.

14) What are the key unresolved issues?

The key unresolved issues are:

1. Will the Security Council be able to prevent an investigation and prosecution of any case where it is considering the situation in which that case arises under its power under Chapter VII of the UN Charter to maintain and restore international peace and security?
2. Will the prosecutor be able to initiate investigations based on information from victims and their families or other reliable sources, subject only to appropriate judicial review of that decision?
3. Will the ICC be able to exercise the same universal jurisdiction over genocide, other crimes against humanity or war crimes as any one of its states parties?
4. Will the ICC be required to secure the consent of the state which has custody of the suspect or accused, the state where the crimes occurred (whose officials may well be implicated in these crimes), the state of the victim's nationality, the state of the nationality of the suspect or accused, the state seeking extradition of the suspect or accused and any other interested state before it can investigate a case?

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