THE INTERNATIONAL CRIMINAL COURT

16 fundamental principles for a just, fair and effective international criminal court

For more than half a century since the Nuremberg and Tokyo trials ended, national prosecutors and courts have largely failed to bring to justice those responsible for the crimes of genocide, other crimes against humanity and serious violations of humanitarian law. The international community has recognized, therefore, that a permanent international criminal court is necessary to complement national criminal jurisdictions by investigating and prosecuting these three core crimes when national prosecutors are unable or unwilling to do so, serving as a model of international justice and acting as a catalyst for national prosecutors and courts to fulfil their primary responsibility to bring those responsible for these crimes to justice. On 15 June 1998, the world's governments meet in Rome to open a five-week diplomatic conference to adopt a statute for a permanent international criminal court.

If the court is to be a just, fair and effective institution, there are certain fundamental principles which must be reflected in its statute, rules and practice. There are a wide variety of forms which the court could take, drawing from many criminal justice systems, but whatever solutions are found must be consistent with each of the 16 fundamental principles set forth below.

Although these 16 principles are largely based upon principles being considered and developed by a number of African governments and non-governmental organizations, they reflect principles which have been included in the declarations and statements of an increasing number of governments, intergovernmental organizations, non-governmental organizations and independent experts from all parts of the world. Indeed, many of these principles have appeared in one form or another in statements by the Caribbean Community (CARICOM); the Council of Europe Parliamentary Assembly; the Dakar Declaration on the Establishment of the International Criminal Court, adopted by 25 African governments, as well as by African and international non-governmental organizations, on 6 February 1998; the European Parliament; the League of Arab States; the Rio Group of Latin American states; and the Southern African Development Community (SADC).

If each of the following principles are fully reflected in the statute, rules and practice of the court, the court could be an effective complement to national criminal justice systems. If any of them are omitted, the court risks being an illusory remedy and, perhaps, even a setback for the rule of law and international justice. Amnesty International fully endorses each of these principles without any reservation and is calling upon every government around the world to pledge publicly that it will ensure that the diplomatic conference incorporates each of these principles in their entirety in the statute of the permanent international criminal court. No government which is serious about the establishment of an effective and independent court should be able to refuse to make this pledge.

16 FUNDAMENTAL PRINCIPLES FOR A JUST, FAIR AND EFFECTIVE INTERNATIONAL CRIMINAL COURT

1. The court should have jurisdiction over the crime of genocide. The statute should provide that the court has jurisdiction over this crime as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, in peace as well as during armed conflict.

2. The court should have jurisdiction over other crimes against humanity. The court should have jurisdiction over other crimes against humanity, including the following crimes when committed on a systematic basis ***or*** large-scale (there should be no requirement that they have to be ***both*** systematic ***and*** large scale): murder; extermination; forced disappearance of persons; torture; rape, enforced prostitution and other sexual abuse; arbitrary deportation across national frontiers and forcible transfer of population within national frontiers; arbitrary detention; enslavement; persecution on political, racial, religious or other grounds; and other inhumane acts. The court should have jurisdiction over these crimes whether they have been committed in peace or armed conflict.

3. The court should have jurisdiction over serious violations of humanitarian law in international and non-international armed conflict. The court should have jurisdiction over serious violations of humanitarian law in ***international*** armed conflicts, including: all grave breaches of the Geneva Conventions of 1949, grave breaches and denials of fundamental guarantees of Additional Protocol I to the Geneva Conventions and violations of the 1907 Hague Convention IV and its Regulations. The court should also have jurisdiction over serious violations of humanitarian law in ***non-international*** armed conflicts, including violations of common Article 3 of the Geneva Conventions and Additional Protocol II to the Geneva Conventions. There should be no threshold, such as a requirement that the violations of humanitarian law in either type of conflict were part of a plan or policy or part of a large-scale commission of such crimes. Similarly, there should be no threshold for violations of common Article 3.

4. The court must ensure justice for women. The statute should include jurisdiction over rape, enforced prostitution and other sexual abuse as crimes against humanity, when committed on a systematic basis or large scale, and as serious violations of humanitarian law in international and non-international armed conflict. The prosecutor must investigate these and other crimes against women and all staff in all organs of the court should receive training relevant to the investigation and prosecution of crimes against women. The court must be able to take certain measures to protect women victims and their families from reprisals and unnecessary anguish to which they might be exposed in a public trial, without prejudicing the rights of suspects and accused to a fair trial. The statute should also facilitate the selection of women with a view to achieving gender balance in all organs of the court.

5. The court must have inherent (automatic) jurisdiction. The statute should provide that all states when ratifying or acceding to the statute consent to the court having

inherent (that is, automatic) jurisdiction over the three core crimes of genocide, other crimes against humanity and serious violations of humanitarian law. No further state consent should be required. Since such inherent jurisdiction is ***concurrent*** with that of states, the court would exercise its jurisdiction only when states were unable or unwilling to exercise their jurisdiction.

6. The court must have the same universal jurisdiction over these crimes as any of its states parties. Under international law, each of these three core crimes - genocide, other crimes against humanity and serious violations of humanitarian law - are crimes of universal jurisdiction. That means that ***any*** state may exercise jurisdiction over a person suspected of having committed one of these crimes and bring ***anyone*** responsible for such crimes to justice ***no matter where the crime was committed.*** If the court is to be an effective complement to national courts, and not a weaker court, then it must have the same universal jurisdiction over these crimes as any one of the states parties.

7. The court must have the power in all cases to determine whether it has jurisdiction and whether to exercise it without political interference from any source. If the court is to be an effective complement to national courts when they are unable or unwilling to bring those responsible to justice for these crimes, it must be able to determine when they are unable or unwilling to do so. Otherwise the court will be at the mercy of states which are unable or unwilling to bring those responsible for the worst crimes in the world and which are also unwilling to have any other court do so.

8. The court should be an *effective* complement to national courts when these courts are unable or unwilling to bring to justice those responsible for these grave crimes. Every provision of the proposed statute must be tested against this requirement that the court be effective. Many of the proposals by states would make the court ***less*** effective than the national courts of states parties.

9. An independent prosecutor should have the power to initiate investigations on his or her own initiative, based on information from any source, subject only to appropriate *judicial* scrutiny, and present search and arrest warrants and indictments to the court for approval. There is only one truly effective method to ensure that all cases which should be brought before the court are brought. An independent prosecutor should be able to initiate investigations of any crime within the court's jurisdiction on his or her own initiative, based on information from any source, and present search and arrest warrants and indictments to the court for approval, without state interference. The Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda (Yugoslavia and Rwanda Tribunals) has the power to initiate investigations of any crime which took place within the tribunals' jurisdiction on his or her initiative, and present indictments to the tribunals for approval, without any selection or prior interference by the Security Council or states, although states are free to seek judicial review of court orders. There are advantages to permitting the Security Council to refer situations involving threats to or breaches of international peace and security to the prosecutor for investigation pursuant to Chapter VII of the UN Charter, as the requests and orders of the court would benefit from the Security Council's Chapter VII enforcement powers, but referrals and state complaints should only be a supplement to other sources for the

prosecutor. Both the Security Council and states are political bodies and likely to select situations on political, not legal, grounds. Moreover, neither are likely to submit many situations. The Security Council has established only two *ad hoc* tribunals in more than half a century and states rarely file complaints against other states under state complaint mechanisms of human rights treaties.

10. No political body, including the Security Council, or states, should have the power to stop or even delay an investigation or prosecution under any circumstances whatsoever. There is no legitimate ground under international law or morality to obstruct justice by stopping or delaying investigations of crimes of genocide, other crimes against humanity or serious violations of humanitarian law. Indeed, all states have obligations to repress these crimes. Justice must never be a bargaining chip in peace negotiations. Therefore, no ***national*** amnesty or pardon which has prevented justice and the emergence of the truth may prevent the ***international*** court from bringing those responsible for these crimes under international law to justice. The Security Council has never sought to prevent the International Court of Justice or national courts from hearing cases involving situations which it was considering under its Chapter VII powers to address threats to or breaches of international peace and security. Any delays in an investigation would let memories of witnesses fade and facilitate the destruction of evidence and intimidation of witnesses.

11. To ensure that justice is done, the court must develop effective victim and witness protection programs, involving the assistance of all states parties, without prejudicing the rights of suspects and the accused. The court, in close cooperation with states, must be able to take certain security measures to protect witnesses and victims and their families from reprisals. Such measures must not prejudice the rights of suspects and accused.

12. The court must have the power to award victims and their families reparations, including restitution, compensation and rehabilitation. As recognized in a wide variety of international instruments, including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, victims of grave human rights violations and their families have the right to reparations, including restitution, compensation and rehabilitation. The court itself should have the power to award such reparations since it is unlikely that national courts, which were unable or unwilling to bring the person responsible to justice, will be able or willing to award reparations or to enforce the award.

13. The statute must ensure suspects and accused the right to a fair trial in accordance with the highest international standards at all stages of the proceedings. If the court is to be effective, particularly in the situations in which these crimes occur, justice must not only be done, but be seen to be done. Therefore, the court must be scrupulous in its respect for the highest possible international standards for fair trial. These standards include those found in Articles 9, 10 and 11 of the Universal Declaration of Human Rights; Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights; the UN Standard Minimum Rules for the Treatment of Prisoners; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Articles 7 and 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

the UN Basic Principles on the Independence of the Judiciary; the UN Basic Principles on the Role of Lawyers; and the UN Guidelines on the Role of Prosecutors.

14. All states parties, including their courts and officials, must provide full cooperation without delay to the court at all stages of the proceedings. Like the two *ad hoc* Yugoslavia and Rwanda Tribunals, the court will be largely dependent upon state cooperation, whether this involves voluntary measures such as on-site visits and interviews with witnesses, or compulsory process to search premises, compel testimony and production of documents or to arrest and transfer persons. Therefore, all states parties must provide the court the same cooperation and compliance that their executive authorities provide their national courts. To ensure that the court is not frustrated before it can begin, full cooperation must be provided in the period before the court determines whether it has jurisdiction and should exercise it. States may not refuse to comply with court orders or requests to provide information or to transfer persons to the court on any of the traditional grounds for refusal in state-to-state cooperation. The court must have the power to determine whether a state has fully complied with court orders and requests and it must determine whether a state or individual may be excused from complying with an order or request.

15. The court should be financed by the regular UN budget, supplemented, under appropriate safeguards for its independence, by the peace-keeping budget and by a voluntary trust fund. The experience of the two *ad hoc* Yugoslavia and Rwanda Tribunals demonstrates that an international court must receive stable and adequate financial, human and technical resources to ensure its effective functioning. The independence of the court should not be affected by the method of its financing. Despite current difficulties, the best method over the long-term for providing regular and secure financing is through the regular UN budget, supplemented by the peace-keeping budget and a voluntary trust fund, provided that there are adequate safeguards for the court's independence. The court should not be financed by states parties or by complaining states, as this would discourage ratifications, cripple the court in its early years if a few wealthy states did not ratify the statute, be unreliable over the long-term and lead to domination by wealthy states.

16. There should be no reservations to the statute. The statute must expressly prohibit ***all*** reservations. Permitting reservations would defeat the object and purpose of the statute - to bring to justice those responsible for the worst crimes in the world - by allowing states parties to redefine crimes, to add defences not consistent with international law or avoid obligations to cooperate with the court. It would also lead to an unworkable system in which each state would have undertaken a different set of obligations, instead of common international commitments.

WHAT YOU CAN DO:

- ♦ *Send this document to your heads of government and Ministers of Foreign Affairs asking them to pledge publicly that they will ensure that each of these 16 principles is fully reflected in the international criminal court statute.*

- ♦ *Send the document to members of parliament and ask that the parliament adopt a resolution calling upon the government delegation attending the Rome conference to ensure that the 16 principles are fully reflected in the international criminal court statute.*

- ♦ *Send the document to editors and journalists to inform them of AI's position and urge that they report on the government's implementation of the principles.*