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INTERNATIONAL CRIMINAL COURT

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This report follows a request by the 1997 Council of Delegates to the ICRC, in consultation with the International Federation,

"to report to the 1999 meeting of the Council of Delegates on progress made in establishing an international criminal court."

1. Background

On the basis of the principle of universal jurisdiction, States have a duty to search for persons alleged to have committed, or to have ordered to be committed, grave breaches of international law instruments, i.e. war crimes, and shall bring such persons, regardless of their nationality, before their own courts (Arts. 49/50/129/146 of the four Geneva Conventions of 1949, 85 of the 1977 Additional Protocol I). They may also hand over such suspects to another State for prosecution (*aut dedere aut punire*).

However, this system of penal repression on the national level has only rarely been applied by States. This deplorable fact led the 26th International Conference of the Red Cross and Red Crescent, following on recommendations of the International Conference for the Protection of War Victims and of the Intergovernmental Group of Experts for the Protection of War Victims, to urge States *"to increase international efforts*

- *to bring before courts and punish war criminals and those responsible for serious violations of international humanitarian law,*
- *to establish permanently an international criminal court."* (Resolution 2).

The United Nations have been considering the establishment of such an international criminal court (ICC) since the end of the Second World War. In 1993 and 1994, the UN Security Council set up two *ad hoc* Tribunals to punish serious violations of international humanitarian law committed, respectively, in the former Yugoslavia and Rwanda. The creation of these Tribunals was an important first step to stop the impunity of war criminals; it led the international community to resume and to intensify the work on the establishment of a criminal court which jurisdiction would not be limited to two specific situations, as was the case with those two *ad hoc* Tribunals.

Within this broader context, the Movement agreed on a position during the 1997 session of the Council of Delegates. It adopted a resolution inviting National Societies to support all efforts and to promote the creation of an effective and impartial international criminal court, while, at the same time, encouraging States to comply with their existing obligation of repression under international humanitarian law.

On 17 July 1998, the Diplomatic Conference in Rome adopted the Statute for the establishment of an International Criminal Court (ICC), showing the determination of the negotiating States *"to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes"* (Preamble of the Statute). This Court, which will be created after the deposit of the 60th instrument of ratification, has jurisdiction over the crime of aggression, genocide, crimes against humanity and war crimes. States Parties to the ICC Statute will be under a duty to comply with requests for arrest and surrender of alleged war criminals, in accordance with the relevant provisions of the Statute and the procedure under their

national law. However, the primary responsibility for enforcement of International Humanitarian Law still rests with national authorities. The jurisdiction of the ICC is intended to come into play only when a national judicial system is genuinely unable or unwilling to act in relation to individuals over whom they would normally have jurisdiction. To benefit from this principle of complementarity, States will need have adequate legislation enabling them to prosecute war criminals.

In accordance with the 1997 Council of Delegates resolution the ICRC, in consultation with the International Federation, kept the National Societies informed on the progress made in establishing the ICC. *Inter alia*, information files on the work of the Preparatory Committee and the work at the Rome Conference, including the ICRC's position and declarations made, were transmitted to all National Societies and reports were given at a number of meetings, including the annual meetings of Legal Advisers of National Societies in 1998 and 1999.

2. Accomplishments and lacunae - the ICRC's position

The ICRC has been mandated to promote respect for IHL, which includes the development of better mechanisms of implementation. This explains its active participation in the negotiations and its support for the establishment of the ICC. The International Federation, assuming its constitutional role of representative of National Societies in the international field, was also represented in the Rome Conference by a Delegation.

The ICRC welcomed the text of the Statute as being substantial and enabling the Court to engage in a more effective battle against impunity.

Although not all serious violations of international humanitarian law appear on the list of war crimes in Article 8 of the Statute, it does contain a large number of offences. The major accomplishment in this regard is certainly the inclusion of war crimes committed during non-international armed conflicts.

However, the exclusion of some war crimes from the list adopted in Rome is regrettable. For example, there are no provisions on unjustifiable delay in the repatriation of prisoners of war or civilians or on the launching of indiscriminate attacks affecting the civilian population or civilian objects. The provision on the use of particularly cruel weapons was kept to a minimum, leaving the decision on the inclusion of other weapons to a later review conference. Accordingly, nuclear, biological and blinding laser weapons, as well as anti-personnel mines, were omitted. In regard to the repression of war crimes in non-international armed conflicts, the ICRC regretted the lack of specific provisions mentioning the use of famine, indiscriminate attacks and prohibited weapons.

A really unfortunate part of the Statute is that it gives the possibility for ratifying States to prevent the Court from having jurisdiction over them for war crimes for a period of seven years. This, in fact, creates a regime for war crimes which is different from that relating to other crimes within the jurisdiction of the Court, and appears to send out the wrong message that war crimes are not as serious as the other core crimes. This is particularly regrettable since international law already recognizes the obligation of States to prosecute war criminals, irrespective of their nationality or the place where the crime was committed.

Taking into account the difficult negotiations in Rome, the issue of jurisdiction was solved in a quite satisfactory manner. States agreed to the principle that when a State becomes party to the Statute it accepts the jurisdiction of the Court. The ICC may exercise its jurisdiction if the State on whose territory the act or omission in question occurred, or the State of which

the person being investigated or prosecuted is a national, is bound by the Statute or has accepted the jurisdiction of the Court. No consent is required from a State when the Security Council refers a situation to the Prosecutor under Chapter VII of the Charter of the United Nations.

It is regrettable that the proposal to give the Court automatic jurisdiction if the custodial State is bound by the Statute was not accepted. Especially in the context of a non-international armed conflict, the custodial States can play an important role in the prosecution of war crimes when alleged war criminals leave the country where the conflict occurred. Under the Statute, the ICC will not be able to take action if the State on which territory the internal armed conflict takes place is not party to the Statute and refuses to accept the ICC's jurisdiction over a suspect of its nationality. Prosecution would be possible only if the Security Council referred the situation to the Prosecutor. This scenario shows that the Statute will not have any clear, practical impact until a large number of States has ratified the treaty, thus allowing the Court to exercise its jurisdiction whenever necessary.

3. The way ahead

Despite the establishment of the ICC, States will continue to have a duty to exercise their criminal jurisdiction over persons alleged to have committed international crimes, as the Court has jurisdiction only when a suspected criminal has not been tried in a national court. This is likely to encourage States to put in place (more effective) national implementation measures. In this context, the ICRC Advisory Service will continue to offer its technical assistance to States in adopting legislation necessary for the investigation and prosecution of suspected war criminals.

A number of tasks still remain to be undertaken by States and these have been indicated in the Statute itself, namely, the drafting of a document containing the Elements of Crimes, the drafting of the Rules of Procedure and Evidence and the finding of an agreement on the definition of the crime of aggression. The UN General Assembly has mandated a Preparatory Commission to finalize the draft for the Elements of Crimes and the Rules of Procedure and Evidence by 30 June 2000 when they should be formally adopted. The definition of aggression does not have to be agreed on before the first review conference seven years after the entry into force of the Statute.

For the first two sessions of the Preparatory Commission in February and July/August 1999 the ICRC prepared six parts of a study on relevant international and national case law on the elements of war crimes to assist the negotiating States. This work - overwhelmingly appreciated by the States and relied on by many - will be finalized during the next months. It will be submitted to the next session of the Preparatory Commission scheduled for November/December.

With respect to future promotion activities the Movement must concentrate its efforts in particular on the following issues:

- To make the ICC really effective, States must sign and ratify the Statute in great number; therefore States must be encouraged to take these steps.
- States should be encouraged not to make a declaration under Art. 124 ICC Statute to exclude its jurisdiction over them for war crimes for a period of seven years.
- The substantial rules of the Statute on war crimes, especially the list of war crimes must still be supplemented: the possibility of revising them seven years after their entry into

force is therefore to be applauded. In the meantime, no time should be lost in drawing up the annex concerning the use of weapons which are of a nature to cause superfluous injury or unnecessary suffering or which are indiscriminate, especially weapons of mass destruction. The consolidation of the ban on the use of anti-personnel mines and blinding weapons should, moreover, allow to include as a war crime the prohibited use of these weapons as well in the first revision of the Statute.

- Although the document on Elements of Crimes will not have binding force upon judges, every effort must be made to formulate them in a way as to ensure that the "acquis" with regard to international humanitarian law are properly reflected. This document may subsequently be an important tool to ensure uniformity in the jurisprudence on the international and probably also on the national level. In this regard, particularly, the ICRC must assume its role as guardian of international humanitarian law by following very closely the on-going negotiations within the Preparatory Commission.