I. INTRODUCTION

The upcoming Preparatory Committee meeting presents the first opportunity for States to negotiate and draft the text of a statute for a permanent International Criminal Court (ICC), following thorough discussion at the two Ad Hoc Committee sessions in 1995, and consideration by the General Assembly's Sixth Committee last November. It is essential that the present round of meetings, mandated by the Sixth Committee to discuss and draft a consolidated text, achieve significant progress. Underlying the urgency for demonstrable progress during the upcoming Preparatory Committee session is the need to limit impunity for the most egregious human rights crimes--genocide, serious violations of the laws and customs applied in armed conflicts and crimes against humanity--that have proliferated in the last several years.

The fundamental issues facing this session of the Preparatory Committee--the court's subject matter jurisdiction, its relation to national court systems and the exercise of its jurisdiction--are integrally linked. In particular, the question of the court's inherent jurisdiction--its authority to decide when it will prosecute a case--is perhaps the most critical of these issues.

Human Rights Watch urges the many delegations supporting the early establishment of an effective international criminal court to coordinate across regional lines and, on the basis of a common interest, work together for maximum progress in drafting at this session. We believe that by working together these States will be able to establish positions that will significantly advance the goal of convening a Diplomatic Conference of Plenipotentiaries.
II. SUBJECT MATTER JURISDICTION

At the Ad Hoc Committee sessions, there was widespread support for limiting the subject-matter jurisdiction of the court to the crimes of genocide, war crimes, and crimes against humanity. Human Rights Watch has consistently held the position that the court's jurisdiction should be limited to the most serious human rights crimes to break the cycle of impunity for these crimes. In this respect, Human Rights Watch agrees with the views of many delegations that the inclusion of crimes like terrorism, drug trafficking, or other crimes commonly handled under domestic law, bilateral treaties, or multilateral treaties, would overload the court and dilute its effectiveness.

Consistent with the principle of legality, we believe that these crimes must be defined precisely to clarify what conduct is penalized.

Genocide

We favor including the definition of genocide that is codified in Articles II and III of the Convention on the Prevention and Punishment of Genocide in the statute.1 The purpose of the permanent international court is to enforce established, universally recognized law. Thus, for the purposes of the court's statute, Human Rights Watch does not support redefining genocide to include political and social groups.

Aggression

A finding of aggression, an eminently political act, normally would be determined by the Security Council. Human Rights Watch believes that such a heavily politicized crime and the inevitable role of the Security Council would undermine the independence of the proposed court as an impartial judicial body.

While it would be possible to include the crime of aggression in the court's subject matter jurisdiction without a role for the Security Council, this would not necessarily solve the problem. The very process of the court's determining when aggression is not self-defense would have the potential of undermining the court's appearance of impartiality. 2

We do not believe that eliminating aggression from the ICC's jurisdiction would increase impunity for its perpetrators because those who would be indicted for aggression would likely be subject to indictment for other crimes such as serious violations of the laws and customs applicable in armed conflict and crimes against humanity.

Serious Violations of the Laws and Customs Applicable in Armed Conflict
To comply with the principle of legality these offenses must be rooted in customary international law, and so universally applicable. Human Rights Watch believes that the definition of these violations should include the grave breaches codified in the Geneva Conventions of 1949, as well as serious violations of the laws and customs of war contained in other conventions that have customary international law status. The definition of these offenses must also include the acts prohibited by Common Article 3 of the 1949 Conventions, covering conduct in noninternational conflicts, so that violations committed in the course of internal armed conflict are within the ICC's scope.

There is important recent support for this position. The Trial Chamber of the International Tribunal for the Former Yugoslavia found that it had jurisdiction over crimes under Article 3 "because violations of laws or customs of war are part of customary international law over which it ha[d] competence regardless of whether the conflict is international or national." In a major development of humanitarian law regarding internal armed conflicts, the International Tribunal for Rwanda, under Article 4 of its statute, is empowered to prosecute persons who have committed serious violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II.

Human Rights Watch believes that Articles 2 and 3 of the statute for the International Tribunal for the former Yugoslavia would be an appropriate basis for the ICC's subject matter jurisdiction in this area.

Crimes Against Humanity

We endorse the definition of crimes against humanity contained in the draft statute for an International Criminal Court prepared by the Siracusa Committee of Experts. The definition addresses the essential concerns raised in the Commentary to the ILC draft statute that there be a more specific and precise definition. Human Rights Watch agrees that the crimes are characterized by their widespread and systematic character, committed against a civilian population on national, political, ethnic, racial or religious grounds. It is crucial to expand the definition of the crimes to cover situations other than war as well as war. The Special Rapporteur of the ILC on the Draft Code of Crimes Against the Peace and Security of Mankind has written

[first linked to a state of belligerency,] ... the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes ... crimes against humanity may
be committed in time of war or in time of peace; war crimes can only be committed in time of war.

The Ad Hoc Tribunal for Former Yugoslavia has pointed to the Einsatzgruppen case under Control Council Law No.10, as expanding the Allied tribunal's jurisdiction over crimes against humanity to those committed in peace as well as war. Furthermore, the Tribunal cites Oppenheim's International Law as stating that crimes against humanity, "are now generally regarded as a self-contained category, without the need for any formal link with war crimes." The Siracusa Draft also properly elaborates on the 'residual' category of "other inhumane acts."

III. COMPLEMENTARITY

Human Rights Watch believes that the court should have jurisdiction complementary to national systems to vigorously prosecute these offenses and that this international court is not a substitute for the principal role of national systems of justice. As third paragraph of the ILC draft statute's preamble states, the International Criminal Court will play a role where national jurisdiction is either "unavailable or ineffective." We agree with the great majority of States that the International Criminal Court's complementary role requires further elaboration, and that this elaboration should remain in the preamble without being codified in a separate article.

Human Rights Watch urges that the preamble include criteria to determine where national courts have not fulfilled their responsibility to prosecute these crimes. The following three criteria should be explicitly included to guide the court in making such determinations: 1) where national courts function as a shield for the accused; 2) where national authorities have failed to prosecute diligently; and 3) where the national court is neither impartial nor independent.

The concerns regarding a possible undermining of the principle of complementarity that have been voiced by some delegations are unwarranted and the suggested safeguards are flawed. This applies especially to efforts to limit even the initiation of an independent prosecution as long as a national investigation is taking place and to assume the bona fide nature of that national prosecution, even in case of a determination not to prosecute, unless there is an affirmative showing of bad faith or a manifestly unreasonable judgment. Such deferral to national sovereignty is not warranted in cases of massive human rights violations. An independent international investigation is indispensable to allow a well-founded assessment of whether or not an international crime has been committed and national jurisdiction has been effectively exercised. Articles 26 (1) and 35 provide a sufficient
safeguard against the ICC superseding bona fide national investigation, taking into account that the principle of complementarity is explicitly stated in the preamble and has to be observed in the application of these provisions.

It is critical that the ICC retain the power to decide whether national courts have proven effective or not. This is linked to the court's inherent jurisdiction and the preconditions for its exercise of jurisdiction as discussed below.

IV. EXERCISE OF JURISDICTION

Inherent Jurisdiction

Human Rights Watch urges that the ICC be given inherent jurisdiction over serious violations of the laws and customs applicable to armed conflict and crimes against humanity, as well as genocide. This authority means that the court is presumed to have a superior claim to exercise jurisdiction in those cases where the national courts have been "unavailable" or "ineffective." This presumption must, of course, be rebuttable on the basis of criteria to be defined in the statute and after the State claiming jurisdiction has been appropriately heard.

In the current ILC draft statute, the court has inherent jurisdiction only over genocide, and we urge that inherent jurisdiction must be extended to the other two major areas of criminal liability under international human rights and humanitarian law. Our contention is based on the following considerations: 1) extending inherent jurisdiction would simplify the exercise of jurisdiction by limiting the requirement of State consent; 2) crimes against humanity and serious violations of the laws and customs applicable in armed conflict often accompany genocide; and 3) a restrictive approach to inherent jurisdiction is likely to frustrate the court's actions and render the quest for international justice elusive.

The court's inherent jurisdiction is critical to its ability to play an effective role. If the court has inherent jurisdiction, then any State party would accept that the court has the authority, without additional state consent, to take jurisdiction. However, inherent jurisdiction does not mean exclusive jurisdiction. The appropriate forum would be determined by the court after a hearing (according to the procedure outlined in Articles 34, 35 and 36) on the basis of the complementarity principle. If the court lacks inherent jurisdiction over these crimes, its ability to operate would depend on the cooperation of
States whose actions were in question.

The basis for the court's inherent jurisdiction over the most serious human rights crimes has been underscored by a judgment of the Ad Hoc Tribunal for the Former Yugoslavia where that Tribunal held the crimes which the International Tribunal has been called upon to try [crimes against humanity, genocide, violations of the laws or customs of war, and grave breaches of the Geneva Conventions of 1949] are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one state. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.

Therefore, Human Rights Watch believes that no single state should be able to block the adjudication of these crimes, and that Article 21, "Preconditions to the Exercise of Jurisdiction" should be revised to eliminate the requirements of state consent for serious violations of the laws and customs of war as applied in armed conflict and crimes against humanity.

Complaint Mechanism

Human Rights Watch finds the complaint procedure in the ILC draft statute to be unnecessarily narrow. Under the present wording, only States can lodge complaints to the prosecution. Since States parties may be reluctant to submit complaints, the procedure should be expanded to accept petitions from individuals concerning the most severe human rights violations.

The Role of the Security Council

Human Rights Watch agrees with several delegations that expressed support for retaining Article 23(1) of the draft statute. This clause allows the Security Council to refer matters to the court when acting under Chapter VII of the UN Charter. This should avoid the need to create additional ad hoc tribunals and would enhance the effectiveness of the court.

In sharp contrast, Article 23(3) gives the Security Council the exclusive power to prevent prosecution and trial by the ICC
situations which are being dealt with by the Security Council. Some States have argued that this provision is necessary to guarantee the legitimate role of the Security Council in the preservation of international peace and security under Article 24 of the United Nations Charter. However, Human Rights Watch believes that this provisions reduces the ICC from an independent judicial body to a subordinate body of the Security Council and could render justice hostage to Security Council vetoes. Indeed, leaving the court's jurisdiction a negotiable element in any potential peace agreement may actually frustrate settlements and over time would inevitably diminish the court's stature and politicize its role. The advancement of the rule of law in the international community, which is the underlying goal of the establishment of the ICC, requires a judicial system that is truly independent. The current ILC draft Article 23(3) creates a dependency of the ICC on the political decision making of the Security Council. It creates the possibility for permanent members of the Security Council to protect their interests by shielding themselves or others from criminal prosecution.

ENDNOTES

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1 The provisions of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN. General Assembly on December 9, 1948 (G.A.Res. 2670, 3 GAOR, Part 1, U.N. Doc. A/810, p. 174), entered into force on January 12, 1951, reads as follows: Article II In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Article III The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

2 For example, U.N. General Assembly Resolution 3314 denouncing aggression defines the act in terms that make it inherently difficult to apply in a politically neutral manner. Aggression is "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State" including acts by a state that are supportive of armed insurgents against another; yet nothing in the definition is to "in any way prejudice the right to self-determination, freedom and independence." See L.C. Green, The Contemporary Law of
3 Article 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, which entered into force on October 21, 1949, provides as follows:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

4 Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, entered into force on October 21, 1949, provides as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

5 Decision on the Defence Motion on Jurisdiction, Prosecutor v. Dusko Tadic a/k/a "Dule", Case no. IT-94-1-T, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of
Articles 2 and 3 of the Statute of the International Tribunal read as follows: Article 2: Grave breaches of the Geneva Conventions of 1949 The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) willful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

Article 3: Violations of the laws or customs of war The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

The "Updated Siracusa Draft" of 31 January 1996, suggests modification of Article 20(d) to include the following language to define crimes against humanity: (d) for the following crimes against humanity when committed as part of a widespread or systematic attack against any civilian population on national, political, cultural, ethnic, racial or religious grounds: I. Extermination; ii. Murder, including killings done by knowingly creating conditions likely to cause death; iii. Enslavement, including slavery-related practices; iv. Deportation; v. Imprisonment in violation of international norms on the prohibition of arbitrary arrest and detention; vi. Torture; vii. Rape and other serious assaults of a sexual nature; viii. Prosecution including laws and practices targeting such groups or their members in ways that seriously and adversely affect their material well-being, their welfare or ability to maintain their group identity; ix. Other
inhumane acts, including but not limited to serious attacks upon physical integrity, personal safety, and individual dignity, such as castration or other mutilation, forced impregnation or forced carrying to term of fetuses that are the product of forced impregnation, and unlawful human experimentation.


9 Id.
