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QUESTIONS AND ANSWERS ON THE INTERNATIONAL CRIMINAL COURT

“The International Criminal Court promises, at last, to supply what has for so long been the missing link in the international legal system: a permanent court to judge the crimes of gravest concern to the international community as a whole — genocide, crimes against humanity and war crimes.”

- Kofi Annan, United Nations Secretary-General

1. What is the International Criminal Court?

The International Criminal Court (ICC) is the first permanent, independent court capable of investigating and bringing to justice individuals who commit the most serious violations of international humanitarian law, namely war crimes, crimes against humanity, genocide and, once defined, aggression. The Court is seated in The Hague, The Netherlands and was established in accordance with the Rome Statute, the ICC's founding treaty, on 1 July 2002. To date, the ICC treaty has been ratified by 100 States, with representation from every region of the world.

The legal framework of the Court was established at a United Nations-sponsored conference in Rome involving representatives of 160 countries. Following five weeks of the intense deliberations, the Rome Statute of the International Criminal Court was adopted by an overwhelming majority on 17 July 1998. By the established deadline of 31 December 2000, 139 countries had signed the Rome Statute. In a record four years, the ICC treaty was ratified by the required 60 States on 11 April 2002, and the treaty entered into force and became law on 1 July 2002.

2. Why is the International Criminal Court needed?

Over the past century, we have witnessed the worst violence in the history of humankind. In the past 50 years alone, more than 250 conflicts have erupted around the world; more than 86 million civilians, mostly women and children, died in these conflicts; and over 170 million people were stripped of their rights, property and dignity. Most of these victims have been simply forgotten and few perpetrators have been brought to justice.

The United Nations General Assembly first recognized the need for a permanent mechanism to prosecute mass murderers and war criminals in 1948, following the Nuremberg and Tokyo trials after World War II. Since that time, numerous laws, treaties, conventions and protocols have defined and forbidden everything from war crimes to poison gas and chemical weapons, yet no system was proposed to enforce these norms by holding *individuals* criminally responsible for the most serious violations of international law until the adoption of the Rome Statute of the International Criminal Court in 1998. In addition to bringing justice to victims of such atrocities, the ICC hopes to serve as a deterrent to the future Hitlers, Milosevics and Pol Pots, bringing an end to the culture of impunity.

3. What has the ICC achieved to date?

Since the establishment of the Court in July 2002, the ICC has set up its offices in The Hague and has grown from a three-person staff to more than 250 personnel working in the Court's three principal organs: Office of the Prosecutor, Presidency/Judges and Registry. All senior officials of the Court – the Prosecutor, Judges and Registrar – have been elected or appointed.

As of December 2005, the Office of the Prosecutor, headed by Chief Prosecutor Luis Moreno Ocampo, has initiated investigations in the Democratic Republic of Congo and Uganda, at the request of those

The Coalition for the International Criminal Court is a global network of over 2,000 civil society organizations supporting a fair, effective and independent International Criminal Court.

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States, and another investigation in Sudan following a UN Security Council referral of the situation in Darfur, Sudan to the ICC on 31 March 2005. On 13 October 2005, arrest warrants for five senior leaders of the Lord's Resistance Army (LRA) in Uganda, including LRA leader Joseph Kony, were unsealed by the Court. The ICC Prosecutor's Office is also currently analyzing eight situations on four continents including the Central African Republic and Cote d'Ivoire.

The 18 Judges of the ICC, under the Presidency of Judge Philippe Kirsch, have adopted the Regulations of the Court; and the Registry, or administrative arm of the Court, headed by Bruno Cathala, has been involved in the many practical and policy decisions involved in setting up a new international judicial institution.

4. How does the ICC differ from the International Court of Justice and the ad hoc tribunals for former Yugoslavia and Rwanda?

The International Court of Justice (ICJ), the principal judicial organ of the United Nations, was designed to deal primarily with disputes between States. It has no jurisdiction over matters involving individual criminal responsibility.

The two ad hoc tribunals for the former Yugoslavia and Rwanda differ from the International Criminal Court in geographic jurisdiction and temporal scope. Created by the UN Security Council, the ad hoc tribunals are mandated to deal only with crimes committed in those regions during specific periods of time.

In contrast, the International Criminal Court is a permanent and independent institution capable of addressing the crimes identified in the Rome Statute which have been committed by individuals since 1 July 2002.

5. What crimes does the ICC address?

The Court has jurisdiction over the most serious crimes committed by individuals: genocide, crimes against humanity, war crimes and once defined, aggression. The first three crimes are carefully defined in the Statute to avoid ambiguity or vagueness. The crime of aggression will be dealt with by the Court when the Assembly of States Parties has agreed on the definition, elements and conditions under which the Court will exercise jurisdiction; this cannot happen until the Review Conference which will be held in 2009, seven years after entry into force of the Rome Statute. It is important to note that the Rome Statute does not identify any new categories of crimes, but rather reflects existing conventional and customary international law.

Genocide covers those specifically listed prohibited acts (e.g. killing, causing serious harm) committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

Crimes against humanity cover those specifically listed prohibited acts when committed as part of a widespread or systematic attack directed against any civilian population. Such acts include murder, extermination, rape, sexual slavery, the enforced disappearance of persons and the crime of apartheid, among others.

Genocide and crimes against humanity are punishable irrespective of whether they are committed in time of "peace" or of war.

War crimes cover grave breaches of the Geneva Conventions of 1949 and other serious violations of the laws of war, committed on a large scale in international as well as internal armed conflicts. The inclusion of internal conflicts is consistent with customary international law and reflects the reality that in the past 50 years, the most serious violations of human rights have occurred not in international conflicts but within States.

The definitions of the crimes in the Statute are the product of years of hard work involving many delegations and their experts. The judges of the Court are required to strictly construe the definitions and are not to extend them by analogy. The aim is to establish objective international standards, leaving no room for arbitrary decisions. In cases of ambiguity, the definitions are to be interpreted in favor of the suspect or accused.

6. When does the ICC have jurisdiction over crimes?

Since the entry into force of the Rome Statute on 1 July 2002, the ICC has jurisdiction over crimes committed by nationals of States that have ratified the ICC statute, as well as over crimes committed on the territory of States that have ratified the treaty. The ICC is designed to *complement* existing national judicial systems, however, the Court can exercise its jurisdiction if national courts are unwilling or unable to investigate or prosecute such crimes. Therefore, the Court also serves as a catalyst to States' investigating and prosecuting such crimes committed either within their territories or by their nationals. The ICC's jurisdiction is not retroactive, but its very existence serves as a deterrent to future architects of genocide, war crimes and crimes against humanity by sending a strong signal that never again will such acts be met with impunity.

Matters can be referred to the Court by a State Party to the Rome Statute, by the Prosecutor, and by the UN Security Council. The Court may then exercise its jurisdiction over the matter if either the State in whose territory the crime was committed, or the State of the nationality of the accused, is a party to the Statute. Non-States Parties may accept the Court's jurisdiction on an ad hoc basis. When a matter is referred by the Security Council, the Court will have jurisdiction regardless of whether the State concerned is a party to the ICC treaty.

7. Can a citizen from a country that is not party to the Rome Statute be prosecuted?

Yes, citizens of any country fall within the jurisdiction of the Court under one of the following conditions: 1) the country where the alleged crimes occurred is a State Party to the ICC treaty; 2) that country accepted the ICC's jurisdiction on an ad hoc basis; or 3) the UN Security Council referred the situation to the Court. However, under the principle of complementarity, the Court will act *only* if the national court of the accused does not initiate investigations and prosecution, if appropriate.

8. Can high-level government officials or military commanders be prosecuted by the ICC?

Yes. Criminal responsibility will be applied equally to all persons without distinction as to whether he or she is a Head of State or government, a member of a government or parliament, an elected representative or a government official. It will also not be possible for such official capacity to constitute a ground for reduction of sentence.

The fact that a crime has been committed by a person on the orders of a superior will not normally relieve that person of criminal responsibility. A military commander may be held criminally responsible for crimes committed by forces under his/her command and control. Criminal responsibility may also arise when a military commander knew or should have known that the forces were committing or were about to commit such crimes, but nevertheless failed to prevent or repress their commission.

In addition, civilians effectively acting as military commanders may be held criminally responsible when they knew of or consciously disregarded information clearly indicating that crimes were being or were about to be committed.

9. Does the ICC violate international law by having jurisdiction over members of national forces or of peacekeeping missions?

Under existing international law, the State in whose territory genocide, war crimes or crimes against humanity have allegedly been committed, or whose nationals are victims of such crimes, has the right to and is often legally obligated to investigate and prosecute persons accused of committing such crimes. The ICC Statute does not violate any principle of treaty law and has not created any entitlements or legal obligations not already existing under international law. The cooperation of a non-State Party is purely voluntary and no legal obligation is imposed on a non-State Party.

The ICC Statute provides for special protection of peacekeepers by including among its punishable crimes intentional attacks against personnel, installations, material units or vehicles involved in humanitarian assistance or peacekeeping missions. Such violations constitute war crimes or crimes against humanity under certain circumstances. The Statute does not otherwise affect existing arrangements with respect to UN

peacekeeping missions since troop-contributing countries retain criminal jurisdiction over their members of such missions.

10. Does the International Criminal Court infringe on the jurisdiction of national courts?

No. The International Criminal Court will *complement*, not supercede, the jurisdiction of national courts. National courts will continue to have priority in investigating and prosecuting crimes within their jurisdiction. Under the principle of complementarity, the ICC will act only when national courts are unable or unwilling to exercise jurisdiction. If a national court is willing and able to exercise its jurisdiction, the ICC cannot intervene and no nationals of that State can be brought before it. The grounds for admitting a case to the Court are specified in the Statute and the circumstances that govern inability and unwillingness are carefully defined so as to avoid arbitrary decisions. In addition, the accused and interested States, whether they are parties to the Statute or not, may challenge the jurisdiction of the Court or admissibility of the case. They also have a right to appeal any related decision.

11. What role does the UN Security Council have in the Court's work?

The work of the Security Council and the International Criminal Court will continue to complement each other. The Rome Statute recognizes the role of the Security Council in the maintenance of international peace and security. Specifically, the treaty notes that under Chapter VII of the UN Charter, the Security Council may refer a "situation" to the Court when one or more of the crimes covered by the Statute appear to have been committed. This would provide a basis for the Prosecutor to initiate an investigation.

Since the referral of a situation by the Security Council is based on its competence under Chapter VII, which is binding and legally enforceable in all States, the exercise of the ICC's jurisdiction becomes part of the Council's enforcement measures. Its jurisdiction becomes binding even when neither the State in whose territory crimes have been committed nor the State of nationality of the accused is a party to the Statute. In those instances, the International Criminal Court, through investigation and prosecution, helps the Security Council in maintaining peace and security. This jurisdiction, resulting from a Security Council referral, enhances the role of the ICC in enforcing international criminal law. At the same time, the Court's jurisdiction is expanded to cover even non-States Parties, in these instances.

Furthermore, the Security Council, by adoption of a resolution under Chapter VII of the UN Charter, may request that the ICC defer an investigation or prosecution for a renewable period of 12 months. This deferral is to ensure that the Security Council's peace-making efforts will not be hindered by the Court's investigations or prosecutions.

In order to ensure the independence of the Court, a Security Council referral is only one of three ways the ICC can obtain jurisdiction: a matter can also be initiated by a State Party to the treaty or by an independent Prosecutor.

12. How does the Rome Statute ensure the independence of the Prosecutor?

While the Prosecutor may initiate investigations when sufficient evidence points to serious violations, detailed provisions are included in the Rome Statute to ensure proper checks and balances with respect to this power. In the first place, the Prosecutor must defer to States willing and able to pursue their own investigations. Before initiating an investigation, the Prosecutor is required to submit all supporting materials collected and to obtain permission to proceed from the Pre-Trial Chamber, composed of three judges. The suspect and the States concerned also have the right to challenge the ICC's jurisdiction or the admissibility of the case either prior to or at the commencement of the trial. These measures provide ample opportunity to ensure that the case is substantial and deserves investigation and prosecution by the Court.

Luis Moreno Ocampo of Argentina was elected as the first Prosecutor of the ICC on 21 April 2003 by secret ballot by the Assembly of States Parties – the Court's oversight body made up of all States that have ratified the Rome Statute. He was sworn into office on 16 June 2003 and immediately began his work. The Rome Statute requires that the Prosecutor possess the highest moral character, competence and experience in the prosecution or trial of criminal cases. The Prosecutor will not be allowed to participate in any case in which his or her impartiality may be in doubt. Any question concerning disqualification will be decided by the Court's

Appeals Chamber. The Assembly of States Parties has the power to remove the Prosecutor if he or she is found to have committed serious misconduct or a serious breach of duties.

13. What guarantee is there that suspects will receive due process and a fair trial?

The Rome Statute of the ICC created a truly international criminal justice system as it reflects input from all major legal systems and traditions. The Statute recognizes a full range of rights of the accused, and even extends the standards embodied in major international human rights instruments. It will provide impartial and qualified judges, due process and fair trials to individuals accused of crimes falling within the jurisdiction of the Court.

Additional protections of the rights of the accused include the screening mechanisms by the investigative and prosecutorial organ and the judicial organ of the Court, which are designed to protect innocent individuals from frivolous, vexatious or politically motivated criminal investigations or prosecutions. In addition, the persons who are entrusted with making decisions relating to the initiation of a criminal investigation or trial must possess the highest qualifications of competence, independence and impartiality.

Furthermore, the ICC Statute also contains elaborate provisions (over 60 articles) on criminal law principles, investigation, prosecution, trial, cooperation and judicial assistance and enforcement. These provisions required the harmonization of divergent and sometimes diametrically opposed national criminal laws and procedures. That agreement was reached on these highly technical matters represents a major achievement in international law.

14. What guarantee is there that judges will be qualified and impartial? What safeguards are included to prevent outside political influence on the Court?

The Rome Statute requires that ICC judges possess the highest professional competence, must be persons of high moral character, impartiality and integrity and must possess the qualifications required in their respective States for appointment to the highest judicial offices or to the ICJ. They must also be independent in the performance of their functions, and cannot engage in any activity that is likely to interfere with their judicial functions or to affect confidence in their independence.

Each judge must have competence in criminal law and procedure, and the necessary relevant experience in criminal proceedings, or competence in relevant areas of international law such as international humanitarian law and human rights law. To ensure that the composition of the bench would be truly balanced and international, the election of judges took into account the need to represent the principal legal systems of the world and ensured the inclusion of judges with equitable geographical representation, a fair representation of female and male judges, and the inclusion of judges with expertise on violence against women or children. No two judges are nationals of the same State and judges are elected for three-, six-, or nine-year terms.

A judge may be removed from office if he or she is found to have committed serious misconduct or a serious breach of his or her duties. All these safeguards are intended to ensure independence, integrity and competence and to prevent outside political influence.

The ICC is comprised of 18 judges, who were sworn in on 11 March 2003. Of these, seven judges are women, a statistic which represents the highest number of women at any international judicial institution.

15. To whom is the ICC accountable? And how will this affect its independence?

The Assembly of States Parties (ASP) – comprised of all States that have ratified the treaty as full participants and those States that have signed the treaty as observers – oversees the work of the Court; provides management oversight regarding the administration of the Court for the President, the Prosecutor and the Registrar; decides on the budget for the Court; decides whether to alter the number of judges; and considers any questions relating to non-cooperation of States with the Court. The ASP cannot interfere with the judicial functions of the Court. Any disputes concerning the Court's judicial functions are to be settled by a decision of the Court itself.

To date, 94 States are members of the Assembly of States Parties, representing many of the world's democracies and all regions of the world.

16. How strong has the support been for the creation of the International Criminal Court?

One hundred and sixty States participated in the United Nations Diplomatic Conference (held in Rome from 15 June to 17 July 1998), which led to the adoption of the Rome Statute of the International Criminal Court. The draft text submitted to the Diplomatic Conference was fraught with competing options, with over 1,400 brackets indicating disagreement on the text. Through working groups, informal negotiations and open debates, a delicately balanced text emerged and a generally agreed solution was found for the many politically sensitive and legally complex issues.

The Statute and the Final Act were put forward as a complete "package" for adoption. This package was the product of intense negotiations and judicious compromises designed to reach widespread agreement. The most dissidence came from India and the United States, which both tried to amend the final package. In each case, a "no-action motion" — a procedural device for not considering these amendments — was adopted by an overwhelming majority. The package was thus maintained and then agreed on in its entirety by those delegations in attendance on the final day, by a vote of 120 in favor and 7 against, with 21 abstentions.

Article 125 of the Rome Statute called for the Statute to remain open for signature at the United Nations headquarters until 31 December 2000. On 31 December 2000, the United States, Iran and Israel were the last to sign the Rome Statute, bringing the total number of signatures to 139¹. Although many predicted that it would take decades to obtain the 60 ratifications needed for the Statute to enter into force and the Court to be created, this landmark was reached on 11 April 2002, within four years of the adoption of the treaty. Currently, 100 countries from every region of the world have ratified the Rome Statute.

17. Why did some States vote against the Statute?

Seven States voted against the Statute in an unrecorded vote. Three States – China, USA and Israel – stated their reasons for voting against the treaty. China indicated its view that the power given to the Pre-Trial Chamber to check the Prosecutor's initiative was not sufficient and that the adoption of the Statute should have been by consensus, not by a vote. The principal objection of the United States was over the application of the Court's jurisdiction to non-States Parties. The US also stated that the Statute must recognize the role of the Security Council in determining an act of aggression. Israel stated that it failed to comprehend why the act of transferring populations into an occupied territory was included in the list of war crimes.

18. Will the ICC prosecute crimes of aggression, terrorism and drug trafficking?

Support was widespread from both States and the NGO community at the Rome Conference for the inclusion of aggression as a crime under the ICC's jurisdiction. However, there was not time to reach a definition of aggression that was acceptable to all. As a result, the Statute includes this crime but provides that the Court may not exercise jurisdiction over the crime of aggression until agreement is reached by States Parties at the Review Conference on the definition, elements, and conditions under which the Court may exercise jurisdiction with respect to this crime.

Under the United Nations Charter, the Security Council has competence to determine whether an act of aggression has been committed. It is provided in the Statute that the final text on the crime of aggression must be consistent with the relevant provisions of the UN Charter.

¹ On 6 May 2002, the Bush administration announced in a foreign policy address and letter to UN Secretary-General Kofi Annan that it did not recognize the United States' signature of the Rome Statute, (which occurred during the Clinton presidency) and had no intention to become party to the Statute. The signature of the United States now appears in UN records marked with an asterisk to this effect.

Although there was also considerable interest in including terrorism and drug crimes in the ICC's mandate, countries could not agree in Rome on a definition of terrorism, and some countries felt investigation of drug offences would be beyond the Court's resources. A consensus resolution was passed recommending that States Parties consider inclusion of such crimes at a future review conference.

19. Will the ICC prosecute sexual crimes? How will the ICC address the needs of victims and witnesses?

Yes. The Statute includes crimes of sexual violence such as rape, sexual slavery, enforced prostitution and forced pregnancy as crimes against humanity when they are committed as part of a widespread or systematic attack directed against a civilian population. They are also considered war crimes when committed in either international or internal armed conflict.

In Rwanda and the former Yugoslavia, rape and gender-based violence were widely used as weapons to inflict terror and to humiliate and degrade the women of a particular ethnic group as well as the entire community to which they belonged. In prosecuting cases of rape and other gender-based violations, the ad hoc tribunals found that victims were often afraid to come forward with their stories and even feared being victimized by the process.

To help victims and witnesses face the judicial process, the International Criminal Court has created a Victims and Witnesses Unit within the Registry, to provide protective measures and security arrangements, counseling and other assistance for witnesses and victims, while fully respecting the rights of the accused. The Court must also take appropriate measures to protect the privacy, the dignity, the physical and psychological well-being and the security of victims and witnesses, especially when the crimes involve sexual or gender violence.

20. Will victims be entitled to compensation?

The ICC has established a Victims Trust Fund to provide reparations to victims and their families, including restitution, compensation and rehabilitation. The Court is empowered to determine the scope and extent of any damage, loss and injury to victims, and to order a convicted person to make specific reparation. Sources for the Fund may include money and other property collected through fines and forfeiture imposed by the Court. States and individuals are encouraged to contribute to the Victims Trust Fund, the first ever reparations mechanism set up by an international tribunal.

21. How will persons indicted be brought before the ICC?

All States Parties to the Statute have to commit themselves to comply with ICC orders and requests. A failure to fulfill 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 established by treaty – such as the International Court of Justice and the European Court of Human Rights – and the political cost of refusing to cooperate is usually too high to permit defiance forever. The handful of cases where states fail to comply is front page news.

Some countries are prevented by their laws from extraditing an accused war criminal to another country for prosecution. However, during the ICC negotiations, many countries stated that their laws would not prevent them from delivering a suspect to an international court as it would be considered a surrender rather than an extradition. Other countries indicated they would change their laws.

22. What sentence can the ICC impose? Can the ICC impose the death penalty?

Consistent with international human rights standards, the International Criminal Court has no competence to impose a death penalty. The Court can impose lengthy terms of imprisonment of up to 30 years or life imprisonment when so justified by the gravity of the case. The Court may, in addition, order a fine, forfeiture of proceeds, property or assets derived from the committed crime.

23. What obligations will States that do not ratify the treaty have towards the Court?

While there is no expressed general obligation in the Rome Statute requiring non-States Parties to cooperate, all States – whether parties to the ICC treaty or not – are obliged under existing international law to bring to



justice those responsible for genocide, crimes against humanity and war crimes. If States are incapable of this, they are expected to extradite suspected individuals to a state willing and able to conduct a fair trial. 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.

The ICC complements existing national judicial systems and while it will step in only if national courts are unwilling or unable to investigate or prosecute such crimes, the Court may invite national courts to cooperate under an ad hoc agreement. If a State chooses to conclude such an agreement, it would be bound to comply with requests for assistance. Additionally, if the Security Council refers a situation to the ICC that threatens international peace and security, it can use the powers under Chapter VII of the UN Charter to compel non-States Parties to cooperate with the ICC's requests for assistance.

The information contained in this document is derived from papers by the United Nations Department of Public Information, Amnesty International and the Lawyers Committee for Human Rights (now Human Rights First). It is the product of the CICC Secretariat and does not necessarily represent the views of these organizations.