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Joint Standing Committee on Treaties

**Inquiry into the Statute of the
International Criminal Court**

SUBMISSION OF HUMAN RIGHTS WATCH

International importance of the ICC

1. Almost 50 years have passed since the members of the UN first contemplated creating a permanent international criminal court to prosecute those who commit the kind of heinous crimes that were the subject of the Nuremberg and Tokyo trials. In those 50 years, the world witnessed seemingly endless atrocities, committed largely against civilian populations, by people who were rarely, if ever, held accountable for their acts.

2. While the International Court of Justice (the World Court) has been able to settle disputes between states since its creation by the UN Charter, the International Criminal Court (ICC) will be the first permanent international criminal court able to hold individuals accountable for their criminal acts. Importantly, the ICC is not an organ of the UN but a creation of a multilateral treaty, the Rome Statute, adopted on 17 July 1998.

3. The ICC has the potential to hold accountable those who commit the crimes of greatest international concern - genocide, crimes against humanity and war crimes. When states fail to exercise their primary responsibility to investigate and prosecute these crimes, whether because of genuine inability or in a cynical effort to shield the perpetrator from justice, the international community will be able to look to the ICC to ensure that justice is done.

4. Human Rights Watch believes that ensuring that the perpetrators of these most serious crimes are brought to justice is a vitally important end in itself. However, justice for these crimes can also have a far-reaching impact. For example, the ongoing conflicts and commission of atrocities against civilians in Sierra Leone and the Great Lakes region of Africa prove that there can be no real and lasting peace without genuine efforts to bring those responsible for gross violations before an impartial judicial organ. By investigating and prosecuting those cases of genocide, war crimes and crimes against humanity that states are

unable or unwilling to pursue, the ICC will play an important role in promoting peace and human security in those parts of the world where these terrible crimes occur. Hopefully it will also be a deterrent to the future commission of such crimes. His Excellency, Judge Jorda, President of the International Criminal Tribunal for the former Yugoslavia, made this point in his recent address to the UN General Assembly when presenting the Tribunal's annual report for the year 2000. He said: "[H]istory has taught us that so long as the duty of rendering justice has not been truly discharged, the spectre of war can re-emerge, sometimes even several generations later."

National Interest in the ICC

5. Consistent with its national interest in promoting the rule of law and building institutions that promote fundamental human rights and humanitarian principles regionally and internationally, Australia should ratify the Rome Statute as soon as possible.

6. Human Rights Watch is aware that Australia has always supported the two ad hoc tribunals for the former Yugoslavia and Rwanda and has played a key role in trying to bring effective and impartial justice to the people of Cambodia. Australia has consistently demonstrated its support for the rule of law in the international arena and the importance of justice to lasting peace, most recently in its intervention in East Timor. Ratification of the Rome Statute for the ICC is wholly in keeping with Australia's interest in practical measures that can be taken to protect people from the worst human rights abuses, to hold those who commit such abuses to account and to extend the rule of law.

7. Ratification of the Rome Statute will also complement Australia's ratification of other treaties, in particular the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the 1949 Geneva Conventions and their Protocols. The ICC will provide a judicial mechanism to pursue those who commit the acts proscribed by these conventions as well as other crimes of greatest international concern.

8. Ratification will also allow Australia, as a state party, to continue to work for an efficient and independent ICC. As a member of the Assembly of States Parties, Australia will be able to nominate and participate in the election of the Court's judges and prosecutor. It will also be able, amongst other things, to consider and decide the budget for the Court, to oversee aspects of the administration of the Court, and to consider any question of non-cooperation with the Court by a state party.

Relationship between national courts and the ICC

9. The main impetus for creating an international criminal court was to redress the fact that perpetrators of the most heinous crimes rarely face justice as most states routinely fail to investigate and prosecute them. Nonetheless, delegates to the Rome Conference strongly believed that states have, and should retain, the primary duty and right to prosecute those who commit genocide, war crimes and crimes against humanity.

10. To balance these competing objectives, the regime for admissibility and jurisdiction in the Rome Statute is based on the notion that the Court's jurisdiction is complementary to

national jurisdictions. This ‘principle of complementarity’, as it is known, is stated plainly in the Preamble to the Rome Statute and is evident throughout the Rome Statute, in every aspect of the process for investigation and prosecution of cases by the ICC. The complementarity principle preserves the primary right and duty of states to prosecute these crimes while allowing the ICC to step in, albeit as a last resort, to prevent a person accused of having committed genocide, war crimes or crimes against humanity from escaping justice altogether.

11. The circumstances in which this court of last resort can proceed with an investigation or prosecution are quite limited. Article 17 of the Rome Statute provides that the Court can act if the state that would ordinarily exercise jurisdiction over the case is genuinely unable to proceed, perhaps due to the collapse of its judicial system, or when the state has tried to shield the persons concerned from justice, that is when it is “unwilling” to proceed. Bona fide efforts to discover the truth and to hold those responsible for any acts of genocide, crimes against humanity or war crimes to account will bar the ICC from proceeding.

12. The complementarity regime protects the sovereign right of each state to investigate crimes and decide whether to prosecute or not while filling the gap left by the repeated failure of States to proceed against individuals for the world’s worst crimes. It is not a replacement of state jurisdiction or a supranational watchdog judging domestic proceedings in different countries. It is not empowered for such a role and nor will it have the resources or inclination to take on such a role.

13. The implementation of the Rome Statute into domestic legislation provides states with the opportunity to strengthen their ability to assert jurisdiction. By incorporating all the ICC crimes into domestic law, as I understand Australia proposes to do, along with ensuring that national procedures meet international standards for due process, including those set out in the Rome Statute, Australia will be in a position to assert its jurisdiction over a person in relation to any of the ICC crimes. Once Australia’s implementing legislation is in place, and provided that it is comprehensive, the likelihood of the ICC ever asserting jurisdiction in a case over which Australia would ordinarily exercise jurisdiction, becomes extremely remote. Australia would have the necessary laws and procedures in place to enable it to carry out a bona fide and fair investigation and prosecution.

Due process guarantees in the Rome Statute

14. The Rome Statute guarantees the highest international standards for fair trials and the protection of the rights of accused persons. The fair trial guarantees in the Rome Statute are comprehensive and extensive. Drawing consciously on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, delegates to the Rome Conference drafted a detailed list of the rights an accused person shall enjoy under the Statute. In addition, the Rome Statute provides separately for the rights that suspects shall enjoy under the Statute. Article 66 provides for the presumption of innocence and the standard of proof that the prosecutor bears, namely beyond reasonable doubt. Article 67 provides for the rights of accused persons including the right to know the charges against the person, the right to be tried without undue delay, the right to counsel, the right to present evidence, including witness testimony and the right to remain silent without that silence being a consideration in the determination of guilt or innocence. Article 55 provides the

rights to be accorded to suspects. These include, the right not to be compelled to incriminate oneself, not to be subjected to any form of duress or coercion or torture or other cruel, inhuman or degrading treatment and to be questioned in the presence of counsel.

Ratifications and signatures

15. As of 27 November 2000, 24 countries have ratified the Rome Statute. From the Asia-Pacific region New Zealand and Fiji have ratified. From Human Rights Watch's work around the world, it is apparent that there is considerable commitment to ratification across the globe, including in the Asia-Pacific region. In many nations, the internal processes for ratification are underway. As the Committee is aware, ratification can be a lengthy process and in some cases, implementing legislation must be adopted prior to ratification. Naturally, where this is the case, ratification takes longer to complete. The willingness of states to take the necessary steps, including, in some cases, undertaking constitutional amendments or adopting a more streamlined approach to ratification than usual, reveals deep and widespread support for the principles that underpin the Rome Statute and for the early establishment of the Court. Human Rights Watch believes that the 60 ratifications needed for entry into force will be obtained by June 2002, five years from the adoption of the Rome Statute.

16. In addition to the 24 ratifications, there are now 117 signatories. Signatories from the Asia-Pacific region are Samoa, Bangladesh, Solomon Islands, Cambodia, Republic of Korea and the Marshall Islands. In addition, three of the five permanent members of the Security Council have signed the Rome Statute, France, Russian Federation and the United Kingdom. France has also ratified the Statute and the UK is in the process of finalizing its implementation Bill after a process of public consultation. The UK has committed itself to ratifying once its implementing legislation is in place. This is expected to take place in the New Year at the latest.

17. Human Rights Watch welcomes Australia's decision to give serious consideration to ratifying the Rome Statute. Given Australia's leading and constructive role throughout the negotiating process and its commitment to the principles underlying the Rome Statute, it would be appropriate for Australia to ratify. Further, given the regime provided for in the Rome Statute, in particular the governing principle of complementarity and the comprehensive due process guarantees in the Rome Statute, ratification by Australia will not result in a diminution of its sovereign right and duty to prosecute the crimes of most serious concern to the international community. Human Rights Watch looks forward to Australia's ratification of the Rome Statute of the ICC in the near future.

About Human Rights Watch

Human Rights Watch conducts regular, systematic investigations of human rights abuses in some seventy countries around the world. We are the largest U.S.-based international human rights organization, having served our cause for over twenty years. We are widely recognized for timely and accurate investigations and thoughtful and informed policy recommendations. We address the human rights practices of governments of all political stripes, geographical alignments, and ethnic and religious persuasions. Human Rights Watch defends freedom of thought and expression, due process and equal protection of the law, and a vigorous civil society; we document and denounce murders, disappearances, torture, arbitrary imprisonment, discrimination and other abuses of internationally recognized human rights. Our goal is to hold governments accountable if they transgress the rights of their people. We publish scores of reports on our findings each year, and mount campaigns to put an end to the abusive practices we have exposed.

Human Rights Watch began in 1978 with the founding of its European and Central Asia Division (then known as Helsinki Watch). Today it includes divisions covering Africa, the Americas, Asia and the Middle East. In addition, it includes three thematic divisions on arms, children's rights and women's rights. It maintains offices in New York, Washington, Los Angeles, London, Brussels, Moscow, Dushanabe and Bangkok. Human Rights Watch is an independent, non-governmental organisation supported by contributions from individuals and foundations worldwide. It accepts no government funds, directly or indirectly.

Human Rights Watch is a staunch advocate of global justice. We believe fervently in the importance of giving victims of human rights abuses the opportunity to seek redress for their suffering and that abusers must be held accountable for such heinous acts as genocide, war crimes, torture and other crimes against humanity. We believe that only by bringing those who commit these heinous crimes to justice can victims heal and lasting peace be attained in the communities where these violations occur. For this reason, we strongly support the earliest possible establishment of the International Criminal Court (ICC), created by treaty at the Rome Diplomatic Conference in July 1998.

In the wake of horrific crimes committed in the conflicts in the former Yugoslavia and Rwanda in the past decade, and in recognition of the need to establish a broader and more permanent judicial system than the temporary criminal tribunals created for those countries, Human Rights Watch played a major role in spearheading the campaign to create the International Criminal Court. Prior to and during the July 1998 Rome conference where the ICC treaty was adopted, we prepared analyses of the developments in negotiations and the issues at stake to raise awareness amongst the international media and the general public. We also conducted extensive legal research and drafted commentary on how to create the most effective court while maintaining its impartiality and independence. We worked very closely with government delegations to achieve these goals and the ultimate adoption of the Rome Statute of the ICC.

Since the Rome Diplomatic Conference, Human Rights Watch has continued to play a high profile role at the ongoing meetings of the Preparatory Commission for the ICC which recently adopted by consensus the Rules of Procedure and Evidence for the Court and a paper elaborating the elements of each of the crimes over which the ICC will exercise jurisdiction. We also have a worldwide campaign for the ratification of the Rome Statute and its early entry into force. Sixty states must ratify the Rome Statute for it to enter into force and before the Court can begin its work. As part of this campaign, we regularly travel to different parts of the world to meet with parliamentarians, government members, senior officials and local groups to raise awareness of the ICC and to assist with the process of ratification and domestic implementation of the Rome Statute.

Our ICC ratification strategy also entails pressing intergovernmental and regional organizations, such as the European Union and the Commonwealth to raise awareness of the importance of the ICC, to make it a policy priority, to offer technical assistance where needed and to urge individual states to assist each other, on a bilateral basis, with ratification and the development of the domestic legislation necessary to implement the Rome Statute.