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INTERNATIONAL COMMITTEE OF THE RED CROSS: STATEMENT OF 8 JULY  
RELATING TO THE BUREAU DISCUSSION PAPER (A/CONF.183/C.1/L.53)

The comments of the International Committee of the Red Cross (ICRC) herein are limited to the part of article 5 dealing with war crimes and are given by ICRC in its capacity as an expert of international humanitarian law which has the task of ensuring that existing law is not weakened.

**1. With regard to the possible threshold for war crimes,** ICRC has already indicated that no such threshold exists in humanitarian law: every serious violation of the law is a war crime which States have the obligation to repress. Nevertheless, if there is a fear that the Court might be overloaded with cases, ICRC understands the wish of a number of nations to accept option 2 of the draft, on the understanding that isolated cases will be prosecuted at the national level.

**2. On the list of war crimes in section B, we would like to raise several points:**

- Paragraph (b): The addition of the words "clearly" and "overall" in this provision relating to proportionality in attacks must be understood as not changing existing law. The word "overall" could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974-1977 Diplomatic Conference that led to Additional Protocol I to the 1949 Geneva Conventions and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of Additional Protocol I, the inclusion of the word "overall" is redundant;

GE.98-72161 (E)

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- Paragraph (c): The purpose of this rule is to prohibit the bombardment of towns that are immediately open to occupation and it is hoped that the addition of the words "and are not military objectives" does not change this customary rule;

- Paragraph (e): This rule should read "making improper use ...". As far as emblems are concerned, the notion of perfidy only relates to the misuse of those to which humanitarian law gives a special protection and which may not be attacked. Such protection is given to persons who are not, or no longer taking part in hostilities. Humanitarian law gives no special protection to military uniforms, nor to United Nations uniforms when used by combatants. It is therefore inappropriate to use the word "perfidiously" in this context;

- Paragraph (o): ICRC expressed its preference of option 3 as this accurately reflects existing international law. However, if a list is chosen, subparagraph (vi) becomes of extreme importance as it is essential that the use of other weapons prohibited by international law be added to the list. If option 1 is chosen, the chapeau must include the words "or which are inherently indiscriminate" which reflects a fundamental rule of humanitarian law, recently reaffirmed by the International Court of Justice, and which led to the prohibition of some of the weapons in this list.

### **3. War crimes committed in non-international armed conflicts**

ICRC considers it essential that these be included in the Statute and urges States to consider carefully the actual acts that are criminal, without reference to which treaty these may appear in. In particular, whether certain States are party or not to Additional Protocol II can be of no importance to this list as it must include actions which are violations of customary law and which are generally recognized by the international community as prohibited heinous acts.

Several States have mentioned certain concerns, which can be met. First, with regard to the threshold, i.e. which situations amount to armed conflicts and which fall below this threshold, this is relevant for the implementation of article 3 common to the Geneva Conventions, to which 188 States are party. It is generally understood that for a situation to be an armed conflict it needs to involve armed confrontation of a military nature between two or more armed groups. Acts such as riots and demonstrations do not amount to armed conflicts.

Secondly, a concern was indicated relating to the primary responsibility of the Government of a State to deal with these situations and with any violations of international humanitarian law. Of this there is no doubt: ICRC has stressed time and again the importance of complementarity between national jurisdictions and the International Criminal Court, so that the latter will only have a role to play if the former does not do so.

### **4. Article V.**

This is of critical importance. It is essential that the Statute of the Court indicate that it in no way affects existing international humanitarian

law nor impede its development. The list of war crimes contained in the current draft Statute is incomplete owing to the necessity to attain an agreement in time. Mention may be made, for example, of the use of prohibited weapons, indiscriminate attacks, the starvation of civilians as a method of warfare and the 130-year-old prohibition of the use of bullets that explode in the human body (Declaration of St. Petersburg, 1868) in armed conflicts. The fact that a certain rule is not included under the jurisdiction of the Court can in no way mean that it does not reflect serious violations under international customary law.

#### **5. Definitional elements of the crimes**

If such a document is drafted, it is of imperative importance that it be done with extreme care. A great deal of existing law is to be found in detailed treaty provisions and in both international and national case law that interprets international humanitarian law provisions. Any inaccuracy could create the danger of such a document amounting to unintended international legislation rather than a reflection of existing law. The experience of ICRC in its Advisory Service work (which helps governments incorporate humanitarian law into their domestic legislation) is that national legal systems, concepts and vocabulary vary widely. Care should be taken, therefore, in this international document intended for the Court, to avoid approaching such elements from a primarily domestic law perspective but rather to concentrate on international law and practice.

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