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Non-Governmental Organization Action Alert (No. 3) February 1998

I. ESTABLISHING AN EFFECTIVE INTERNATIONAL CRIMINAL COURT

As we near the end of the most violent century in human history, we have a unique opportunity to help end impunity for the most serious international crimes. The United Nations General Assembly has set June 15, 1998 as the date for the commencement of the Diplomatic Conference in Rome to create the International Criminal Court (ICC). The Court will investigate and prosecute those accused of genocide, crimes against humanity and serious war crimes where national courts are either unavailable or ineffective. The impunity currently enjoyed by the architects of this century's worst massacres underscores the urgent need for the ICC. Human Rights Watch believes that the establishment of an effective and independent Court is essential to the enhanced enforcement of human rights.

Since 1996, the Sixth Committee of the U.N. General Assembly has convened five sessions of the Preparatory Committee on the Establishment of an ICC (PrepCom) to negotiate a Draft Statute for the Court. The final PrepCom, scheduled for March 16 - April 3, 1998, will prepare a consolidated text for the Diplomatic Conference. The question now is what kind of court will emerge from the Diplomatic Conference? Will the ICC have the authority and the independence to deliver justice and to punish the most heinous criminals? Or will the ICC be crippled by its dependence on approval by the Security Council and on cooperation by individual governments? Will this historic opportunity to deter the gravest international crimes be squandered on a court that is unable to fulfill the tasks for which it was created?

The progress on the creation of the ICC can be attributed principally to two factors: the commitment of the "like-minded" states and the persistence of non-governmental organizations (NGOs). Consistent with the new model of post-Cold War diplomacy, heralded by the successful campaign to eradicate landmines in 1997, a bloc of small and medium-sized states, the "like-minded" group, have established themselves as the leading force for an effective and independent Court. Among the strongest supporters of the Court are states which have undergone transitions from authoritarian rule and have an intimate understanding of how impunity undermines the rule of law. Already, the like-minded states have won significant gains by thwarting efforts to delay the creation of the ICC and insisting on important language in the definition of war crimes to ensure that the Court can effectively exercise its jurisdiction. On the other hand, a minority of states, including the United States and France, are advocating positions that will subordinate the Court to the Security Council and seriously undermine its effectiveness and credibility.

As the process to create the ICC enters its final and most critical stage, the role played by NGOs will be crucial to ensuring an effective and independent Court. The relevance of the ICC to the daily work of NGOs worldwide cannot be overstated. While the ICC is not a panacea for all human rights abuses, its jurisdiction over crimes against humanity and genocide will possibly extend to the kinds of ethnic conflict and suppression of minorities which are unfortunately so prevalent today. The Court will also have the effect of extending the rule of law and bringing national courts up to the standards of international law. For these reasons, Human Rights Watch believes it is essential for NGOs to make their views known on key issues and lobby their governments to support an effective and independent ICC. NGOs and civil society groups need to hold governments accountable for their positions on the ICC, strengthen the resolve of the like-minded governments to remain committed to a strong ICC, and raise the political stakes for governments who continue to block the creation of an effective and independent Court.

In an effort to stimulate discussion and activism, Human Rights Watch issues Action Alert No. 3 to highlight the key issues which will determine the effectiveness of the Court, to identify the issues to be debated at the upcoming March-April Preparatory Committee meeting, and to outline basic suggestions for NGO efforts.

We look forward to learning your organization's views on the ICC, discussing the outstanding issues with you, and exploring possible joint efforts.

II. ISSUES CRITICAL TO ENSURING AN EFFECTIVE COURT

Human Rights Watch believes that the following principles and mechanisms are essential to a fair and impartial Court:

A. Trigger Mechanism and the Role of the Prosecutor

The current Draft Statute has a restrictive trigger mechanism that limits the Prosecutor to initiating an investigation only when the Security Council refers a situation or a State Party that has accepted the jurisdiction of the Court files a complaint. Unlike the two Ad Hoc Tribunals, the Prosecutor will simply be an executor of the decisions of the Security Council or states. Since states and the Security Council may, for a variety of reasons, be reluctant to bring cases to the ICC, failure to broaden the complaint mechanism will restrict the Court's authority, significantly reduce the number of cases that come before it and allow alleged perpetrators to go free.

The ICC's "trigger mechanism" must be expanded to allow the Prosecutor to initiate an investigation based on his or her own findings, or on information obtained from any source, including individuals and NGOs. The contributions of victims and NGOs will be instrumental in bringing perpetrators to justice.

B. The Role of the Security Council

Although it is essential that the Security Council maintain its primary authority to determine threats

to international peace and security, the exercise of the ICC's jurisdiction cannot be subject to a preliminary approval by this highly-politicized body. The Draft Statute currently prevents the Court from exercising jurisdiction in cases arising in situations being "dealt with" by the Council under its power to maintain international peace and security. The Draft Statute enables Permanent Members to use their veto power to protect potential defendants wherever their countries' interests are involved. This procedure would seriously undermine the Court's independence and credibility.

C. The Relationship of the National Courts to the ICC (Complementarity)

The ICC is intended to be complementary to national criminal justice systems in cases where such trial procedures are unavailable or ineffective. This provision ensures that the ICC does not become a substitute for national courts which have the primary responsibility for bringing the accused to justice. A correct understanding of complementarity and its expression in the Statute is essential if the Court is to be more than a marginal institution.

The Draft Statute holds that a case is "inadmissible" where it is being or has been investigated or prosecuted by a state with jurisdiction, unless there is "inability" or "unwillingness" on the part of that state to "genuinely" carry out such an investigation or prosecution. This sets a high threshold for the Court's jurisdiction and makes it very difficult for the Court to determine admissibility. The Statute should also clarify that, while the relevant states may challenge admissibility, the Court will make the final decision regarding admissibility. No state should be able to subvert the Court by justifying decisions not to cooperate on the basis of a unilateral determination of inadmissibility.

D. Inherent Jurisdiction

The current Draft Statute only gives the Court inherent jurisdiction for genocide. For crimes against humanity and serious war crimes, the prosecutor's ability to launch an investigation will depend on whether a number of states (the state with custody over the accused, the state where the crime took place, and possibly, the state of the accused's nationality) have consented to the Court's jurisdiction over those particular crimes. These elaborate preconditions will result in the piecemeal application of justice and increase the possibilities for delay, obstruction, and selective justice.

To function effectively the Court needs inherent jurisdiction over the core human rights crimes within its jurisdiction, and such jurisdiction ought to be conferred on the Court when the state becomes a party to the Statute. Concerns about state sovereignty will be sufficiently safeguarded by the principle of complementarity since the primary duty to prosecute criminals will still remain with the individual states.

E. Procedural Questions, Fair Trial and Rights of the Accused

The ICC must uphold the highest standards of justice. While the judges require clear guidelines on the rules of evidence and procedure, it is impractical and unnecessary to include all the details in the Statute. The Statute should contain the fundamental principles of due process governing arrest, pre-trial detention, the trial, the rights of the accused, evidence and protection of victims and witnesses.

F. Definition of War Crimes

The Court's statute should not treat crimes committed in internal conflicts and those committed in international conflicts unequally in the definition of war crimes. The statute of the Court should reflect the reality that contemporary armed conflicts are predominantly non-international. If the ICC is to have any relevance in the contemporary world it must be able to address the full breadth of international crimes committed in internal armed conflicts. We believe that the scope of the Court's jurisdiction over war crimes is critical to its impact and credibility.

G. Crimes of Sexual and Gender Violence

Women are commonly the targets and victims of egregious international crimes and have frequently been denied access to justice at both national and international levels. The conflicts in Rwanda and the former Yugoslavia are only the most recent examples of horrifying levels of violence against women, including acts of rape, sexual slavery, enforced prostitution and other forms of sexual assault. The ICC must be fully empowered to prosecute sexual and gender violence if it is to fulfil its mandate to end impunity for the most serious violations of international law. Toward this end, the ICC statute should explicitly recognize the court's jurisdiction over these crimes against women and adopt legal principles and procedures that would facilitate the prosecution of these crimes without prejudice to the accused.

H. Rights of Children

Children's rights and protection issues need to be emphasized. These concerns are raised with regard to issues such as the forced recruitment of children into armed forces, the age of criminal responsibility, and punishment and imprisonment of children.

I. Victims and Witnesses

Evidence from the International Criminal Tribunals for the Former Yugoslavia and Rwanda overwhelmingly indicate that witnesses face serious security, psychological, and medical concerns. Victims of gender-based crimes who testify may experience profound stigma and shame. For these reasons, Human Rights Watch supports the creation of a Witness Support and Protection Unit within the Procuracy to protect the physical and psychological well-being of witnesses - particularly victims - and their family members, before, during, and after trial proceedings.

Victims and their representatives have a right to reparations under international law in respect of serious violations such as those falling within the jurisdiction of the Court. Human Rights Watch suggests that the most efficient way for the international community to make effective the exercise of this right would be through the mechanism of the ICC. Consistent with emerging international legal norms, reparations must be understood, in a broad sense, to "include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."

III. THE PREPARATORY COMMITTEE

A. Recent Developments in the Preparatory Committee Sessions

Three PrepCom sessions were convened in 1997. The most recent PrepCom, held from December 1 - 12, included discussion of international cooperation and judicial assistance, the definition of war crimes, general principles of criminal law and procedural questions. Important progress was made with regard to the inclusion of sexual and gender violence in the definition of war crimes. Also welcome was the substantial opposition to the requirement that a war crime be committed according to a plan or policy and to the exclusion of internal armed conflicts from the definition. Another major development was the United Kingdom's withdrawal of support for the provision in the ICC Statute which would allow an automatic Security Council veto of the Court's jurisdiction. The UK's increasingly positive policies on the ICC should help strengthen the position of the like-minded coalition at the Diplomatic Conference.

B. The Final Preparatory Committee Session (March 16 - April 3, 1998)

The agenda items for the March - April 1998 PrepCom include the composition and administration of the Court, the relationship of the ICC to the U.N., and the final clauses of the ICC Statute. These items include funding for the Court, the permissibility of reservations to the ICC treaty, and the number of signatories required for the treaty to enter into force. The PrepCom will also review procedural and other matters left over from previous PrepCom sessions; these matters may include the applicability of domestic law, reparations to victims, the crime of aggression, and procedures for the Diplomatic Conference. Finally, the PrepCom will prepare a report and the Draft Statute for the Diplomatic Conference.

IV. WHAT YOU AND YOUR ORGANIZATION CAN DO

Advocacy by NGOs with government officials has highlighted human rights concerns in the PrepCom negotiations and influenced the development of state positions. NGO pressure was critical in securing General Assembly approval for the 1998 Diplomatic Conference. Pressure on governments to support an effective and independent ICC can also be mobilized by raising awareness among civil society and the media.

As the PrepCom debates focus on finalizing the Draft Statute in preparation for the Diplomatic Conference, NGOs have an even more crucial role to play. By lobbying for positions essential to an effective Court, NGOs can strengthen the commitment of the growing number of states that have supported an effective ICC and can increase pressure on those few that have been more obstructive.

The next Preparatory Committee meeting is scheduled for March 16 - April 3, 1998 at United Nations Headquarters in New York. The Diplomatic Conference is scheduled for June 15 - July 17 1998 at the U.N. Food and Agriculture Organization complex in Rome. We urge your organization:

- **To form national coalitions to support an effective and independent ICC.** Recently, NGOs in several countries in the North and South have held meetings to launch these national coalitions. These national coalitions can draw together general human rights or humanitarian organizations; groups working on women's, children's or victim's rights; political prisoners' associations; bar and judicial associations; religious organizations; and the local branches or affiliates of international organizations.
- **To request meetings with officials in the Ministries of Foreign Affairs and of Justice.** Emphasize the importance your organization attaches to these negotiations and to the creation of an effective Court. Ask these officials for an accounting of the government's positions and urge them to support the issues critical to ensuring an effective Court. Such meetings will be particularly crucial during the month of May, as the government is formulating its ICC policies in preparation for the Diplomatic Conference. Urge the Ministries to make the ICC their top priority in the coming months and to raise the issue in bilateral and multilateral discussions with other governments.
- **To request government officials to make public statements about the ICC.** Invite government officials to speak at public events or hold joint NGO-government press conferences. Publicizing a government's support for the ICC will assist it in maintaining its position when it faces pressure to compromise at the Diplomatic Conference.
- **To raise awareness of the ICC through the media.** Contact the editorial boards and columnists of major newspapers about the importance of the ICC and your government's position on this issue. Write letters to the editor or op-ed articles to express your organization's support for a strong Court.
- **To urge the creation of "Friends of the ICC" coalitions within national parliaments.** In November 1997, a "Friends of the ICC" coalition was established within the European Parliament. Similar coalitions can be created within national parliaments to bring the issue of the ICC into the forefront of national policy debates. Such coalitions can push for parliamentary resolutions supporting a strong Court and call for hearings on questions pertaining to the ICC.
- **To utilize upcoming events, meetings, conferences and seminars to raise the issue of the ICC.** For example, Human Rights Watch staff members and others have popularized the ICC at meetings of the African Commission on Human and People's Rights and the Union of Arab Lawyers.
- **To send observers to the March-April PrepCom session.** This is an invaluable opportunity to learn the issues firsthand, to lobby and to influence government positions. Some funding is available to defray the expenses of travel to and lodging in New York.

• **To contact the Coalition for an International Criminal Court.** The Coalition for an International Criminal Court (CICC) is an association of more than 300 international and domestic NGOs advocating an effective and independent Court. The webpage of the CICC (located at <http://www.igc.apc.org/icc/>) posts information about the ICC, including relevant U.N. documents, NGO position papers, and regular updates about the status of ICC negotiations. The CICC may be reached at 212-687-2176, or via e-mail at cicc@igc.apc.org.

Human Rights Watch looks forward to consulting with you on these issues.