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**Non-Governmental Organization Action Alert (No. 4)
May 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. On June 15, 1998, over 100 nations will meet in Rome to create a permanent International Criminal Court (ICC) to investigate and prosecute those accused of genocide, crimes against humanity and serious war crimes where national courts are either unavailable or ineffective. Whether that Court becomes an effective tool to prevent and punish these atrocities or is a meaningless facade depends on the mobilization of non-governmental organizations (NGOs).

Indeed, progress in the creation of the ICC can be attributed to the persistence of NGOs and the growing group of small and medium-sized "like-minded" states, similar to that which spearheaded the 1997 landmines treaty. With members from every region of the world, the like-minded group has established itself as the leading force for an effective and independent Court and provided an eloquent testimony to the universality of support for the ICC.

Unfortunately, the United States and France are advocating positions that will subordinate the Court to the Security Council and seriously undermine its effectiveness and credibility. The United States is now even using the Pentagon to lobby militaries worldwide. Other states, such as India, Iran, Colombia, and Egypt, are trying to obstruct the Court by foisting their minority view onto the members of the Non-Aligned Movement, many of who have already formulated strong progressive positions.

While the like-minded states have won significant gains, the true test of their strength and cohesion will come in Rome. The outcome of the Diplomatic Conference will depend on the ability of the like-minded states to withstand pressure from those who oppose a fully independent court as well as those few obstructionist states that prefer no court at all. The like-minded group must identify the criteria essential to an effective ICC and reject compromises that fall below that bottom line. This historic opportunity must not be squandered.

In this context, NGOs have a crucial contribution to ensure the establishment of an effective and independent Court. We must rally domestic support to encourage governments when they are playing a constructive role and to bolster them when their commitment to the Court wavers. In the final weeks leading up to the Rome Conference, we must continue to hold governments accountable for their positions on the ICC, strengthen the commitment of the like-minded governments to a strong ICC, and raise the political stakes for governments which continue to block the creation of an effective and independent Court.

Our efforts will help to determine whether the resulting ICC will have the authority and the impartiality to deliver justice or will be crippled by a dependence on the consent of states who may themselves be complicit in the charged crimes.

Human Rights Watch is issuing Action Alert No. 4 to highlight what we believe are the issues that will determine the effectiveness of the Court and to outline basic suggestions for NGO efforts.

II. ISSUES CRITICAL TO ENSURING AN EFFECTIVE COURT

While there are many issues important to the functioning of an independent and effective ICC, Human Rights Watch believes that the following five pillars are the essential benchmarks for the ICC statute¹:

1. Requiring State Consent For Crimes Which Are Already Subject To Universal Jurisdiction Is Regressive And Would Paralyze The ICC

International law already recognizes that universal jurisdiction exists over genocide, war crimes, and crimes against humanity. Because these crimes are an outrage to the international community as a whole, their perpetrators may be tried in any jurisdiction. The established principle of universal jurisdiction makes the requirement of state consent regressive. According to a proposal introduced by Germany, the ICC should be able to exercise jurisdiction, without a further requirement of state consent to either particular crimes or cases.

Other proposals for pre-conditions to the exercise of the Court's jurisdiction, however, introduce significant obstacles. One model, known as the "opt-in, opt out" model, permits each state to pick and choose which crimes the Court can prosecute. France has proposed that states should be able to deny consent to the Court's jurisdiction on a case-by-case basis. Alternatively, the United Kingdom has proposed that the ICC should not be able to address a situation unless the state where the crime occurred and possibly the state with custody over the accused have ratified the statute. During the March-April 1998 Preparatory Committee negotiations, the United States suggested that ratification by the state of the defendant's nationality may also be required. These elaborate requirements of state consent or state ratification will, at best, result in the selective application of justice, or, at worst, paralyze the Court altogether.

2. Political Interference with the ICC, by Mechanisms Such as a Security Council Veto Over the Court's Docket, Is Unacceptable

Although it is essential that the Security Council maintain its primary authority to determine threats to international peace and security, this role must be balanced against the need to protect the impartiality and credibility of the Court. One proposal in the Draft Statute requires the Court to obtain approval from the Security Council before proceeding with a case arising from a situation that the Council is "dealing with" under Chapter VII of the United Nations Charter. This proposal would enable Permanent Members to use their veto power to protect potential defendants wherever their countries' interests are involved, thereby jeopardizing the Court's independence and credibility.

In August 1997, Singapore presented a compromise which requires the Security Council to take an affirmative decision to delay ICC proceedings if there is a genuine conflict between peace and prosecution. The Singapore proposal would prevent any one of the permanent members of the Security Council from unilaterally acting to obstruct ICC proceedings. However, the Singapore modification is troubling because it still allows for political interference with the Court and it would permit an unlimited period during which the ICC could be prevented from exercising its

¹ As used throughout this document, the term "current Draft Statute" refers to the Zutphen document (the text consolidated in Zutphen, The Netherlands in January 1998) and the revisions made during the March - April 1998 Preparatory Committee session. These will serve as the basis for negotiations in Rome.

jurisdiction.

3. The Prosecutor Must Be Empowered To Initiate Investigations Based On Information From Any Source, Including From Victims And Non-Governmental Organizations.

The current Draft Statute 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. Since states and the Security Council may, for a variety of reasons, be reluctant to bring cases to the ICC, failure to broaden the “trigger mechanism” will restrict the Court’s authority, significantly reduce the number of cases that come before it and allow crimes to go unpunished. 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.

In the Preparatory Committee sessions in March 1998, Argentina and Germany proposed that the prosecutor may initiate an investigation based on information received from victims and other sources. Before proceeding with an investigation, the prosecutor must first obtain authorization from the Pre-Trial Chamber by showing that there is a “reasonable basis” to investigate. While this is an appropriate standard of judicial review at such an early phase, any higher standard would be an unacceptable constraint.

4. The Principle Of Complementarity Is Necessary To Ensure The Primacy Of National Courts But Cannot Justify Lengthy Delays Of ICC Investigations.

The ICC is intended to complement national criminal justice systems in cases where such trial procedures are unavailable or ineffective. The principle of complementarity ensures that the ICC does not become a substitute for national courts which continue to have the primary responsibility for bringing the accused to justice. The Draft Statute establishes that a case will be admissible only when a national judicial system is “unwilling or unable” to carry out an investigation or prosecution. The Statute appropriately establishes that, while the accused and relevant states may challenge admissibility, the Court will make the final decision regarding admissibility.

During the March-April 1998 Preparatory Committee session, the United States introduced a new Article 11 *bis* which requires the Court to announce publicly that a matter has been referred to the ICC and permits states to delay ICC investigations for up to six months or one year. At the heart of the United States proposal is an insistence that the ICC defer to vigorous and genuine national investigations and prosecutions. However, the United States’ concerns have already been addressed in the Draft Statute since the complementarity principles set an extremely high threshold for establishing admissibility and permits states to raise admissibility challenges before or at the commencement of the trial. The proposed Article 11*bis* enables states acting in bad faith to keep the ICC at bay while placing evidence and potential witnesses at risk.

5. The Definition Of War Crimes Must Reflect The Reality Of Contemporary Armed Conflict.

The Court's jurisdiction over war crimes should apply to the same range of criminal acts whether they are committed in international or non-international armed conflict. 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. It must also have jurisdiction over acts which have become prevalent in contemporary armed conflict, including but not limited to, launching indiscriminate attacks against civilians, causing widespread and severe damage to the natural environment, and forcing the displacement of civilian populations.

If the ICC is going to be credible and effective, Human Rights Watch believes that these five pillars must be linked to the following principles and mechanisms in the Statute.

- **The Statute and the Rules of Evidence and Procedure must reflect the highest standards of justice, with full protection for the rights of the accused, victims, and witnesses.**

The ICC must uphold the highest standards of justice. 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. 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. In the March-April 1998 Preparatory Committee session, there was general agreement that the Rules of Procedure and Evidence should be drafted as a separate instrument. However, some states have suggested that the ICC Statute should not be opened for signature until the Rules of Procedure and Evidence have been completed. Human Rights Watch feels that this proposal will only delay the establishment of the Court.

- **The ICC must be empowered to effectively prosecute 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 while respecting the rights of the accused.

The possibility of effective prosecution of gender-related crimes will be greatly enhanced if women are represented at all levels of the Court, particularly in the prosecutor's office, the Victim and Witness Unit and within the judiciary itself. Requiring expertise in gender violence should also be included among the qualifications for positions within all organs of the ICC.

- **The ICC must define the use of child soldiers as a war crime, limit its jurisdiction to persons aged eighteen and over, and incorporate expertise on the rights of children.**

One of the most alarming trends in contemporary armed conflicts is the increasing reliance on children as soldiers. They are often recruited because of their youth and unique vulnerability, rendering them susceptible to psychological and physical control, and fear and intimidation from their commanders. While child soldiers may end up committing grave abuses, they should be seen as victims of the conflicts in which they are engaged. The Court, given its structure and purpose, is not a proper forum for trying children in a manner consistent with established international juvenile justice standards, which stress rehabilitation for juveniles rather than punishment; the Court's jurisdiction should be limited to persons aged eighteen and over at the time the crime was committed. At the same time, the ICC statute can serve as a powerful deterrent to the use of children in armed conflict by making it a war crime to force children under the age of eighteen to participate in hostilities. To ensure that the ICC upholds children's rights, whether as victims or perpetrators of crimes, the membership of the court should include persons with expertise on the protection of children.

- **The ICC must be empowered to provide support and award reparations to 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 Registrar's Office 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 CRITICAL NEED FOR ACTIVISM BY NON-GOVERNMENTAL ORGANIZATIONS

In the past three years of Preparatory Committee negotiations on the ICC Draft Statute, NGO advocacy with government officials and delegates has highlighted human rights concerns and influenced the development of state positions. NGO pressure helped to secure General Assembly approval for the 1998 Diplomatic Conference. Recent Preparatory Committee sessions have demonstrated that NGO lobbying has persuaded governments to reconsider positions during negotiations.

Maintaining a high level of NGO activity on the ICC will be critical both in the period leading up to the Diplomatic Conference and during the Conference itself. In early June, Human Rights Watch will issue a special NGO Action Alert containing specific suggestions for activity during the Diplomatic Conference. We encourage your organization to take the following actions over the next six weeks:

- **To request meetings with officials in Foreign Affairs and Justice Ministries.** Emphasize the importance your organization attaches to the creation of an effective Court. Such meetings will be particularly crucial during the month of May, as the government is formulating its ICC positions in preparation for the Diplomatic Conference. During these meetings, your organization may want to:

- * Ask for an accounting of your government's positions on the "five pillar issues" that will be absolutely essential to ensuring a strong and independent Court. Urge them to include these five pillars as essential elements in a final package and to reject compromises that fall below these bottom lines.

- * Ask your government to send a large delegation to the Diplomatic Conference and to include individuals with human rights expertise in these delegations. The U.N. has established a fund to enable the least and less developed countries to attend the Diplomatic Conference.

If government officials are unavailable for personal meetings, make your views known in a fax or letter.

- **To request government officials to make public statements about the ICC.** Where appropriate 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 request public statements about the ICC from intergovernmental organizations.** Urge representatives of other intergovernmental organizations with expertise in relevant areas, such as the rights of women, children, humanitarian law, and displaced persons, to issue public statements about the importance of the ICC in protecting and promoting those rights.

- **To organize initiatives in support of an effective and independent ICC.** Your organization -- working alone or with several others -- can organize important initiatives to raise domestic awareness about the ICC and encourage your government. Such initiatives may include sending individual letters or sponsoring a signature petition or a postcard campaign to highlight the issues critical to an effective Court. Suggested texts for signature petitions or postcard campaigns can be made available, upon request, from Human Rights Watch, the NGO Coalition and other human rights organizations.

- **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, tying the ICC in with on-going national debates on impunity and international tribunals.

- **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 activists popularized the ICC at an NGO workshop sponsored by the International Commission of Jurists at African Commission on Human and People's Rights, and sponsored NGO briefings on the ICC during the sessions of the Commission on the Status of Women in New York and the Human Rights Commission in Geneva.

- **To contact the Coalition for an International Criminal Court.** The Coalition for an International Criminal Court (CICC) is an association of more than 600 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.

- **To prepare actively to monitor your government's role in the Diplomatic Conference.** If your organization is unable to send representatives to Rome, we suggest that you contact NGOs from your country who will be observing the Diplomatic Conference and request periodic updates of your government's role in the negotiations. Pressure for domestic NGOs and the local media will continue to be critical throughout the Diplomatic Conference either to build support for positive positions taken by your government or to voice opposition to negative positions. You should also check the websites of the CICC and Human Rights Watch for the latest developments in the Diplomatic Conference.

Human Rights Watch looks forward to learning your organization's views on the ICC, discussing the outstanding issues with you, and exploring possible joint efforts.