

HUMAN RIGHTS WATCH

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Telephone: 212-290-4700
Facsimile: 212-736-1300
E-mail: hrwnyc@hrw.org

Website: <http://www.hrw.org>

Kenneth Roth
Executive Director

Michele Alexander
Development Director

Carroll Bogert
Communications Director

Reed Brody
Advocacy Director

Cynthia Brown
Program Director

Barbara Guglielmo
*Finance & Administration
Director*

Susan Osnos
Associate Director

Wilder Taylor
General Counsel

Lotte Leicht
Brussels Office Director

Joanna Weschler
*United Nations
Representative*

DIVISION DIRECTORS

Peter Takiram budde
Africa

José Miguel Vivanco
Americas

Sidney R. Jones
Asia

Holly Cartner
Europe and Central Asia

Hanny Megally
Middle East and North Africa

Joost R. Hiltermann
Arms

Lois Whitman
Children's Rights

Regan E. Ralph
Women's Rights

BOARD OF DIRECTORS

Jonathan Fanton
Chair

Robert L. Bernstein
Founding Chair

Lisa Anderson
William Carmichael
Dorothy Cullman
Gina Despres
Adrian W. DeWind
Irene Diamond
Fiona Druckenmiller
Edith Everett
Vartan Gregorian
Alice H. Henkin
James F. Hoge, Jr.
Stephen L. Kass
Marina Pinto Kaufman
Bruce Klatsky
Josh Mailman
Yolanda T. Moses
Samuel K. Murumba
Andrew Nathan
Jane Olson
Peter Osnos
Kathleen Peratis
Bruce Rabb
Sigrid Rausing
Orville Schell
Sid Sheinberg
Gary G. Sick
Malcolm Smith
Domna Stanton
Maya Wiley

NONGOVERNMENTAL ORGANIZATION ACTION ALERT

May 1999

Vol. 2 No. 1

I. STATUS REPORT

Nongovernmental organizations have a critical chance to transform the culture of impunity that has been all too frequently associated with genocide, crimes against humanity and war crimes. At the end of a five week conference in Rome on July 17, 1998, 120 states voted to approve a treaty establishing a permanent International Criminal Court (ICC). The ICC will hold to account those accused of egregious crimes. The horrific crimes being committed in Kosovo underscore the urgent importance of establishing the Court and strengthening the enforcement of international humanitarian law.

The ICC has the potential to bring justice to victims, to heal the scars these egregious crimes create, and to deter their commission in the next century. The Court can strengthen national courts and extend the rule of law. In short, the ICC has enormous potential to change the human rights landscape in the twenty-first century.

The near-universal approval of the ICC treaty was an historic achievement and nongovernmental organizations made an essential contribution to the process. Born out of four years of complex negotiations, the ICC treaty or "statute" embodies a delicate balance of divergent political interests and a remarkable synthesis of the worlds' legal traditions. Only seven states, the U.S., China, Iraq, Israel, Libya Qatar, and Yemen voted against the statute. Significantly, the Court's creation was driven by a diverse coalition of states from north and south, led by Canada, Germany, The Netherlands, Argentina, Malawi, South Africa, and the Republic of Korea. This history provides a solid starting point for the establishment of a strong, effective and truly International Criminal Court.

But real challenges still lie ahead. Sixty states must ratify the treaty before the ICC becomes a reality and the next several months will be critical. Eighty-two states have already signed the treaty and two (Senegal and Trinidad and Tobago) have ratified it. At the end of July, the ICC Preparatory Commission will meet in New York to work on the Court's rules of procedure and evidence and to define the elements of the crimes the Court will prosecute. Between now and July it is essential that more states sign or announce their commitment to ratification, so that the delegates meeting in New York feel the momentum.

Meetings of governments and NGOs to galvanize efforts for ratification have recently been held in Trinidad, Argentina, and Morocco. In the next few months, other meetings will take place in nearly every region. NGO activism is crucial to re-enforce the ratification drive--so that no state, no matter how powerful, will be able to interfere with the treaty's entry into force.

Since Rome, the Pinochet affair has shown that there is a growing consensus--both political and legal--that the worst crimes must be punished. Spain's request to prosecute General Pinochet and the decision by Britain's House of Lords to uphold the grounds for his extradition represent a significant shift from impunity to accountability.

II. THE STATUTE

The Rome statute, while imperfect, created the structure of an effective and independent court. Here are the statute's highlights:

1. Attempts to require the consent of state parties before the ICC could proceed with an investigation were rejected.
2. A compromise resolved the contentious question of the Security Council's ability to suspend or delay ICC prosecutions. Article 16 provides that no investigation or prosecution can be commenced or continued where the Security Council, acting under Chapter VII, has so decided. Importantly, deferral--for a renewable period of 12 months--would require a decision of the Council, and therefore bars one Permanent Member's veto to block jurisdiction. There is still the possibility of political interference in through unlimited renewal and deferral.
3. In a crucial positive outcome, the statute gives "*ex officio*" powers to the prosecutor (Article 15) to investigate allegations of crimes not only upon referral from the Security Council and State Parties, but also on information from victims, non-governmental organizations or any other reliable source.

At the same time, the prosecutor's power is restricted by many checks and balances, including several opportunities for judicial review and challenge. These measures give states adequate assurance against unwarranted or politically motivated prosecutions. If the prosecutor finds that there is a reasonable basis to proceed with an investigation, this determination must be confirmed by the Pre-Trial Chamber before the investigation begins.

4. The ICC will not substitute itself for national courts where the national institutions are doing their job. The ICC will investigate and try cases where national authorities have failed to do so and thereby it will encourage national courts to be the first line of prosecution.
5. The rights of suspects and accused persons are unequivocally guaranteed, in accordance with international human rights law. Appropriate provision is made for the protection of witnesses in the ICC proceedings. Furthermore, the victims remain firmly in focus throughout

ICC proceedings, taking into account their needs for protection and participation, and through the Court's power to order that persons convicted make reparations to victims.

6. The statute gives the Court less power than we, other NGOs and many governments had sought. The principal weakness of the Court lies in its jurisdictional structure. This provides that in the absence of a referral by the Security Council, either the state where the crimes occurred or the state of nationality of the accused must be a party to the treaty or consent to an investigation on an *ad hoc* basis. This means that where the territorial state and the state of nationality of the accused are the same (in internal conflicts, for example) *that* state must be a party to the treaty for the Court to have jurisdiction. For example, had the ICC existed at the time of Pinochet's crimes, it would have been necessary for Chile to have been a party to the statute. With widespread ratification, however, this obstacle can be overcome.

III. A WORLDWIDE CAMPAIGN FOR EARLY ENTRY INTO FORCE

Now is the time for a worldwide campaign for early and "universal" ratification. The ratification process must accelerate while the Preparatory Commission completes its work. The more states that ratify the treaty, the greater the momentum will be for entry into force and the more difficult it will be for any state to insist on re-opening negotiations or to otherwise frustrate entry into force. Currently, 82 states have signed the treaty. This is an important indication of support. But states from diverse geographical regions must begin and complete the often lengthy ratification process to maintain the necessary momentum. Drawing on the experience leading up to Rome, we believe ratification will progress more efficiently if those efforts are coordinated on a regional basis.

Our belief in the need for nongovernmental organizations to work in partnership with states supporting entry into force is underscored by our concerns over the United States government's continued criticism of the statute. The *sine qua non* of American approval has been some form of veto power for the state of nationality of the accused. Such a loophole would destroy the Court's effectiveness and credibility. This approach was rejected by the overwhelming majority of states at the Rome Diplomatic Conference. Nonetheless, the U.S. appears determined to press its objective despite the fact that the treaty has been finalized.

While we believe U.S. support for the Court is preferable, it is not mandatory for the ICC to function effectively. This is due to breadth of support, north and south, for the ICC. The 120 states voting in favor of the statute in Rome comprise a coalition with sufficient resources, expertise and diversity to make the ICC successful.

IV. SUGGESTED STEPS FOR NGOs

The prospects for the ICC achieving its potential in the near future depend in large part on NGO activism. There is much nongovernmental organizations can do to bring about early entry into force of the Rome Treaty. Among other ideas we suggest the following:

- * Request meetings with appropriate foreign and justice ministry officials to discuss government attitudes toward ratifying the International Criminal Court treaty.
- * If your state has not yet signed the Rome Treaty, ask foreign ministry officials about plans to sign it. Ask about the obstacles to signing.
- * If your state has signed the treaty, ask about government plans for ratification. We need 58 more ratifications for entry into force. Raise with government officials the importance of their beginning and completing the process of ratification. Ask governments to make a public commitment to ratification and a projected date for ratification.
- * Ask for meetings with key parliamentarians to discuss their role in accelerating ratification.
- * Promote discussion about the importance of the International Criminal Court among civil society including law academics and bar associations. Initiate programs on the ICC with these groups.
- * We urge nongovernmental organizations to check the Human Rights Watch website (www.hrw.org) and the website of the Coalition for the International Criminal Court (or the CICC, at <http://www.igc.org/icc/>) for the latest developments in the worldwide campaign for the ICC.
- * We look forward to hearing from you and to discussing these issues with you.