

On the Record for a Criminal Court, Issue 22

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Late on Friday evening, the Committee of the Whole accepted the statute for an international criminal court. The statute was then put to a plenary session of the conference. If accepted, as expected, it will be open for signature at a ceremony in Rome on Saturday. In this issue, *On the Record* analyses this latest – and final – text.

A Court Is Born

Applause, relief and jubilation as US and Indian Amendments are rejected

After five numbing weeks, the Rome Conference gave birth to a statute for an international criminal court late Friday night.

The decision was taken by a packed and expectant meeting of the committee of the whole to prolonged applause after the committee soundly rejected last minute amendments by the United States and India. With that, Philippe Kirsch, the long-suffering Canadian chairman, brought down the gavel and declared L.76 – the document containing the ICC draft statute – adopted. A storm of applause broke out.

The draft statute is a complex and ambitious package of 116 articles, each of which was fought over in separate drafting battles. Friday was the day when it had to coalesce into a politically-acceptable package.

When the document emerged early on Friday morning, the first reaction of nongovernmental groups was shock, even though the conference bureau had managed several artful compromises, and included many of the elements considered essential to an independent court. These include an independent prosecutor, limits on the ability of the UN Security Council to withhold cases from the court, reparations for victims of crimes, automatic jurisdiction for the court over core crimes, and the inclusion of aggression in the statute.

The Women's Caucus fought the Arab states to a draw over gender issues. Rape, forced pregnancy, and sexual slavery are all included as war crimes and crimes against humanity. In return, the Arab states have managed to have gender defined differently from the Beijing Declaration and other UN documents. It now reads: "two sexes, male and female, within the context of society."

In spite of their achievements, NGOs are deeply worried that the court's jurisdiction regime will allow states parties to the ICC treaty to opt out of war crimes for seven years, if the crimes has been committed by one of its nationals, or on its territory. This was a

last-minute compromise to France, and NGOs feel that it creates a gaping loophole that could make it impossible to arrest major criminals. The extent of their dismay emerged clearly at a press briefing Friday, at which Human Rights and Amnesty International both criticized the provision.

But all this was swept away at the final, tumultuous session of the committee of the whole in the evening.

As expected, India and the United States both introduced amendments in a last attempt to reverse the course of events and influence the shape of a package that both profoundly oppose.

India proposed that nuclear and other weapons of mass destruction be reintroduced into the list of war crimes, and that the UN Security Council be barred from any relationship with the ICC. Allowing the Council to refer cases to the court, said the Indian delegate, would be tantamount to allowing non-states parties to dictate to the court.

But Malawi and Chile both supported Norway's proposal that no action be taken on the Indian amendments, showing the depth of opposition to Indian among the nonaligned countries. India's position on nuclear power is considered particularly hypocritical in the light of India's recent nuclear tests. The Norwegian proposal was accepted by 114 states and opposed by 16. Twenty abstained.

This was a prelude to the second vote that everyone knew was coming. Speaking from a hastily prepared note, US delegate David Scheffer expressed "profound misgivings" at the package that had emerged, while paying compliment to the work of the bureau and its chairman, Philippe Kirsch of Canada.

Scheffer repeated the arguments that have become familiar over the last five weeks. In the first place, he said, the package did not make sufficient allowances for states to "opt out." In fact, the statute does permit states' parties to opt out of war crimes for seven years. But this is not enough for the Americans, who had wanted a similar provision for crimes against humanity.

Second, said Scheffer, the statute allows for a proprio motu prosecutor, who can initiate cases on his or her own authority and receive information from NGOs. This, warned Scheffer, would overwhelm the prosecutor with complaints.

But Scheffer's most impassioned argument concerned the issue of jurisdiction, which has been the key concern all along for the Americans. Scheffer said that the ICC will be able to exercise jurisdiction over non states' parties. This, he said, would be a fundamental violation of the principle that states cannot be obligated to a treaty they have not joined.

On the surface, Scheffer is clearly correct. According to the ICC statute, states that do ratify the ICC treaty can "opt out" of war crimes for a period of seven years if the crime was committed on their territory, or if the court proposes to prosecute one of their

nationals. On the other hand, a government that has not ratified the ICC treaty could find that one of its nationals is prosecuted if the state on whose territory the crime was committed does not object. This, said Scheffer, was completely unacceptable. Moreover, it would actually penalize states that do not ratify the treaty.

But that, explained one delegate, was precisely the point. "We have to give the US some incentive to join," she said. If this was indeed the intention, Kirsch and his colleagues exhibited a remarkable sleight of hand. What many took to be an awkward compromise on jurisdiction, made under duress, may have turned the tables on the Americans.

Qatar and China seconded the US amendments. Once again, Norway proposed that no action be taken on the US amendments. Once again, this was accepted by a resounding majority of 113, with 25 abstentions. The room erupted into applause. Several states then explained their vote, before Kirsch brought down the gavel and declared the statute adopted by the committee of the whole. At this, delegates embraced and broke into cheering. After five long weeks, the tension was released.

The analysis, the political jockeying, and the fight for public opinion began immediately in the plenary session, where India explained its position at great length and the US called for an unrecorded vote on the statute, only to see the plenary accept the statute again, to huge applause. While the Americans have been thoroughly isolated at this conference, Scheffer's concerns are certain to find an echo in the United States itself, and many are bracing themselves for a quick and savage blast from the US Senate and Senator Jesse Helms.

The concern will center around that identified by Scheffer: if the US does not ratify the ICC, could American soldiers in some foreign land find themselves arrested and prosecuted by the ICC in foreign lands? The answer is yes – if they commit the kind of crimes proscribed by the statute, and if the case fits the complex jurisdiction regime outlined in the statute.

Such a prosecution could hardly be frivolous. Thanks largely to the US efforts at this conference, the threshold for crimes against humanity and war crimes is still high and there are several safeguards built into the statute to ensure against mischievous prosecutions. These include the existence of a pre-trial chamber, which would monitor and authorize prosecutions.

But the real fallacy in the US argument, say supporters of the court, is the implication that the court would penalize states, as opposed to individuals. The ICC will prosecute people not governments. "Once someone has committed genocide or crimes against humanity, they become an international criminal and lose the protection of their state," says David Donat-Cattin, from the European Law Students Association (ELSA). "That's why a Rwandan war criminal can be arrested in Texas. This is exactly what the ICC is about."

In fact, supporters of the court, like Donat-Cattin, are deeply concerned that the compromise package will not permit states which may have arrested a suspected war

criminal (the so-called "custodial state") to surrender him to the ICC if neither the territorial nor state of nationality has ratified the ICC statute. This was sacrificed in the interests of compromise, and could – in the view of the NGOs – lead to exactly the opposite kind of abuse from that raised by the United States. If, for example, Idi Amin was arrested by Saudi Arabia, or Mengistu was arrested by Zimbabwe, Uganda and Ethiopia would both have had to ratify the ICC before these tyrants could be prosecuted in the Hague.

"This could allow criminals to travel freely, without fear of arrest," says Richard Dicker of Human Rights Watch. "It could make the world safe for tyrants."

In spite of this, the mood among NGOs late Friday was one of euphoria at having achieved a compromise after five grueling weeks and a final day of extraordinary suspense.

As he watched the conference room explode into cheers, and the flashbulbs popping at the deflated Americans, one campaigner said that US opposition had ensured that the final package looks much more acceptable than it actually is. "There's plenty wrong with this," he said. "But for the moment, it looks more like a silk purse than a sow's ear. For that we have the United States to thank."

The Statute at a Glance

On the Record gives you a quick guide to the highlights in the ICC statute

Preamble:

- The preamble emphasizes states and peoples, rather than individuals. No reference to individual human dignity. No express link between peace and justice.

Establishment:

- The Court will be established in the Hague; the links with UN to be determined.

Definitions:

- Aggression is included as a core crime, together with genocide, crimes against humanity, and war crimes (the crime of aggression has, however, not been defined yet).
- Forced pregnancy is included as a crime against humanity and a war crime.
- Nuclear, chemical, biological, and bacteriological weapons and landmines are excluded.
- Internal armed conflict is included, with a lower threshold than expected.

- "Elements of crimes" to serve as a guide, after adoption by Assembly.

Jurisdiction:

- Automatic jurisdiction for genocide and crimes against humanity for states that ratify the ICC.
- Non states' parties can accept ICC jurisdiction over a crime.
- Consent of the territorial state or state of nationality of the accused, but not custodial state, is required for prosecution of core crimes.
- States' parties can opt out on war crimes for seven years after the statute enters into force (in the state).
- Prosecutor can refer cases to the ICC proprio motu, acting on NGO information.
- Security Council can refer cases; consensus required among permanent five members for the Council to withhold cases for a year (this is not only relevant in the context of SC referral). This is renewable, must be done under Chapter 7 of the UN Charter.
- Under the principle of "complementarity," the state will take up a case first. The ICC will take over if the state is "unwilling or genuinely unable" to prosecute.
- A US proposal that allows states an early challenge to the admissibility of a case is accepted.
- Judges can refer to international human rights treaties, and the prohibition of discrimination based on gender in interpreting law.

General Principles:

- ICC to cover individuals; firms are excluded.
- Children under 18 will not be prosecuted by ICC (is not a matter of "general principles of criminal law" but has become an issue of jurisdiction!).
- Civilian and military commanders to be held responsible for crimes of their subordinates.
- Superior orders accepted as defense when crimes are not "manifestly unlawful"; war crimes are excluded.

Composition:

- Eighteen judges will be chosen from two lists: at least nine will have criminal law experience, five to have international lawyers.
- Also required: geographical representation, "fair representation" of male and female judges; expertise on violence against women and children.

Investigation:

- Pre-trial chamber will oversee prosecutorial investigations, ensure defendants' rights.

Trials:

- No trials in absentia.
- Victims may participate, be represented at trials.

Penalties:

- Death penalty excluded.
- Maximum term is 30 years, although life in jail is permitted in "exceptional circumstances."

Cooperation:

- Prosecutor will be able to interview witnesses and consult documents (voluntarily) without state authorities present.
- States will be able to withhold cooperation on grounds of national security.
- States will be able to invoke "procedures of national law" when executing a request for cooperation, but will have to ensure that national procedures are in place.

Enforcement:

- States to enforce sentences, but on a voluntary basis. If none volunteer, sentences will be served in the Netherlands at the ICC's expense.
- The ICC, not state, will decide parole, based on the cooperation of convict.
- Conditions of detention will meet acceptable international standards.

Finance:

- ICC costs to be born by states' parties and United Nations, but details and proportions still to be worked out.
- Voluntary contributions from individuals, NGOs, and firms to be accepted.

Final Clauses:

- No reservations to be permitted.
- No amendments will be permitted before seven years after the ICC's entry into force.
- A two-thirds majority will be needed for substantial amendments. A majority of 7/8 will be needed to make the amendment part of the statute. Amendments to add new crimes are not binding on states that do not ratify them.