



On the Record for a Criminal Court

Issue 19: July 13, 1998

Special Lobbying Issue

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Amnesty International
Human Rights Watch
Lawyers Committee for Human Rights
Women's Caucus for Gender Justice in the ICC**

From the AP Editorial Desk

With the Rome Conference at a critical juncture, and the future of the criminal court in the balance, human rights groups and caucuses are appealing for support in getting out the word. In this special issue, *On the Record* reproduces appeals from Amnesty International, Human Rights Watch, the Lawyers Committee for Human Rights, and the Women's Caucus for Gender Justice in the ICC. We urge all of our readers to distribute these to as many groups as possible.

An Appeal From Four Major Human Rights Organizations

Over the weekend, representatives from Amnesty International, Human Rights Watch, the International Commission of Jurists and the Lawyers Committee for Human Rights met with delegates from the likeminded governments at the Rome conference, and expressed concern at the direction of negotiations. The four organizations issued a joint appeal, which is reproduced here.

Major Areas of Concern With the Bureau Proposal (C.1/L.59)

Many compromises reached at the conference undermine existing international law. It would be profoundly disturbing if this conference retreated further. But that seems to be a real danger. And it would be a tremendous mistake to think that flaws in a final statute can be fixed later; the lack of political will, the supermajority required for amendment and the complexity of issues will make that close to impossible. Although there are many problematic aspects in the Bureau proposal and other parts of the draft, the issues below

are three of the most fundamental issues. They will make the difference between a court that is acceptable and one that is not.

Propio Motu Prosecutor

A prosecutor with propio motu powers is non-negotiable.

There should be no further restrictions on the power of the prosecutor to initiate prosecutions.

War Crimes Thresholds and Internal Armed Conflict

Option 1 for the war crimes threshold is too high. Most states favored Option 2 or no threshold.

The threshold added to the chapeau of Section D would exclude some of the worst situations, such as conflicts among rival militias and conflicts where the armed groups do not operate under responsible command or do not control territory.

The threshold note added at the end of Sections C and D is too restrictive.

The scope of the court's jurisdiction over war crimes committed in internal armed conflict already has been reduced and must not be reduced further, or the court will be condemned to irrelevance.

Jurisdiction

There should not be differing jurisdictional regimes for the three core crimes.

The court must have automatic jurisdiction over all three core crimes.

There should be no preconditions to exercise of jurisdiction that are more restrictive than option 1, which is already a compromise from the universal jurisdiction supported by 23 states.

Above all, an effective court should not be sacrificed to unreasonable demands from the United States or certain other countries. About three-quarters of the countries here support almost every point made above, making clear that a court based on those points would enjoy broad enough support to succeed in promoting international justice and breaking the cycle of impunity. A court not based on those points would be a failure.

Amnesty International Fears International Criminal Court Will Be Condemned to Irrelevance

Amnesty International issued the following statement on Monday:

Amnesty International is deeply concerned about the compromises made so far by the diplomatic conference for the establishment of an international criminal court able to try genocide, crimes against humanity and war crimes (the core crimes) and about those further compromises proposed in Friday's paper of the bureau of the conference to the Committee of the Whole (the key negotiating body). This proposal contains options which would restrict the independence and powers of the prosecutor, severely limit the scope of the court's power to try cases involving internal armed conflict, allow states which were parties to the court's statute to pick and choose the crimes the court could try and prevent the court from exercising the same universal jurisdiction over these crimes which all states now have under international law.

Many unfortunate compromises have been made so far at the conference which undermine current international law. It would be a matter of grave concern if the diplomatic conference were to retreat even further. However, there is a real danger that the delegates at the conference will do exactly that simply to secure the agreement of a small number of states which are unlikely to ratify the statute and one major power which last week launched a worldwide effort to prevent the establishment of an effective court. It would be a serious mistake to think that the flaws in the statute could ever be fixed by amendment or a review conference. The lack of political will, the supermajority required for amendment and the complexity of the issues could make that almost impossible for decades, if ever.

Summary of Concerns about the Bureau's Paper

Although there are many troubling aspects of the bureau's proposal and the draft text adopted so far, at least four of them could spell the difference between an effective court worth fighting for and an ineffective court which would be unacceptable to the international community and to national parliaments. These include options (1) restricting the independence and powers of the prosecutor, (2) limiting the scope of the court's power to try cases involving internal armed conflict, (3) allowing states which were parties to the court's statute to pick and choose the crimes the court could try and (4) preventing the court from exercising the same universal jurisdiction over the core crimes which all states now have under international law.

Attacks on the independence of the prosecutor and the prosecutor's power to start investigations

More than three quarters of the delegates supported an independent prosecutor with the power to initiate prosecutions based on information from any reliable source, subject only to judicial review by a pre-trial chamber (Article 12). Although the proposal does not contain an option to eliminate this power, it refers to a – yet unpublished – proposal which could restrict the powers of the prosecutor.

It would be unacceptable if the power of the prosecutor to initiate investigations of genocide, other crimes against humanity and war crimes based on information from any source were restricted in any way.

Restrictions on the scope of the court's jurisdiction over war crimes, particularly in internal armed conflict

More than three-quarters of the governments assembled in Rome said in last week's debate that either there should be no threshold before the court could try cases of war crimes or that the court should give priority to war crimes of a certain type or scale. Only a handful said that there should be a threshold for all war crimes. Nevertheless, the bureau's proposal still contains an option for a threshold for all war crimes (Article 5) that would result in the court only having jurisdiction over war crimes committed as part of a plan or policy or as part of a large-scale commission of such crimes. Such a standard would pose serious problems of definition and proof.

It would be unacceptable to impose a threshold in the statute – which would radically reduce the number of cases which the court could try – for all war crimes.

On top of a threshold over all war crimes, the bureau's proposal contains provisions to limit the court's jurisdiction by way of additional thresholds over war crimes committed in internal armed conflicts – virtually the only type of armed conflict occurring today Ñ dealt with in Articles 5.C and 5.D of the bureau's proposal. The threshold in Article 5.D would prevent the court from trying cases involving conflicts between different armed groups and those where the armed groups did not operate under a responsible command or control territory enabling them to carry out sustained and concerted military operations. Had the court been in existence during the past decade, these thresholds would have prevented the court from trying many of the cases of war crimes in Algeria, Cambodia, Chad, Guatemala, Liberia, Myanmar, Papua New Guinea, Peru, Rwanda, Sierra Leone, Somalia, Sudan and Uganda.

It would be unacceptable to impose thresholds in the statute on violations during internal armed conflict.

The bureau proposal has also eliminated some violations during internal armed conflict which were included in the draft statute being considered by the diplomatic conference (Article 5.D), such as the intentional starvation of civilians as a method of warfare and slavery, and some delegates are pressing for all or most of the other violations in Article 5.D to be dropped simply to accommodate the concerns of a small, but vocal, minority. Such a further step could prevent the court from trying cases such as intentional attacks on civilians, displacement of civilians, pillaging and recruiting children into armed groups.

It would be unacceptable to delete any of these violations in internal armed conflicts from the statute.

Attempts to restrict the court's automatic jurisdiction and its universal jurisdiction

Three-quarters of the governments at the conference have declared that all states which become parties to the statute should consent to the court's inherent (automatic)

jurisdiction over each of the three core crimes of genocide, other crimes against humanity and war crimes. Such automatic jurisdiction would mean that there would be no further consent requirements before the court could act if a state were unable or unwilling to bring those responsible for these crimes to justice. The bureau's proposal contains an option which would permit states which became parties to the statute to decide whether they would accept the court's jurisdiction over crimes against humanity and war crimes. For genocide the bureau's paper proposes automatic jurisdiction.

It is vital for the court to have the same jurisdictional regime for genocide, crimes against humanity and war crimes. It would be unacceptable if the court were not to have automatic jurisdiction over each of the three core crimes.

Under international law, every state has universal jurisdiction over the three core crimes. This means that each state has the power to try persons responsible for these crimes no matter where they occurred and no matter what the nationality of the suspect. Although there was substantial support for a German proposal giving the court the same universal jurisdiction over the three core crimes which each state has, the bureau's paper omits this proposal, which is the only one fully consistent with international law. Two other proposals – which attracted almost no support – are unacceptable. One (Article 7, option 2) would require both the state with custody and the state where the crime occurred to be parties and another (Article 7, option 3) would require that the state of the suspect's nationality be a party to the statute as preconditions to the court exercising jurisdiction over war crimes and crimes against humanity. The bureau's paper contains a proposal made by the Republic of Korea which would give the court jurisdiction over all three core crimes whenever the state with custody of the suspect, the state where the crime occurred, the state of the victim's nationality or the state of the suspect's nationality has accepted the court's jurisdiction. Under this proposal, if the court had been in existence over the past three decades, it would not have been able to try Pol Pot unless he had entered the territory of a state party.

The court should have universal jurisdiction over the three core crimes.

Conclusion

If the powers of the prosecutor will be further restricted,

if threshold upon threshold will limit the court's jurisdiction over war crimes,

if the list of crimes committed in internal armed conflict under the court's subject matter jurisdiction will be further cut,

if the courts automatic and universal jurisdiction will be watered down, for instance by incorporating a special jurisdictional regime for crimes against humanity or war crimes, then the diplomatic conference will condemn the international criminal court to irrelevance.

Human Rights Watch Appeal for Action and Key Issues Impacting the Court

Dear friends:

As the Rome conference to establish an International Criminal Court enters its final week, we are making a special appeal for you to intervene urgently (MONDAY or TUESDAY) with your government.

Last week's debate shows that a clear majority of countries, including yours, favor a strong and independent court. Yet this majority is facing increasing pressure to compromise.

Over the weekend, a joint delegation from Human Rights Watch, Amnesty International, the International Commission of Jurists and the Lawyers Committee for Human Rights met with your government's delegation here in Rome. We called on your government to stand by its principles and not capitulate to threats of sabotage by the United States and the unprincipled objections of other countries, which want to weaken the court's powers. We presented the delegation with the attached talking points on the most recent proposal by the conference's Bureau. In particular, we insisted that a court which does not include 3 principal points – an independent prosecutor, the ability to try war crimes without an artificial threshold, and automatic jurisdiction for the core crimes of genocide, crimes against humanity and war crimes – is not acceptable.

The next two days will be decisive in determining whether we have a court, which can end impunity for the gravest international crimes. Please contact your government TODAY.

Many thanks

Reed Brody
Advocacy Director
Human Rights Watch

Background on ICC

At the end of the most violent century in human history, there is a unique opportunity to end impunity for the gravest international crimes. A genuinely effective and independent ICC, with its potential to deter the most atrocious crimes, could dramatically transform the human rights landscape in the next century. The Court will also have the effect of extending the rule of law and strengthening national court systems to prosecute these crimes themselves.

The ICC will be different from the International Court of Justice in The Hague, which addresses only disputes between states, and different from the ad-hoc tribunals for Rwanda and the former Yugoslavia, which are temporary and involve only specific

countries. The ICC will be a permanent forum to prosecute and punish individuals who commit egregious human rights violations.

These key issues remain to be decided:

1. An independent prosecutor: Some states (19), such as the US, China and Russia, maintain that the prosecutor should have to wait for states or the UN Security Council to bring cases to the ICC. States are notoriously reluctant, however, to register complaints against other states, so many crimes will go unpunished under this system. A majority (61) of countries have therefore suggested that the prosecutor should be empowered to initiate an investigation based on information from any source, including individuals and non-governmental organizations.

2. The court's jurisdiction: According to various proposals (cumulatively backed by 24 states), the Court can take up crimes against humanity and serious war crimes only when certain states (the state with custody over the accused, the state of the accused's nationality or the state where the crime took place) have not only ratified the statute but also consented to its jurisdiction on a case-by-case basis. This could effectively paralyze the Court's operations. Most states (66), however, have rallied to a South Korean proposal giving the court jurisdiction when any of these states have ratified the treaty, with no further consent requirement.

3. The role of the Security Council: Only China and Russia still insist on allowing the permanent members of the Security Council to veto the Court's jurisdiction – and thereby manipulate the docket – if the Council is already "dealing with" a situation that concerns international peace and security. The overwhelming majority – including the United Kingdom and France – support the "Singapore proposal": the Security Council, acting affirmatively, could tell the court to delay any prosecutions for a period of time if it believed this was necessary for the promotion of peace and international security. The United States announced Thursday that it was willing to consider this proposal despite its dissatisfaction with it.

4. Jurisdiction over internal armed conflict: A few states, such as India and Mexico, argue that the Court's jurisdiction over crimes committed in internal conflicts should be very limited, ignoring the reality that contemporary wars are predominantly non-international. Nine states, such as the United States and China, seek to limit the Court's jurisdiction over war crimes to those committed pursuant to a "plan or policy," thus excluding many serious massacres. A majority of states want the Court to have full jurisdiction over war crimes in civil wars.

- The Human Rights Watch website has further details on the ICC.
- Rome: Richard Dicker: (mobile) 39 335-345-629; Reed Brody: (mobile) 39 348-3349972

Lawyers Committee for Human Rights Key Concerns Raised by the Bureau Proposal (C.1/L.59)

The Lawyers Committee for Human Rights is deeply concerned about the key issues of jurisdiction, definition of crimes and role of the Prosecutor in the Bureau Proposal of July 10, 1998. Although the Proposal narrows options, some choices still on the table cast serious doubt on the future court's independence and effectiveness. This brief commentary highlights some of our concerns.

Jurisdiction

The Lawyers Committee is very worried that, in Articles 7 and 7 bis, the Bureau Proposal includes options that would impose inappropriate limitations on the court's jurisdiction.

First, there should be no jurisdictional distinctions among genocide, crimes against humanity and war crimes. The Proposal presents the possibility of differing jurisdictional regimes for genocide and for crimes against humanity and war crimes. As a matter of principle, however, these crimes are of equal gravity and therefore should have one jurisdictional regime. As a matter of practicality, these crimes are often committed together. It would make little sense to create a court that would be able to adjudicate charges of genocide, but that might not have jurisdiction over charges of crimes against humanity or serious war crimes arising out of the same situation. Articles 7 and 7 bis should each have one jurisdictional regime for all three core crimes.

Second, the option of a state consent regime should be rejected. The Proposal retains the possibility of state consent for crimes against humanity and serious war crimes. As an overwhelming majority of states have said, the ICC must have automatic jurisdiction over these crimes, as well as genocide, both as a matter of law and practice. Current international law permits any state to prosecute a person suspected of these crimes without the consent of any other state. It is impossible to understand why the ICC, which is being created collectively by many states, should have less authority to prosecute such serious crimes than a single state. The only acceptable option in the current Bureau Proposal is Option I of Article 7 bis, which provides for automatic jurisdiction over the three core crimes.

Finally, there should not be unduly restrictive preconditions on the exercise of the court's jurisdiction. Although we would have preferred universal jurisdiction, which is consistent with current international law, Option 1 for Article 7, paragraph 2 is preferable to the other two options in the Proposal. This option, reflecting a compromise proposal originally made by the Republic of Korea, would create the same preconditions for all three core crimes. It would allow the ICC to exercise jurisdiction if any one of four states (territorial, custodial, state of nationality of the accused or victim) were either a party to the treaty or a non-party that had accepted the ICC's jurisdiction on an ad hoc basis. According to statements presented to the Committee of the Whole, this is the majority view.

War Crimes: Thresholds and Internal Armed Conflict

The Lawyers Committee is disappointed that the Bureau Proposal still contains, as an option, a general threshold for war crimes that would limit the ICC's jurisdiction "only" to war crimes committed as part of a plan or policy or as part of a large scale commission of such crimes (Article 5 quater, Option 1). Option 1 should be deleted because it is inconsistent with current international law, which does not contain any such threshold. Option 1 was also rejected by the majority of delegations that took the floor in the Committee of the Whole debate. There should be no threshold for the court's jurisdiction over war crimes. The option of no threshold should be restored in the next Bureau Proposal.

We are very concerned that the Bureau Proposal introduces new thresholds for war crimes committed in internal armed conflict (Sections C and D of Article 5 quater). Not only are these new thresholds contrary to existing international law, but they would also severely restrict the court's ability to exercise jurisdiction over atrocities committed in internal armed conflict. The threshold for Section D (page 8 of the English text) would prevent the court from investigating war crimes committed in internal conflict taking place in non-States Parties. It also would bar the court from assuming jurisdiction where armed conflict is among rival militias, where one side of the conflict is not under responsible command and where one side does not control any territory. These limitations would effectively remove from the court's reach many of the worst crimes being committed in the world today.

The Lawyers Committee is concerned that there might be further deletion of crimes covered by Section D. Crimes such as the intentional starvation of civilians and attacks on civilians causing incidental loss of life or damage were already left out of the first Discussion Paper (C.1/L.53). In our view, there should be no further deletion of war crimes committed in internal armed conflict from the draft Statute. These crimes are the most widespread today. Their omission would be contrary to existing international law and against the interests of justice.

Prosecutor

The Lawyers Committee is very encouraged that the Bureau Proposal no longer retains the option of eliminating the proprio motu Prosecutor. A Prosecutor with the authority to initiate proceedings on his or her own motion, based on information from any source, is non-negotiable. We are concerned, however, about the possibility of further limiting the prosecutor's independence under the guise of adopting unspecified "additional safeguards," as provided for in Option 2 of Article 12. Option 1 of Article 12 contains sufficient safeguards to protect against abuse of prosecutorial discretion. No further restrictions on the power of the prosecutor to initiate proceedings are necessary. Thus, Option 2 should be deleted.

Finally, we note that a successful resolution of the issues outlined above would be jeopardized by permitting reservations to the ICC treaty, a topic that will be taken up in

the final week. Reservations would undermine the legal regime provided for in the treaty and should be explicitly prohibited.

- Lawyers Committee for Human Rights Contacts: Jelena Pejic/Jerry Fowler 0337-555357

Women's Caucus for Gender Justice in the International Criminal Court

No more compromises: Bring the Issues of Justice to a Vote

The Women's Caucus is gravely concerned that justice is being hijacked. Fundamental norms and preconditions to international justice have already been compromised.

The Women's Caucus – which represents women from all over the world – calls on the substantial majority of states that are committed to an independent and effective Court to resist the pressure of a minority of powerful countries for further compromises. These powerful countries, including the U.S. and China, must receive the message that a Court will be created without them unless they respond to the demand for universal justice.

We call for a transparent process rather than a back room one. Let all the fundamental, non-negotiable issues of justice be put to a vote:

- Gender justice – Inclusion of crimes of sexual and gender violence, including forced pregnancy and gender-based persecution, and the prohibition on gender and other forms of discrimination.
- An independent prosecutor – No further "safeguards" over the proprio motu prosecutor as contained in Option 2 of the Bureau Proposal.
- Effective jurisdiction over all armed conflict. – Inclusion of internal armed conflict and rejection of proposed thresholds for war crimes.
- Automatic jurisdiction – Acceptance of the jurisdiction of the court over all the core crimes as a condition of joining the treaty. The opt-in option is disingenuous and totally unacceptable.
- No state consent regime – Reintroduction and adoption of the German proposal and rejection of barriers to the exercise of jurisdiction over all the core crimes.

If these minimal criteria are not present in the final statute, the Women's Caucus will not support the resulting weak court and will consider actively lobbying their governments against ratification.