



International Criminal Court

Joe Stork, Human Rights Watch

On June 15, 1998, diplomats from around the world will assemble in Rome to finalize a treaty that will establish an International Criminal Court (ICC). A key issue is the role of the U.S. government in these negotiations and its apparent effort to ensure that actions of U.S. citizens, particularly U.S. military personnel, will always remain beyond the conceivable reach of such a court.

Suggestions for such a court—which could operate when national judicial systems collapse or when no national court prosecutes persons suspected of war crimes or genocide—emerged after World War II but were shelved during the cold war. Responding to a 1989 initiative by the government of Trinidad and Tobago, the United Nations General Assembly commissioned a draft statute for an ICC. Interest in the project grew in the aftermath of the slaughter of hundreds of thousands of people in Bosnia and Rwanda. Delegates from some 80 countries began Preparatory Committee (Prep Com) meetings in the spring of 1996 to negotiate and consolidate a final draft.

Key Points

- A UN conference to finalize an International Criminal Court treaty convenes in June.
 - Such a court needs independent authority to investigate and prosecute war crimes and genocide without political constraint.
 - The U.S., France, and China want to make sure they can veto any initiative they find inconvenient or threatening.
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The impunity enjoyed by the architects and perpetrators of some of the worst massacres and atrocities of a bloody century underlies the drive to establish such a court. Complementing the International Court of Justice in The Hague, which hears disputes between governments, the ICC would investigate and try individuals accused of genocide, war crimes, and crimes against humanity. An ICC, if it had existed, could have been the venue for the work of the special tribunals

now dealing with the atrocities committed in Rwanda and the former Yugoslavia. Last year, when the Khmer Rouge appeared ready to hand over Pol Pot for prosecution, Cambodia was in no position to adjudicate and there was no existing international forum. An ICC could have fulfilled this role. A standing International Criminal Court, had it existed in 1988, would also have been the place to draw up an indictment against Iraqi President Saddam Hussein and his top cohorts for their genocidal campaign against that country's Kurds. Such a court should be crucial in addressing war crimes against women, including rape and sexual slavery,

which are often ignored in national courts and have been minimally pursued by existing ad hoc tribunals.

The last of the six Prep Com sessions ended April 3, 1998, but still at issue is what kind of court will emerge. Will the ICC have the authority and independence to deliver justice, or will it be subject to veto control by the Security Council and by the states implicated in any investigation, as U.S. negotiators suggest? A bloc of like-minded states—led by Canada and including Germany, South Africa, and Argentina—have worked closely with nongovernmental organizations to spearhead the effort for an effective and independent court. Supporters of an independent court have thwarted efforts by China, France, the U.S., and others to delay indefinitely the creation of an ICC, and they have insisted on treaty language extending automatic jurisdiction of the court to cover war crimes and crimes against humanity as well as genocide. Among the like-minded group are states that have undergone transitions from authoritarian rule and understand how impunity undermines political reform and the rule of law. Some of the larger global powers, however, advocate positions that would subordinate the court to the Security Council (where they have a veto) or would require that the state where the indicted citizen resides—Iraq, in the case of Saddam Hussein, for instance—consent to the ICC's jurisdiction on a case-by-case basis. At best, this would result in a permanent ad hoc tribunal, subject to political discretion rather than the imperatives of justice.

Some of the organizations and governments involved in the ICC campaign have cited the recently concluded international treaty banning the use of antipersonnel landmines to argue that the priority should be an effective and independent court, even if the U.S. declines to sign the treaty. The Clinton administration is eager not to be sidelined once again, as it was in the Ottawa landmines negotiations. Yet Washington contends that the two treaties are not comparable and that there could be no meaningful court without the participation and financial support of the United States. These are the stakes going into the final conference in June.

President Clinton, after initial hesitations, has endorsed the concept of an ICC, and U.S. experts have been constructive in many aspects of the negotiations, especially in drafting fair trial procedures and detailing the rights of defendants. But the U.S. has also put forward positions and reservations that, if they prevail, would give the U.S. (and other states) effective veto power over the cases the court investigates and prosecutes.

The U.S. position in ICC negotiations would compromise the court's independence and credibility by politicizing the most crucial decisions—namely, determining which cases the ICC will be able to consider.

The issue of the court's independence and credibility revolves around three areas of dispute. The first area concerns the role of the Security Council. The current draft denies the court jurisdiction in situations that the Security Council is "dealing with," unless the council expressly authorizes the court's involvement. Since the court's areas of jurisdiction—war crimes, genocide, and crimes against humanity—will necessarily involve it in situations likely to be under active Security Council scrutiny, this would give an effective veto to any of the permanent members. The possibility of an unfettered ICC prosecuting a political leader or military commander—one of the leaders responsible for the carnage in Bosnia, for instance—could seriously complicate negotiations to restore peace. Such concerns, though, could be addressed by less drastic means than vetoes. Singapore has proposed that the Security Council could initiate action to delay or forestall the ICC's involvement in such an instance. Under the current draft, one member of the council's permanent five could single-handedly stop the court from moving forward on a case by vetoing approval. Under the Singapore proposal, a member of the Perm Five could stop the court from pursuing a case only by obtaining both the agreement of the other four permanent members and a majority vote of the entire Security Council.

Britain has endorsed the Singapore compromise, and there are indications that the U.S., finding itself relatively isolated on this question, will eventually support it as well. In dropping such hints, though, Washington has also signaled that it intends to secure U.S. veto power by other means—namely, by insisting on language that would require the ICC, before it could initiate an investigation, to secure the consent of any state with an "interest" in the case. According to some proposals, "interested states" could include the state with custody of the accused, the state where the alleged crime took place, and the state of the accused's nationality. One U.S. official involved in the negotiations privately characterized the consent issue as "our nuclear bomb" in the negotiations, referring to the intimidating and potentially destructive impact of this stance.

This issue leads to the second major area of contention: what authority will the ICC have to determine the cases it will investigate and prosecute? One aspect of authority involves defining the court's inherent jurisdiction. There is considerable support, even from the U.S., for enlarging the present language of the draft statute to give the court inherent jurisdiction over not only genocide but also war crimes and crimes against humanity, such as targeting noncombatants, mass rape, and torture. Because these are crimes considered to be covered by customary international law, all states would be subject to ICC jurisdiction over such matters whether or not they have signed a particular treaty or convention. But the U.S. is also threatening to insist that even here interested states would have to give express consent to the ICC to prosecute individual cases.

A key aspect of the "state consent" question is complementarity—in other words, the relationship of the ICC to national criminal justice systems. The purpose of the ICC is not to replace or substitute for those systems but rather to operate where such systems do not exist or are ineffective. It is to make sure that those responsible for the most heinous crimes are investigated and prosecuted when political turmoil renders a national justice system ineffective or when the government itself is responsible for gross abuses. An effective ICC would spur governments to ensure that their judicial systems function effectively as the first line of accountability. By encouraging national governments to address crimes of sexual violence, mainly against women, the ICC could potentially make a huge difference, if the statute is drafted to specify the court's jurisdiction over such crimes.

The present draft statute language, however, fails to clarify where responsibility lies for determining the inability or unwillingness of a state to conduct a genuine investigation or prosecution. If the final statute's wording is weak, a state could decide unilaterally not to cooperate with the ICC by deeming its own actions sufficient. States should be able to challenge the ICC's jurisdiction in a given case, but it is important that the court have the final decision. The U.S. says that it is reserving its position on the issue of state consent until the relationship between the ICC and the Security Council is clarified. This suggests that Washington intends to emerge from the negotiations with its veto power preserved in one way or another. Of course, a high consent threshold would also have the support of numerous other states anxious to guarantee the same prerogative of immunity for themselves.

A third and related area of dispute concerns the role of the ICC prosecutor. The present language, endorsed by the U.S. in no uncertain terms, restricts the prosecutor to initiating an investigation only in situations referred by the Security Council or in response to a complaint by a state that has ratified the treaty. Such language would reduce the ICC to the role of an executor of decisions by the Security Council or by governments that have agreed to its jurisdiction—decisions that invariably embody political considerations that may well outweigh the demands of justice. Prosecutorial autonomy will clearly be important, also, if the court is to adequately address gender-based war crimes. It is important to expand the ICC's trigger mechanisms to allow the prosecutor to initiate an investigation based on his or her own findings or on information obtained from individuals or nongovernmental organizations. There exist provisions of judicial review in the treaty that safeguard against the prosecutor's taking up frivolous, spurious, or politically motivated complaints.

Key Problems

- The Pentagon insists that the U.S. only agree to a treaty that preserves the U.S. ability to reject ICC jurisdiction over cases in which U.S. military personnel might be prosecuted.
- This sort of treaty would appeal to the very states most likely to ignore their own war crimes, genocide, and crimes against humanity.
- If the final treaty adopts some of Washington's current positions, the result will be a permanent ad hoc tribunal, subject to political discretion rather than the imperatives of justice.

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Any treaty that emerges from the Rome conference will go into effect after the required number of governments ratify it. The creation of an effective and credible International Criminal Court is critical to fostering the rule of law—an often-proclaimed objective of the United States. If a strong treaty emerges from the Rome conference, and assuming that the U.S. is one of the signatories, it will be necessary to mount an effective grassroots campaign to secure Senate ratification. The immediate need, however, is to ensure that there will be a treaty worth signing and ratifying.

The very problematic U.S. positions on the key issues described above derive mainly from the insistence of the Pentagon on the ability to prevent the prosecution of U.S. military personnel for actions undertaken in the course of duty. The administration cites the global deployment of U.S. forces, particularly those assigned to peacekeeping and humanitarian intervention missions, to suggest that it ought to have some special dispensation when it comes to accountability. “No other country shoulders the burden of international security

as does the United States,” David Scheffer, chief U.S. negotiator for the ICC, said in late February, citing Security Council mandates, NATO commitments, humanitarian objectives, and counter-proliferation. “It is in our collective interests that the personnel of our militaries and civilian commands be able to fulfill their many legitimate responsibilities without unjustified exposure to criminal legal proceedings. The permanent court must not be manipulated for political purposes to handcuff governments taking risks to promote international peace and security and to save human lives,” he added.

serious crimes and atrocities are committed, it will remain the paramount responsibility of a national judicial or military justice system—which certainly exists in the United States—to investigate and prosecute those alleged to be responsible. One of the desirable effects of a standing ICC will be to provide an inducement for individual countries to meet their responsibilities to investigate and prosecute such crimes. Third, the draft treaty contains checks and judicial review procedures that would prevent an ICC prosecutor from pursuing politically motivated and spurious allegations. Only if U.S. troops committed atrocities in the line of duty and were not investigated and prosecuted by U.S. authorities could such a case be addressed by the ICC. That is the point of justice for all.

The Clinton administration argues that a treaty establishing a strong court—one whose operations could not be restrained unilaterally by U.S. veto power—would stand no chance of being ratified by the Republican-controlled U.S. Senate. Such an argument is premature, given that there has not yet been serious advocacy with the Congress or the general public. Even more to the point, it shortsightedly suggests that the quality and character of such a potentially critical international institution should be determined in the final instance by what Senator Jesse Helms and his colleagues might be willing to accept. Having the U.S. on board for this international undertaking is an important objective, but not worth the price of having to settle for a weak and politicized body with little autonomy and less credibility. What needs to happen now is for White House proponents of a strong and effective ICC to strategize within their ranks for a more forward-looking U.S. position. There is a vital role, also, for an educated and activist citizenry to ensure that the concerns of the Defense Department are balanced with the stated goal of a credible and effective court.

Though Washington often proclaims a commitment to multilateralism, it often fails to support multilateral initiatives that may compel a higher degree of accountability to the international community. The U.S. should support an effective ICC—one that will not be impossibly constrained by the political imperatives of the moment in particular capitals, including Washington. If the Clinton administration declines to take up this challenge, then it may find itself once again—as in the Ottawa landmines negotiations—sidelined by history.

Joe Stork is the Advocacy Director for the Middle East and North Africa division of Human Rights Watch, in Washington, D.C.

Key Recommendations

- The Clinton administration needs to realize that it risks being sidelined once again, as it was in the landmine negotiations.
- The priority should be a treaty worth signing, establishing an effective, credible, and independent court, not a marginal and meaningless entity tailored to win the support of the most conservative U.S. Senators.
- The administration should tap into the currents of actual and potential citizen support for an effective ICC among church and civic groups, bar associations, and NGOs.

Leaving aside the disputable claim that the global deployment of U.S. military forces is primarily for humanitarian purposes, there are several reasons why Scheffer's scenario is farfetched. First, the court's jurisdiction will be limited to genocide, war crimes, and crimes against humanity—levels of atrocity unrelated to isolated and minor offenses committed during a peacekeeping or aid delivery mission. Second, if and when

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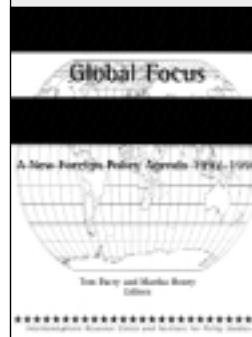
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