

**International Criminal Court : Summary of Recommendations Composition &
Administration of the Court , Crimes Against Humanity**
Women's Caucus for Gender Justice, Preparation for March (6th) Prep Com, 1997

Note:

This summary highlights only the gender-specific recommendations of the Women's Caucus with regard to the above issues to be negotiated at the March PrepCom. This will be followed by our documents containing suggested text and commentary. All references to articles are to the Zutphen draft.

With regard to Procedures, most of our positions are contained in our Suggestions & Commentary to the December PrepCom. With regard to Relationship of the Court to the United Nations, we favor positions that assure maximum autonomy for the Court from political influence. Our specific recommendations in this regard will be not be available until next week. We will also propose, at the appropriate time an addition to the Preamble committing to gender integration throughout the Court's structures and processes.

The Women's Caucus looks forward to the responses of the delegates and to further discussion of these proposals. Thank you.

I. Composition and Administration

1. Selection and Personnel Policies:

Consistent with the principles articulated in the 1993 World Conference on Human Rights in Vienna , the 1995 Fourth UN World Conference on Women in Beijing, and the Convention on the Elimination of All Forms of Discrimination Against Women , the ICC Statute should adopt and implement two fundamental principles for the selection/election and assignment of individuals who will staff the various organs of the Court. In this regard, we emphasize the unique opportunity to do this at the inception of an organization:

(A) Ensure a balance between women and men.

(i) Reject criteria (such as country-based criteria, prior judicial service etc) which will have the effect of excluding qualified women from professional positions within the Tribunal.

For example, Article 30(1),in addition to the traditional criteria of character, independence, impartiality and integrity should include "capable of being highly competent jurists."

(ii) Recognize that positive measures must be taken to ensure equal gender representation. Following the specific direction in the Beijing Platform for Action para. 190(a) and (b), the statute should state the principle and provide measures to ensure a balance between women and men, using as a measure that there be

not less than 40% nor more than 60% of either sex so long as necessary to achieve equal representation. (Amend, e.g. article 30(5)).

(B) Ensure expertise in gender analysis and crimes of sexual and gender violence.

(i) Here we make an important distinction between sex (the male/female composition) and the gender expertise necessary to ensure the effective, fair and respectful prosecution of gender violence and violence against women by the Court. While today gender expertise more likely resides in women, we recognize and hope that both women and men will present themselves as having this expertise.

(ii) Articulate as a selection/election and assignment criteria the need to ensure the integration of this expertise in all the organs of the Court as well as at the highest decision-making levels of each.

(iii) To ensure the election/selection of persons with the necessary expertise to carry out the functions of the Court, we support the UK proposal regarding art. 30(1) for proportional representation as between international law (humanitarian and human rights, including women's human rights) and criminal law and recommend adoption of a third criteria: expertise in crimes of sexual and gender violence. This is an overarching criteria because of the pervasiveness and particularities of these crimes, as well as the ease with which they can be trivialized or ignored.

(iv) To ensure the integration of this expertise, we propose that at least one of the members of the Presidency or Administrative Council (art. 30(1)(c)); the different organs of the Court (art. 33); the Prosecutor and Deputy Prosecutors (art. 36) etc have this expertise.

2. Legal Advisor for Gender and Gender -Related Crimes. The Statute should establish in the Office of the Prosecutor the position of Legal Advisor on Gender. That individual will have the power and responsibility to oversee the full, fair and respectful integration of gender throughout its operations. We emphasize the absolute necessity of the oversight responsibility. The Legal Advisor on Gender must be an advisor to the Prosecutor and work closely with the member of the OP leadership who has expertise in this regard, as recommended in art. 36.

This oversight responsibility should include participation in personnel policies and decisions; training of staff; development of operational protocols; interpretation of international law as to crimes of sexual and gender violence; the definitions of crimes, development, revision and application of rules of procedure and evidence; analysis of the relevance and sufficiency of proposed evidence; the development of appropriate investigative and prosecutorial standards and practices, including the treatment and protection of victims and witnesses (liaison with Registry on these issues); and the establishment of sexual harassment processes.

We emphasize the importance of this post as we believe it has been instrumental in advancing the prosecution of crimes against women in the ICTY while the absence of

such a person on site with oversight power and responsibility has resulted, until very recently (and then by virtue of the monitoring and intervention of NGOs) in impunity for these crimes.

3. **Victim and Witness Unit.** A Victim and Witness Unit (VWU) should be established as an autonomous unit within the Registry under the supervision of the Presidency [or Administrative Council]. It should have the responsibility for arranging for protection of witnesses and their families as well as providing counseling and support, which can, as is beginning in Rwanda, include rehabilitative support projects in the community.

Recognizing that there are very serious problems with the Victim and Witness Units as constituted in the existing Tribunals, we have consulted widely on the question of the placement of the Unit with professionals in the OP and the Registry as well as outside. We think that is critical to place the VWU under the aegis of the Registry for a number of reasons: it has to service both defense and prosecution witnesses (and it must keep these functions separate); it ensures an approach which is dedicated to the surfacing and consideration of the needs of witnesses and their families rather than the more goal-oriented approach of the prosecutor, which, in turn, will minimize the withdrawal of witnesses at the last moment; it ensures that resources devoted to witness protection and support will not be diverted to investigation; and it unites in one body a range of functions that involve supporting survivors and witnesses.

II. Crimes Against Humanity

With respect to the definition of crimes against humanity, we will emphasize the following points:

1. Crimes against humanity are defined by whether the enumerated offenses are widespread or systematic. To require proof of a policy is both unrealistic in many of the conflict situations potentially before the Court and will be an unnecessary obstacle to the proof of sexual violence as a crime against humanity.

2. Crimes against humanity should not be mandatorily linked to armed conflict. The linkage to war would exclude from prosecution most official perpetrators of massive violence through repressive dictatorial regimes such as in Chile and Latin America in recent decades. All that should be required is that they occur on a widespread or systematic basis. This takes care of the need to identify an actor--whether state actor or non-state actor--with the capacity or responsibility to carry out or encourage crimes on this scale. References to the "civilian population" should therefore be replaced with a reference to "any population."

3. Discrimination or group-based animus is not a legal criteria for all crimes against humanity but only for the crime of persecution. This was the law of the London Charter which significantly lists the crimes of atrocious violence first and then states " or persecution based on.....; and it has been reaffirmed in the later work of the International Law Commission.

Because of the factual interrelationship between hate crimes and massive crimes in Bosnia and Rwanda, the Secretary-General's commentary to the ICTY and ICTR Tribunals, however, suggests that animus is a criteria for all crimes against humanity. This is not correct as a general rule. The ICC statute should follow the language of the statute itself which links animus only to the persecution offenses. For this reason, the group-based language should be removed from the chapeau.

4. With respect to the listing of atrocious violence, murder should include killing likely to result in immediate or eventual death; the language of (g) should be conformed to the negotiation of sexual violence under the War Crimes chapter; and persecution should be recognized on the basis of gender or other similar grounds, but not require connection with other crimes within the jurisdiction of the Court. This is a matter of extreme important to the Women's Caucus.