



***On the Record for a Criminal Court***

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**Correction:**

Earlier today, we re-ran an oped piece by Larry Minear entitled 'Inhumanity and Impunity.' Although we reported the reprint as having been from The International Herald Tribune, it was actually printed in The Providence Journal-Bulletin, on June 30, 1998 and syndicated by Knight-Ridder. Our apologies to Larry Minear and to the Journal-Bulletin for this error.

**From the AP Editorial Desk**

**Some Words From William Pace, Convener of the Coalition for an International Criminal Court**

The course of the conference during the past three weeks has thus far exceeded the expectations that many leaders of the CICC had prior to their arrival in Rome. As we have progressed more than half way through the conference, we have witnessed slow but

steady progress. Yet in spite of steps towards the final ratification of the treaty, members remain concerned over the direction in which the negotiations are heading. The like-minded member states, which share many of the CICC's beliefs and goals, are succumbing to the pressure of other nations to lower their demands regarding the final content of the treaty. It remains vital that CICC members at the national and all other levels continue to vigilantly express their concern over the need to establish a strong international criminal court.

Several hundred representatives from approximately 200 NGOs have descended on Rome from all corners of the globe. The organizational success of the CICC has helped foster an environment conducive towards the effective efforts by the NGOs to positively impact all aspects of the treaty. Furthermore, the CICC has been providing services to facilitate the flow of information throughout the duration of the conference. The CICC Teams have prepared numerous reports on the progress of the deliberations. Translation of key reports into French and Spanish by the CICC has assisted governments and NGOs from Africa and Latin America in the negotiations. Each day, members of the regional and treaty teams meet with governments to exchange views and information on specific issues under debate. Additionally, the CICC has continued to keep the international media informed as to the status of the conference.

### **Chairman Struggles to Define Compromise Package**

#### *Costa Rica complains of 'unrepresentative' Sunday session*

Philippe Kirsch, the chairman of the conference negotiating committee of the whole, will present the conference with the broad outlines of a compromise package Tuesday in an attempt to force the pace of negotiations and narrow down the disagreements.

Kirsch's intervention comes at critical time in the Rome negotiations, and will be seen by many as a gamble by the Canadian chairman.

On the one hand, with just two weeks now remaining, Kirsch clearly sees the need to break through the Gordian knot of interlinking problems – textual and political – and start to forge a consensus text. As he told the committee on Monday, delegations need to be able to have something concrete for their governments by the end of this week if the conference is to stand any chance of success. On the other hand, any attempt to force the pace of the negotiations could easily backfire, with the negotiations delicately poised.

All agree that there is extraordinary pressure on Kirsch, a genial and hard-working diplomat. Colleagues and associates say that he had hoped to get "technical issues" out of the way by last week. This would have left him free to start putting together a possible compromise on the most politically sensitive part of the statute concerning the jurisdiction of the court, the role of the Security Council, and the prosecutor (part 2).

In his compromise, say delegates, Kirsch has only partially succeeded in forging a consensus, because Monday's public meeting of the committee of the whole made it clear

that many "technical" issues continue to cause disagreement. They include the broad definition of crimes against humanity, whether self defense should serve as an excuse for criminal responsibility, trials in absentia, the death penalty, the financing of the court, and cooperation between the court and governments in such areas as the transfer of suspects and pretrial investigations.

Kirsch is said to have met with over 60 delegations last week in an effort to find their "bottom line" positions. Based on this, he invited 28 delegations to a marathon session on Sunday at which he presented options on part 2 of the statute. Participants said this did not include their recommendations for excluding or including key elements of the statute – although they did express a preference on some of the lesser components.

According to several participants, the meeting was intense and extremely frank. Delegations from Russia, France, and the United States reportedly expressed irritation at being pressured, with an American delegate reminding Kirsch that governments were negotiating on a voluntary basis, not under duress. The French delegate and Kirsch were seen to exchange angry words at the end of the meeting.

When Kirsch reported on the Sunday session to the committee of the whole on Monday, he was met with more anger from those delegations, which had been excluded from the Sunday session. Costa Rica complained bitterly that only "big delegations" had participated, and that this had "not served the spirit of the conference." In fact, said delegates, Kirsch had made an effort to ensure a representative meeting. Lesotho was among those invited.

While these complaints illustrate the pressure on Kirsch and the procedural problems that he faces in trying to hammer out a compromise, they also remind delegations that time is running out in Rome. One observer expressed the hope that this would serve as a "wake-up call" for governments, which are sincere in wanting an independent criminal court. The first three weeks have allowed for a thorough airing of the issues and the positions are now clear, he said. "What we need now is political will, and an end to posturing."

## **Definitions:**

### **Protection For Aid Workers In Jeopardy**

With time running out at the Rome Conference, some delegates are increasingly concerned that it may be too late to bring attacks on aid workers under the jurisdiction of the ICC.

Headed by the office of the UN High Commissioner for Refugees (UNHCR), relief agencies would like to use the ICC to deter attacks on aid officials and relief workers, which have increased dramatically in recent years.

Spain has taken on the task of coordinating efforts to include such attacks in the list of war crimes that would be prosecutable by the ICC. The text could include "personnel

from humanitarian organizations and peacekeepers not directly involved in hostilities" within the broad category of civilians who are to be protected from attacks.

These efforts have received considerable support. But they have yet to result in an agreed upon text. With less than two weeks now remaining, and the conference increasingly absorbed by larger political issues, many fear that it may already be too late.

Some of the strongest opposition continues to come from the British delegation, which argues that the Geneva Conventions already outlaw attacks on civilians, and that any attempt to list individual groups, like aid workers, could increase the risk for those not specifically mentioned.

Nongovernmental aid agencies could certainly envisage a situation where relief workers are stopped at a roadblock and found not to fit a precise definition as contained in the ICC statute.

But this risk is far outweighed by the importance of preventing the kind of attacks that have claimed the lives of scores of agency officials in recent years. UNHCR officials feel that it might serve as a very useful deterrent if the ICC were known to be serious about prosecuting attacks on aid workers.

Meanwhile, in a related initiative, Slovenia has proposed that attacks on UN declared safe havens be outlawed. This has received support from the Bosnian delegation – which is perhaps not surprising in view of the way safe havens in Bosnia were routinely and viciously attacked in the war.

The problem is that these safe havens were political creations of the UN Security Council, not humanitarian and neutral. Indeed, many historians of Bosnia would maintain that their creation was a deliberate device by the Council to avoid taking action against the Bosnian Serbs. This is hardly the kind of "protection" that should be endorsed by the ICC.

### **Trafficking of women and children must be a crime against humanity, says Women's Caucus**

Representatives from women's and children's groups are fighting to save a proposal that would make the trafficking in women and children a clearly recognized crime against humanity.

This follows a complicated and confused discussion over a proposal by Italy to link trafficking with sexual exploitation, and define it as form of enslavement.

The draft statute proscribed the "trafficking in persons" before Italy presented its amendment on Friday. The amendment reads: "Enslavement means the exercise of any or all of the powers attaching to the right of ownership of a person and includes the

deprivation of physical liberty in the course of trafficking in persons, in particular women and children for the purposes of sexual exploitation."

Women's groups welcome the fact that the Italian proposal would make a specific reference to women and children, but they feel it would be much stronger if it was separated from enslavement and was broader than sexual exploitation. Human rights groups feel that trafficking includes a broad range of slavery and slavery-like practices, including systematic recruitment and forced labor. The women's groups also object to the wording "the right of ownership."

It is far from clear whether the women's groups will be able to reopen the debate. They feel that the Italian proposal was accepted after a desultory and unsatisfactory debate that did no justice at all to the gravity of the crime itself. Some governments have proposed to revive the discussion. They are not thought to include Asian governments, which have been singled out for criticism by human rights groups for permitting the trafficking of women, child prostitution, and a range of other unacceptable practices.

## **General Principles**

### **Conference Grapples with Self-Defense**

The Rome Conference is unable to agree whether individual self-defense as an exclusion of criminal responsibility should be extended to the defense of property.

The issue has sucked delegates into a complicated discussion that has held up the completion of agreement on general principles for the ICC statute, and created considerable confusion among governments.

The statute would cover individual actions, and would have no bearing on self-defense by states. At the same time, the fact that a state uses force in defending itself does not legitimise the commission of crimes under international humanitarian law.

For a soldier to plead self-defense, he or she – or indeed another person – needs to be in acute peril. It is not enough to be part of a defensive operation. This has been the position of a group of states that are worried about accepting too wide a definition of self-defense.

On the other hand, several delegations have argued that the definition should extend to the defense of property as well as the defense of life. Days of debate then narrowed this down to the point where war crimes might be permitted if they occur in the defense of property "which is essential for accomplishing a military mission."

The full text reads: "A person is not criminally responsible if at the time of that person's conduct the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, that property which is essential for accomplishing a military mission against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or property protected."

In the spirit of compromise, New Zealand, Germany, and others ultimately agreed to register their concerns in the form of a footnote. This would read: "The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility."

Arab delegations continue to be dissatisfied. They still want the defense of property included, without qualifications. To many, this would be unacceptable and even inconceivable because it would imply that people could be permitted to commit genocide and crimes against humanity in defense of property. This latest impasse symbolizes the difficulty in finding mutual understanding that has turned this provision into a potential deal-breaker.

## **Perspective**

### **National Security**

by Mathias Neuner

The important question of when and under what requirements the ICC should have the power to request sensitive national security information is still unanswered. The key issue of the discussion is whether states or the ICC should be authorized to determine whether a state could withhold information from the court on the grounds of national security.

This question has been subject to an appeal at the International Criminal Court for the Former Yugoslavia (ICTY). In the case of the Croatian General Blaskic, the Appeals chamber found that the Tribunal, not the state, can determine whether the grounds of national interest are sufficient and well-founded enough to withhold the requested evidence.

Three proposals at the Rome Conference made by the UK, Croatia, and recently, Singapore, follow more or less this precedent and reserve this exclusive determination for the ICC while a joint US/France proposal reserves this exclusive and final right to determination for the states.

All three proposals follow a two-step approach for ICC determination. First an attempt to solve the matter by cooperative means has to be made. If the state and the court cannot agree on a modification of the court's request and/or the modalities for the disclosure in a second step, the court will evaluate the weight of the claimed national interest.

In the UK and Croatian proposals the court would have discretion in evaluating the grounds for a claim of national security. An order to disclose the information can only be made if three cumulative requirements are met: the determination that the state is not acting in good faith, the information or evidence is relevant and necessary for the conduct of the proceedings, and that the states claim is 'manifestly unfounded.'

The Singapore proposal establishes a lower threshold than both the UK and Croatian proposal because it requires only the determination that evidence is 'relevant and necessary' for the establishment of guilt of the accused.

The difference between the UK and Croatian proposal is that the Croatian proposal includes a legal presumption that the states' claim is unfounded until the court establishes the "legitimacy" of their national security claims.

The joint US/France proposal reserves for the states exclusive and final right of determination of national security. The US proposal calls for stricter requirements for an order of disclosure than the UK proposal. The ICC would only be able to compel the information in cases of a 'pattern' of misconduct by states. This proposal opens the door for states to hand over from time to time unimportant sensitive information in order to avoid the determination of a pattern of refusal by the ICC. Most countries were against the inclusion of the "pattern" requirement.

In the working group meeting on Thursday July 2, the US delegation referred to its domestic jurisdiction, under which the final decision to disclose sensitive information lies in the hands of the Executive branch and ultimately with the President. In the delegates' view, judges are competent only in law and are not suitably positioned to handle such sensitive information. In the worst case, criminal proceedings have to be terminated if overwhelming national interests so require.

According to the US/French proposal, if a state continues to disobey after an ICC determination, the question of enforcement has to be sent to the Assembly of States Parties.

The US/French proposal is supported by China, Egypt, Israel, and Japan. According to the working group meeting, the UK proposal is supported by Argentina, Australia, Belgium, Finland, Germany, Italy, The Netherlands, New Zealand, Norway, and Sweden.

It is uncertain where the balance between state interests and the procedural needs of the ICC lies. The key issue is whether a state or the ICC should have the right to a final determination.

### **CICC Reports**

The Coalition for an International Criminal Court has set up 12 teams of monitors to cover key parts of the ICC statute. During the final two weeks of the conference, On the Record will feature regular reports by these teams. Their purpose is to provide NGOs not attending the debate with a clearer understanding of the issues being discussed at the Conference. The CICC in no way guarantees that the positions of each state in the debate are accurately reflected in the reports.

### **Composition Team**

One of the remaining criteria concerning the selection of judges concerns a clause regarding the background required. Criminal and trial law experience and international law and relevant professional experience or criminal and international law plus relevant professional experience are currently being considered. Furthermore, it appears that the majority of countries prefer ICJ criteria for selecting judges. Additionally, they prefer that states determine the nomination of judges.

### **Penalties Team**

Three issues continue to dominate the deliberations over penalties:

#### 1. Death penalty

A minority of states, primarily Arab countries, continue their advocacy for the inclusion of the death penalty in the statute. However, many states express the impossibility of this option and the impossibility of participating in the ICC should capital punishment be included. Death penalty advocates need to reformulate their positions in order for the ICC to work.

#### 2. General penalty provision

An emerging consensus over general penalty provisions would empower the ICC to impose sentences up to life imprisonment with the caveat of mandatory reviews for parole. Additionally, secondary penalties would include fines and forfeiture of proceeds from crimes. Such money would be deposited into a trust fund which would then be used to recompensate victims of crimes.

#### 3. Legal persons

The question of penalties for legal persons has not been addressed since the ICC may or may not have jurisdiction over them.

### **Finance Team**

The debate over finance has been divided into 3 options with the number indicating the amount of states in support of the proposal:

#### 1. State funding (11)

#### 2. United Nations funding (16)

#### 3. Combination of the two (21)

Trinidad and Tobago supports UN funding and also represents 13 other states through CARICOM, thus increasing the number of states supporting UN funding to 29. Discussion over related parts of the treaty has led to two different strategies to deal with

finance. The first calls for states to decide on funding procedures now, while the second calls for states to hold out until the end, using the finance issue as a political bargaining tool. However, most states support early action, proclaiming that it is only possible through a general consensus over the compromise of option 3 listed above.

### **Cooperation and National Security Team**

In regards to the disclosure of information, the UK Proposal advocates that the court would ultimately determine what must be disclosed during an investigation. However, the US/French Proposal, while based upon that of the UK, claims that the release of information should be a matter of the state in question rather than that of the court. Furthermore, a new provision has been added stating that information from a third party cannot be passed onto the court if it had been subject to confidentiality.

### **Investigation Team**

France has proposed that before any investigation, the prosecutor must notify state parties and that the state must notify the persons under investigation. This French proposition has aroused debate among delegates as it may hinder the effective investigation of crimes by the court. Additionally, states have been debating the role of the state in regards to onsite investigation. One option calls for state consent before the Prosecutor commences with an onsite investigation, while the other proposal would allow the Prosecutor to proceed without the consent of the state. These issues remain hotly debated and, presently, remain unresolved.

As the debate moves more and more into informals where NGO presence is increasingly restricted, it will be difficult to report accurately on the positions of the individual states. If your organization is interested in learning more about the portions of a state on a particular issue, we recommend you contact the country of the Team responsible for monitoring the debate on that issue, through the teams secretariat (Birgit Schwenk, Ada Chu or Pascale Norris 39 6 570 50202). Detailed team reports can be found on the CICC website.