



## *On the Record for a Criminal Court*

### **Issue 1: Welcome to On the Record**

#### **From the AP Editorial Desk**

Over the next five weeks, delegates from around the world will be meeting in Rome to draft the statute for a permanent international criminal court. On the Record will keep you informed about this historic initiative.

On the Record has been conceived by The Advocacy Project, an informal association that seeks to promote respect for humanitarianism. The newsletter will be produced on a daily basis by an experienced international team in Rome, and distributed to subscribers by email.

We welcome contributions and comments, and will make every effort to reproduce letters and guest editorials. On the Record will also try to respond to queries, and to put campaigners in contact with delegates and Coalition for an International Criminal Court (CICC) coordinators. Contact us by email.

On the Record endorses the creation of an effective and independent court, and those who are campaigning for its establishment. Our project is supported by the CICC, which is coordinating nongovernmental efforts to establish a court. It has also received support from the Washington-based Coalition for International Justice, which works to bring indicted war criminals to justice and strengthen the two international criminal tribunals (for Rwanda and the former Yugoslavia). At the same time, On the Record is editorially independent and responsible for the contents.

Feel free to reproduce the contents of On the Record, preferably with acknowledgement.

We look forward to hearing from you.

#### **The Case For an International Court**

*"The Victim's left arm had been chopped off by a machete; his right arm slashed by a knife; a right eye was pierced by a nail; and a bullet was smashed into his skull."* -- From a press communique of the UN High Commissioner for Refugees, describing the wounds of a young Bosnian Muslim who was evacuated from Sarajevo during the siege

The Rome conference is taking place against a background of extraordinary violence against civilians. In the weeks leading up to the conference, Serbian security forces have shelled villages and "cleansed" thousands of ethnic Albanians from the Serbian province of Kosovo; women and

children have been slaughtered in Algeria; and emergency food aid has been withheld from starving people in the southern Sudan and central Afghanistan. These are crimes under international law, and in most cases government authorities are responsible -- directly or indirectly. They make a compelling case for the creation of a permanent international criminal court that can enforce international law impartially and without interference from governments.

The idea of such a court is not new. It has long been realized that international law, like any law, needs enforcement, but this requires a leap of faith by states. When the idea of a court was first proposed in the wake of the Second World War, it was beaten back by governments that feared an erosion of their sovereignty.

In some respects the world has come a long way since the 1940s. Building on the precedent set at Nuremberg in 1945, two international tribunals are prosecuting war criminals from Rwanda and the former Yugoslavia. In the process, they are establishing a solid body of case law. Six international human rights treaties now regulate government behaviour. Hundreds of nongovernmental groups are campaigning for a criminal court -- indicating a healthy degree of commitment and interest among non-specialists.

But in other respects, nothing seems to have changed. Governments are invoking the same fears that they used to kill the idea of an international court in 1948 -- that it would erode their sovereignty. As a result, the fundamental issue -- whether governments are prepared to cede authority to a new international criminal court -- remains the same. And if so, how much and what kind.

### **Before Cases Reach the Court**

Much of the controversy centers around when and how the International Criminal Court (ICC) would take up cases. Unlike the two ad hoc tribunals on Rwanda and the former Yugoslavia, which were created by the Security Council and have primacy over national law, the ICC would have "complementarity" with national courts. In principle, this means that national courts would have responsibility to prosecute war criminals. Only when the state is unable or unwilling to deal with a case would it pass to the ICC.

But there is huge disagreement about whether the ICC should be allowed to make this determination. Some governments, notably the United States, are determined to restrict its ability to launch prosecutions. Publicly, and privately, American officials have raised the frightening spectre of a court on the rampage -- of a prosecutor launching "politicized" prosecutions, targeting unwary Americans, even going after UN peacekeepers. As a result, the US has tabled proposals that would make it virtually impossible for the ICC to take up any case without getting prior permission from the UN Security Council, where the US exercises a veto.

Whatever happens, say the Americans, a court will be long in the making. In the meantime, the Security Council should be free to establish ad hoc tribunals along the lines of the ICTR (Rwanda) and ICTY (former Yugoslavia) to deal with egregious situations. One possibility that has been floated by the US: a tribunal to deal with Khmer Rouge abuses in Cambodia (1975-

1978). Several US Senators have also called for the Iraqi president Saddam Hussein to go before a war crimes body.

There is much speculation about how far the United States will go in pushing this position, and whether the United States feels strongly enough to jeopardize the whole conference. On the one hand, war crimes have been a centerpiece of American foreign policy, and without American backing there would be no tribunals on Rwanda or the former Yugoslavia; on the other hand, the US Congress and Pentagon are solidly opposed to an independent ICC. The Pentagon has been lobbying other NATO members, and Senator Jesse Helms (the powerful head of the Senate committee that would have to steer the court through ratification) warned recently that any proposal calling for an independent court would be "dead on arrival" if it was sent to the Senate.

However important, the United States is still only one of many governments with reservations about the ICC. Many nonaligned governments are reluctant to hand over sovereignty to a court, particularly one that is controlled by the UN Security Council. Some of them would like a court to operate without any formal link to the Council at all.

This is unrealistic, because the kind of issues that will come before a court -- genocide, war crimes and crimes against humanity -- are almost certain to be on the Council's agenda by dint of its mandate for international peace and security. It is clearly important that the Council be able to refer cases (or situations) to the court. It is also important that the court does not impede or jeopardize the Council's ability to fashion a peace agreement by its overzealous pursuit of a case.

But this does not mean the Council should be allowed to dictate the court's agenda. Led by the United States, some governments would like to give the Security Council the power to decide which cases go to the court, and which are withheld. This is completely unjustified. The five permanent members of the Security Council failed completely to ensure adequate protection of civilians in the former Yugoslavia and Rwanda. They have treated the two tribunals with inconsistency and indifference. Two of the five, Russia and China, have suppressed dissent within their own boundaries with the kind of ferocity and indifference to human life that should have put them in the dock. Simply put, the Security Council has not earned the right to decide the court's agenda. Handing the court over to the Council would ensure its politicization.

In fact, the sorry record of the Security Council is another compelling argument for a strong, independent court. Not only should it be able independently from the Security Council, but it should be able to prosecute individuals from powerful nations, as well as those from the weak.

### **After a Case Reaches the Court**

There is more consensus on what would happen once the ICC receives a case. This begins with the definition of crimes (applicable law). Most feel that the court should cover genocide, war crimes, and crimes against humanity, which are now well established under customary international law thanks to the two tribunals in the Hague and Arusha. (Their rulings have -- among other things -- firmly established rape as a war crime.) Not all the definitions are agreed, however. Some would like to define the use of certain types of weapons -- land mines and

nuclear weapons -- as a war crime. These and other definitional issues will be covered by On the Record.

Certainly, the more limited the court's applicable law, the less chance there will be of it seeming to overreach its mandate and become "politicized." This explains a disagreement over aggression. Germany and Russia support the inclusion of aggression in the court's applicable law. They are supported in this by some NGOs, who feel that to exclude aggression would weaken the precedent set in Nuremberg (where Nazi leaders were prosecuted for crimes against peace). But many governments and NGOs feel that aggression would be too difficult to define and encroach into the role of the Security Council. Forcing the issue, they feel, could prove fatal.

There is also a wide degree of consensus on proposed legal procedures such as the election of judges, the conduct of trials, the rights of defendants, the treatment of witnesses, and penalties. (There has been almost no support for including the death penalty.) Once again, there is solid precedent in the form of The Hague and Arusha tribunals, which have succeeded in marrying the European civil law system with the more adversarial approach of common law. The rights of defendants are clearly set out in international treaties. There is also wide agreement that witnesses need special support, although it is still to be decided how this would be handled administratively at the ICC and how extensive this support should be. (The experience of the two tribunals suggests it should be broad and long-lasting. Several witnesses to the Rwanda tribunal have been murdered, and although the link to their testifying has not been clearly established, it is close enough to be worrying. Many potential witnesses to The Hague have changed their mind about testifying as a result of intimidation).

Not everyone is happy with the evolution of international criminal procedure in The Hague and Arusha courts. The French are concerned with what they view as an erosion of the continental (civil) system. The Americans feel that the proposed ICC procedures need to be more rigorously defined. They also worry that some constitutional rights might be ignored (such as the right of a defendant to know the identity of his accuser). Overall, however, legal procedure looks like being relatively unproblematical.

The Rome conference will be addressing important administrative issues. These include the financing of the court, and the links between the court and the United Nations and other international organizations. Hopefully, the conference will also underline the importance of outreach and promotion, which have been handled in amateurish fashion by the Hague tribunal.

On the key issue of funding, the two tribunals offer an important (if alarming) precedent. Between 1993 and 1995, the Hague tribunal was kept on an absurd shoestring budget as a result of a funding dispute between the Security Council and UN General Assembly. Meanwhile, in Arusha the ICTR became a byword for mismanagement and inefficiency within the UN system under its first registrar. The Rome conference will try to ensure that the same mishaps do not befall the proposed ICC. It will have to start by deciding whether the ICC is to be financed from the UN regular budget (which is paid for by all UN members) or by its state parties (adherents).

Many governments that do not plan to ratify will object to the former. But many poorer, smaller countries could be deterred from joining if they have to bear the brunt of the cost. This could also

deter nations that are caught up in war; yet they are precisely the countries that would benefit most from adhering to international law. Throughout, delegates will be reminded that the international prosecution of war crimes is expensive. The Hague tribunal, which has delivered just two verdicts in five years, will receive \$68 million this year.

In conclusion, it is easy to be intimidated by the range and scope of the disagreements. These are reflected in the draft statute, which positively bristles with square brackets. Yet this conference is not about square brackets and legal texts. It is about the overwhelming need to protect civilians, and punish war criminals. With this in mind, On the Record will pay particular attention to the needs of those who are most vulnerable in humanitarian crises. These start with women, children, survivors, and refugees.

On the Record will also try and do justice to what promises to be a fascinating political debate. In some ways, the battle lines are already formed. There is growing consensus among nongovernmental campaigners that a weak court would be worse than no court at all, and they will find it hard to accept a draft that weakens existing standards and definitions. If this starts to emerge in Rome, it could provoke an angry response from NGOs.

On the other hand, there is also plenty of room for compromise in Rome. Germany, Singapore, Argentina, France, and Britain have all suggested compromises on difficult issues; showing that the will exists for agreement. This is heartening. It also suggests, once again, that the real threat of politicization is coming from those governments that are trying to scare this conference into accepting a weak and watered down court.

### **What You can Expect from On the Record**

During the first week of the Rome conference, On the Record will establish a set format that should make it easier for readers. In addition to reporting on the day's news, we will cover:

- Core goals of the NGO campaign
  - admissibility
  - state consent
  - the functions of a prosecutor
- Concerns of those most affected by war
  - women
  - children
  - survivors/victims
  - refugees
  - peace groups
  - faith
- The emerging outlines of the court
  - applicable law/definitions
- Legal procedure
- Budget
- Administration
  - witness support

- outreach
  - relations with the UN system
  - enforcement
- Political positions
  - of blocs
  - key governments
  - the Security Council
- NGO news from Rome
- War crimes from around the world that occur during the Rome conference.

On the Record will also offer in-depth coverage on key issues. This will start Monday, June 15 with a review of the historical run-up to the Rome conference.

Finally, we will offer campaigners the possibility of an interactive dialogue with our team in Rome.

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