THE ADVOCACY PROJECT
SUPPORTING ADVOCATES FOR PEACE

On the Record for a Criminal Court

Issue 10: June 30, 1998

Contents:

Spot News

Serbian Suicide Shakes Rome Conference, Raises Questions About ICC Enforcement

The unexpected suicide of an indicted Serb war criminal in a UN detention center in Holland has shaken the Dutch delegation at the Rome conference, and raised major questions about how ICC sentences will be enforced.

Slavko Dokmanovic was found hanging in his cell just after midnight on Sunday. Details are still emerging, and the reason for Dokmanovic's death is unknown. His trial before the International Criminal Tribunal for the Former Yugoslavia (ICTY) finished last Thursday, after lasting 35 days. A verdict was expected soon.

Dokmanovic was the mayor of Vukovar in November 1991, when 200 persons, mostly wounded Croatian soldiers, were taken from the Vukovar hospital, driven to a nearby site, and murdered. He was arrested on June 17, 1997, by UN civilian police from the UN Transitional Authority in Eastern Slavonia (UNTAES) after he was enticed across the then border from Vukovar. Unknown to him, he was under a sealed indictment. Dokmanovic vigorously protested his innocence, and complained about the unfairness of his arrest.

According to reports, the Dutch government and UN are now arguing over such sordid details as who should pay for the body to be flown back to the Balkans. Here in Rome, however, Dutch delegates were said to be scrambling to draw clear implications from the tragedy for the ICC statute.

The most troubling question would appear to concern the enforcement of ICC sentences. Dokmanovic was being held in a UN detention center near the Hague when he died. It was still not decided where he would have served his sentence if found guilty.

This is because, in spite of repeated requests by the UN Secretary-General, governments have been unwilling to provide jail space for convicts from the former Yugoslavia and Rwanda. So far, only Finland, Norway, and Italy have agreed to offer prison space to the Hague tribunal (ICTY). Only Belgium has made an offer to the Arusha tribunal.

This dismal record raises fears that the ICC, too, will have trouble finding states to help enforce sentences. Dokmanovic's suicide, and its messy aftermath, will heighten the concern.

In addition, the suicide will focus more attention on the rights of the accused, before and after trial, and after sentencing. Professor Nigel Rodley, the UN's Special Rapporteur on Torture, told On the Record last week that convicts should be jailed near their families, in accordance with accepted standards of detention. But this will be very difficult, if the only states that offer prison space are far from the ICC (in the Hague).

Another troubling question for the ICC raised by Dokmanovic is whether the ICC statute will open the way to arrest by sealed indictment. Dokmanovic is one of six persons whose indictment was concealed from the suspect. Defending the practice, ICTY officials say that national police do not alert suspects before they are arrested, and see no reason why an international tribunal should do so. They also point out that the ICTY has had little help from NATO troops in Bosnia in arresting publicly indicted war criminals. Some subterfuge was needed.

The current draft of the ICC statute is based on the notion of complentarity, which means that states will have the primary obligation to arrest suspects, in accordance with their national practice. There is, however, a large and complicated debate about how the court would proceed in the event that states failed to meet that obligation. Unlike the ICTY, the ICC will not be able to rely on UN police, or NATO troops to make arrests. (Article 59)

Japanese Oppose creation of Voluntary Trust Fund to Assist Victims

Proposal would also prevent ICC from ordering states to make reparations

Japan is insisting that the ICC should have almost no power to provide reparation for victims of war crimes.

The Japanese position was issued in a document on Monday, and reiterated during an evening debate. It seems certain to draw fire from victims' groups, who have argued that the ICC must provide broad and imaginative support for victims if it is to have credibility.

Britain and France are also likely to take issue with Japan's restrictive position. Both governments have united to push the rights of victims under the ICC. On Monday they issued a strong proposal that would set up a voluntary trust fund for victims, and allow the ICC to issue protective orders to seize the assets of suspects with a view to their being handed over to victims.

The British and French proposal would also allow the court to act on its own initiative. Their proposal makes it clear that the rehabilitation of victims is much wider than merely providing monetary compensation.

France, which has championed victims' rights, had wanted the ICC to order governments to provide reparation, but this was rejected. According to reports, the French agreed to a weaker proposal on the understanding that it would prove acceptable to Japan.

But the Japanese have not played along. The Japanese statement on Monday night was firm in rejecting all the major elements of the Franco-British position. It would make no provision for a trust fund. It would not allow the ICC to seize assets. It would force the ICC to wait until it received a compensation request from a victim. Payment would have to be made to an individual victim, and paid by the convicted person. Finally, the ICC would not be authorised to punish non-compliance.

This will seem intolerably restrictive to many, but Japan is not alone in its views. South Korea also insists that the ICC should not issue orders against states and is opposed to the idea of a trust fund. While supporters of victims' rights feel this is the only practical way of addressing the needs of victims, Korea and Japan apparently feel it could be excessively expensive.

Trinidad Execution Plan Raises Spectre of Death Penalty Row at Rome

The planned execution of a former soldier in Trinidad, in defiance of an order from the Inter-American Court on Human Rights, has increased the likelihood of an angry debate on the death penalty at the Rome Conference.

Anthony Garcia is expected to be executed today (Tuesday) in Port of Spain, in spite of an injunction from the Court. Ironically, today will also see the beginning of a debate on ICC penalties at the Rome conference.

The vast majority of states oppose the inclusion of the death penalty, and many European governments would withdraw rather than endorse its inclusion in the ICC statute. But Trinidad is one of several Commonwealth Caribbean countries which have joined with Arab governments to insist on a public debate.

These states argue that remaining silent would imply their support for abolition – which would be politically impossible. But NGOs fear that an emotionally charged discussion on the death penalty would increase the prospect for horse-trading over penalties, including the length of life imprisonment.

The chairman is said to have offered a statement making it clear that nothing in the ICC statute would prejudice national policies on the death penalty. If this compromise is not acceptable, there will be a noisy and damaging debate today (Tuesday). (Article 75)

Cooperation:

Egypt Insist That States Extradite, Not Transfer, Accused to the ICC, Threatening the Court's Authority

Egypt is fighting a lonely battle to have the ICC seek the extradition of accused persons to the ICC, instead of their transfer or surrender.

The language is crucial, because extradition would give states a number of possible ways to avoid handing over their nationals. Extradition treaties traditionally are signed on a bilateral basis between states that have broadly similar legal and cultural systems. But even then, a state can resist extradition on the grounds that he or she would not face a fair trial, or would face the death penalty.

Different states have different forms of witness protection, and the attitude towards national security also differs widely. The United States, for example, may be more reluctant to extradite Americans to a foreign country if it feels that person has sensitive information.

As a result, supporters of a strong court are determined to avoid any reference to extradition in the ICC statute. Instead, they are pushing for transfer, or surrender. Most like the idea of "surrender" because it sounds more obligatory. Spanish-speaking countries, however, feel that could imply a lack of due process and a violation of the accused's rights – they prefer "transfer."

The outset of the conference found Egypt isolated on the issue of extradition, but Egypt now appears to be picking up support from other Arab states, notably Saudi Arabia and Morocco.

Related to extradition is the question of whether states should be allowed to refuse to transfer an accused to the ICC. Once again, this is often permitted by extradition treaties because they are consensual agreements between two sovereign states. This, however, is not the idea behind the ICC, which will have a supranational character.

Many delegates are beginning to feel that listing grounds for refusal would reinforce the link with extradition. In addition, the rest of the statute sets out many different ways in which governments could resist an ICC ruling – admissibility, state consent, security information, etc. Given this, the chairman has proposed taking grounds for refusal out of this section and placing it elsewhere. (Article 87 and 90)

Trials

French Commitment To Trials In Absentia Gathers Supporters

A growing number of nonaligned countries agree with France that the ICC should permit trials in absentia, even though many jurists feel that this would violate the rights of defendants.

France came to Rome isolated and outnumbered on the issue. But after two weeks, support appears to be building for the French position. In addition to a solid group of Francophone countries, which basically adopted the French legal system, they include the Netherlands, Iran, Korea, Trinidad and Tobago, and Italy.

This is causing some concern among international lawyers. Trials in absentia were permitted at the Nuremberg tribunal (which sentenced Martin Bormann to death in his absence). But the fact that Bormann was not able to defend himself has convinced many historians that Nuremberg was an example of victor's justice, which was deeply unfair to the accused.

The two ad hoc tribunals do not permit trials in absentia, although they do provide for a procedure (article 61) whereby witnesses can be heard and an international arrest warrant issued against an individual who may not be present. The UN Human Rights Committee has concluded that trials in absentia violate the rights of the accused. However, the European Court of Human Rights has concluded that this may not necessarily be the case if all reasonable means have been taken to notify the accused of the date of trial.

France is solidly behind trials in absentia, on the grounds that a conviction can allow victims to collect reparations. Among recent trials in France are those of Klaus Barbie and Alfredo Astiz, the Argentinean navy officer suspected in the death of the French nuns who disappeared in Argentina in 1997. The Netherlands also supports trials in absentia as important for the victims. They feel that such trials can also help the ICC to preserve evidence.

The majority of states still oppose trials in absentia, although the US, UK, and China have supported a proposal that would allow it if the accused is present for the start of the trial. This has the support of many states, ranging from Israel to Vietnam.

A new proposal was introduced Friday by Arab countries, which would allow trials in absentia when the accused has been notified of the date for the trial and refuses to attend or is prevented from attending, or when the accused escapes from lawful custody and does not attend the trial. It is not clear how this differs from the French proposal. (Article 63)

Composition

Composition of ICC Judges Under Scrutiny

Women's caucus angry that gender relegated by UK to second tier

The Rome conference is struggling to work out criteria for the selection of ICC judges that would reflect the international nature of the court, while still ensuring their expertise.

All governments are insistent that the ICC should have good judges, whatever their views about the court. Those who fear frivolous prosecutions feel that judges will act as a check; those who view the court as an exciting opportunity feel the judges can help realize its potential. The judges will also have a key role in developing rules of procedure.

But it is still hard to agree on the criteria for selection. The current statute calls for five criteria: candidates should represent the principal legal systems of the world, the main forms of civilization, equitable geographic representation, gender balance and at least some of the candidates should have expertise in sexual/gender violence and violence against children and "other similar matters."

It will be hard to find judges who fit all of these qualifications. China is insisting on having civilizations represented (although many are unsure what this means). But gender balance and gender/child expertise appear to be slipping away. A proposal from Britain, which is coordinating the negotiations on composition, suggests that gender balance be taken off the list of formal qualifications and relegated to a second tier. Gender and gender/child expertise is receiving even less support.

This proposal has provoked an angry response – as much for the manner in which it was made as for its content. The Women's Caucus is furious because almost everyone supported including gender balance, but the British chairman overruled this. (See related OTR story below).

One government delegate who has been outspoken on gender issues during the plenary debate said the compromise might make sense because so few countries possess female jurists with all the required qualifications.

This delegate said that it might be better to allow countries with a poor representation of women in their legal systems to catch up, rather than propose unqualified nominees to satisfy gender balance requirements. Furthermore, she said, many countries would oppose including gender among the first tier qualifications. Madagascar and a few other countries had already raised objections.

Many recall that governments also struggled over the choice of judges when they were creating the two ad hoc tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY). They looked, in particular, for individuals who combined experience in international law and conducting trials, and found few candidates with both.

Many governments were also angered by the lack of a Muslim judge on the ICTY, in spite of the fact that the tribunal would be ruling on mass crimes committed – for the most part – against the Bosnian Muslims. Indeed, this is one reason for the lack of support for the ICTY among nonaligned countries. This underlines the relevance of China's demand that ICC judges represent the world's major civilizations.

Consensus seems to be growing that the judges should number between 18 and 21. But a proposal by Britain and the United States that a screening panel be created to vet nominations is meeting with opposition. The US and UK feel that some kind of preliminary screening is needed to weed out unqualified persons. But governments from the south are responding that this will make it easier for northern countries (which are the minority) to impose their preferences.

This is critically important for NGOs. Advocates and caucus groups want diversity among the judges. They also want a say in the selection. Any screening panel that comprised the "old boy's network," in the words of one NGO campaigner, would be unacceptable. As a result, NGOs are increasingly supportive of the view that judges should be elected by all states parties to the ICC treaty.

It is still unclear whether governments that hold off from signing and ratifying would have a hand in the selection – something that is likely to interest the United States (Article 37)

Victims

ICC Would Help Prevent Torture and Support Victims, Say Anti-Torture Advocates and UN Torture Rapporteur

Torture victims should be allowed to participate in the proceedings of the ICC, and also claim reparation, according to a distinguished panel of torture victims and their representatives.

The panel met Friday, on the occasion of the United Nations International Day in Support of Torture Victims (June 26).It was headed by Theo Van Boven in his capacity as a law professor and advocate of human rights.

Meanwhile, Prof. Nigel Rodley, the UN's Special Rapporteur on Torture, told On the Record that he strongly favours an ICC with jurisdiction over internal armed conflict, and an independent special prosecutor. Prof. Rodley estimated that torture is widespread in some 30 countries.

Mr. Rodley has spent several years trying to toughen the UN's position on torture, and encourage the idea that it can be prevented. The 1984 UN Convention requires states to treat torture as a universal crime, and prosecute torturers accordingly. But only 104 states have ratified the Convention – the lowest number of any of the six major human rights treaties. In addition, said Professor Rodley, many states that have ratified lack the necessary national laws.

Friday's panel concentrated more on the impact of torture on individuals, and the prospect that the ICC might allow victims to participate in trials and also provide them with reparations. Many governments support this in principle, but they worry about the court providing "social service" for victims. There is also some concern that it could be expensive. As a result, the entire section remains in brackets.

Friday's meeting amounted to a strong emotional argument for the ICC to extend to victims. Speaking of her 20-year involvement with torture survivors, Raquel Edralin-Tiglao, from the Philippines said that justice helps to heal the wounds of torture.

But torture victims cannot secure justice on their own or by relying on national courts. Cecile Porta, from the Medical Foundation for the Care of Victims of Torture in London, said that many Zairians who seek treatment at the Foundation know the identity of their torturers, but are often too afraid to testify. This, she said, underlined the importance of an international court with a jurisdiction over torture. (Article 68)

The Political Scene

British Allies, NGOs Furious at Broad UK Campaign to "neutralise" ICC

"Arrogance" charge against British composition chairman

Several of Britain's allies have concluded that the British delegation is engaged in a broad and sophisticated effort to reduce the powers of the ICC to the point where it will be harmless and impotent.

The British campaign is being conducted with military precision across the entire ICC statute. It has been backed up by a series of well-argued written proposals, and generally argued with great skill in the committees.

The one exception has been an extraordinary revolt against the British chairman of the group dealing with the composition of the court. Last week, the chairman revised the entire section. He then presented it to the group as a virtual fait accompli at a meeting on Saturday and implied that this reflected the views of the UK government. The women's groups also savaged the proposal because it proposed downgrading gender balance in the choice of judges.

This provoked complaints of British arrogance and prompted an "open rebellion" in the words of one delegate. According to one report, twenty-seven of the twenty-nine speakers insisted that the original text be reinstated. Several delegates reportedly want Britain removed as the chair of this sensitive and important group.

On a broader front, a growing number of delegates feel that Britain is a stalking horse for the United States, and that its aim is to create a international court of the lowest common denominator. Many feel that Britain is trying to have it both ways and exploiting its position as the only one of the five permanent members of the UN Security Council that is also a member of the like-minded (in favour of a tough court).

One Scandinavian delegate said that Britain did not belong with the like-minded. "It's retreated on all fronts," said the delegate. "We expected much more."

A growing number of British nongovernmental organizations agree. While they enjoy regular contact with the British delegation, they too feel that Britain is leading the charge to whittle down the court's authority. Among the elements that are emerging in Britain's position:

If the state where a crime has been committed (territorial) has not joined the ICC treaty, it would have to give its consent before the ICC could open a case. Britain feels that it would be illegal to

force a government to comply with a ruling under a treaty that it has not joined. This would effectively take all situations of internal armed conflict involving a non-state party out of the jurisdiction of the Court. Instead, say NGOs, the ICC should have the power to prosecute anyone guilty of the core crimes regardless of where the crime was committed.

Gender balance: Britain is trying to create an unjustified hierarchy in the qualifications required of the ICC judges and prosecutor, in which gender balance and expertise would take a secondary position behind geographical representation and other forms of professional expertise.

The Security Council would be able to hold back a case from the ICC if it is being considered by the Council "during the discharge of any other responsibilities." This is significantly more vague than a Chapter 7 (enforcement) mandate and would allow the Council to control the ICC agenda.

State security: Britain wants to allow a government to withhold information from the court on the grounds of national security, and only compel them to disclose if the grounds for withholding were "manifestly unfounded, and not in good faith." The problem with this is that a government could be in good faith but completely wrong. In this case they would not be compelled to disclose the information. They also feel that the judges would be reluctant to accuse a government of bad faith.

Britain has been noticeably low key in supporting efforts by the UNHCR and other aid agencies to get attacks on aid workers brought under the scope of the ICC – even though Britons have died in humanitarian emergencies and peacekeeping operations.

Under exceptional circumstances, the prosecutor could still seek information even when a government has challenged a case. The UK has proposed that this come from peacekeeping forces in the region, from states, and from intergovernmental organizations. NGOs, however, are not included – even though they are often working in the heart of a crisis, and well informed. Observers are finding it difficult to discern a pattern behind this, but have little doubt that it exists. British delegates are letting it be known that their first objective is to be practical, and create consensus. "They (Britain) keep telling us that the best is enemy of the good," said one frustrated NGO member. "We agree. But Britain is coming up with compromises that we never dreamt they'd put forward."

Some feel that Britain is acting in concert with the US to present hard-line positions under the guise of commonsense. They note, for example, that the UK is pushing state consent hard, while appearing open to reason on the prosecutor, pretrial chamber, and Security Council. The US in contrast, is noisily opposing a prosecutor, and digging in on the Council, but it is reserving its position on state consent. "Between them, they've got it all covered," says one observer.

Ottawa Review of 1992 Human Rights Conference Calls for Tough ICC

Two hundred and fifty NGO representatives have sent a strongly worded "letter of solidarity" to the Rome conference, calling for a strong international criminal court.

The NGOs met in Ottawa, Canada, under the auspices of the Human Rights Internet to review progress since the 1992 Vienna Conference on Human Rights.

Recalling that the Vienna conference supported the creation of an international court, the letter said that the ICC should function "with all the core attributes of a court and a judicial body as defined in well-established international human rights standards."

These attributes, continued the letter, "include independence, autonomy, effectiveness, access to adequate resources, freedom from executive interference, checks and balances against abuse of process, and the ease of access to victims of crimes."

"Any erosion of these principles would not only deprive the Court of its judicial character, but would also constitute a derogation from the principles of the rule of law, creating a negative precedent internationally and for countries worldwide. No effective human rights mechanism or criminal court can operate on the basis of a principle that necessitates the consent of the alleged violator or criminal."

Perspective on Gender

Over 70% of Victims of War are Women and Children, Say Campaigners
by Anna Bliss

Over 70 percent of all victims of war are women and children, making it imperative that the ICC includes gender perspectives, according to three leading members of the Women's Caucus.

Speaking at a press briefing last week, Tina Dolgopol, of Flinders University, Australia, Olabisi Olateru-Olagbegi, president of the Womens' Consortium of Nigeria, and Raquel Edralin-Tiglao, from the Violence Against Women in War Network in the Philippines, all spoke strongly in favour of a clear gender perspective.

Dolgopol welcomed the fact that most delegations are expressing support for gender balance. But, she said, "it is still not clear that negotiators of the statute really understand who the victims are, and how they suffer. Who do they picture in their mind?" Women and children are too often overlooked.

Non-consenting women are widely used as weapons of war, said Olateru-Olagbegi, whether they are raped, subjugated to forced pregnancy, used for the provision of food, or pushed to the front lines as "cannon fodder."

A victim of torture herself, Raquel Edralin-Tiglao argued that the ICC Victims and Witnesses Unit be placed under the authority of the Registry. Such a unit would provide counseling and assistance to victims and witnesses as well as advise the Prosecutor on appropriate measures of protection. It is important, she said, to foster that kind of trust. "Victims won't want to speak. . . . There is so much shame and humiliation, but they will be conscious of legal rights."

One question is how the ICC can remain objective while being sensitive in cases involving emotional trauma. Aren't objectivity and sensitivity inherently opposed? We must remember, Dolgopol replied, that total impartiality and objectivity are not a reality in any court, which is why the Women's Caucus must work hard to incorporate gender sensitivity in the statute. A victims trauma unit in the Registry could provide counseling, and thereby release the Prosecutor for more procedural matters.

The unit would have to provide extensive counseling and provide information to other counseling units and research centers. Dolgopol insisted that the ICC provide broad and extensive counseling, and that it not treat victims as cases.

The briefing also explained the difference between gender violence and sexual violence. Gender violence, said panelists, can be equally, if not more, brutal than sexual violence. Sexual violence involves actual physical violation, which applies more often to women. Gender violence, on the other hand, is a targeting of victims on the basis of their gender, whether male or female. For example, boys may be killed off if they pose a threat as future soldiers.

What many forget is that men and women, no matter who or where they are, are treated on the basis of their gender status. As Olateru-Olagbegi said in an interview, "Wherever there is a group, there is a gender concern." She believes that "we all have the same interests (at this conference), but different approaches." The problem is to discover the common interest hidden among all of the political maneuvering.