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From the AP Editorial Desk

Defendants Rights: Seven Issues to Watch
by Kenneth S. Gallant

Whenever a criminal court or criminal sanctions are brought into being, the possibility exists for abuse of the rights of defendants and other individuals. Therefore, Delegates and human rights activists at the U.N. Plenipotentiary Conference to create an International Criminal Court need to ensure that the Statute of the Court protects against abuse of individual human rights. The good news is that the Draft Statute contains many basic substantive and procedural protections. Many procedural rights from the International Covenant on Civil and Political Rights are preserved in the Draft Statute almost word for word. This Note is only about those provisions on individual human rights that need strengthening. NGO human rights activists must ensure they are included in the final Statute.

1. Human Rights Adopted into Applicable Law of Crimes

The most important advance in the Draft Statute may be the following: "The application and interpretation of law pursuant to this article [on what law will apply in the ICC] must be consistent with internationally recognized human rights, which include the prohibition on any adverse distinction founded on gender, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, or on any other similar criteria." (Draft Statute, art. 20(3)) Human rights advocates should work to ensure this provision is kept in the final Statute. It recognizes that the constitutions of international organizations should protect individuals against violations of substantive human rights by the organizations.

This provision prohibits definition of crimes and defenses that violate international human rights. It might be better if it specifically mentioned protection for freedom of expression, religion, conscience, assembly and association, but these are certainly the core international human rights to be protected by this provision. The equal protection rule is as broad as could reasonably be asked by a human rights advocate, except that it does not prevent discrimination in the definition of crimes on the basis of sexual orientation.

2. Defense Counsel, Investigation and Funding

The right to effective defence investigative capabilities, including funding for those defendants who cannot afford investigative expenses, needs to be stated, most appropriately in Draft Statute, art. 67. The right to prepare and present a defence needs to be strengthened in this way, or it could come to mean just the right to have a lawyer show up in court.

Defence counsel and investigators also need freedom to operate in the states in which evidence is located, similar to the diplomatic immunity or such "privileges, immunities, and facilities necessary for the performance of their functions" currently contained in the Draft Statute for Registry and Prosecution officials. (Draft Statute, art. 49(1&2))

The bracketed (i.e., not yet fully agreed to) provision that would give a defendant the right to request the Court "to seek the cooperation of a State Party . . . to collect evidence for him/her" (Draft Statute, art. 67(1)(I)) should be included. However, this will only partly remedy the situation. Defendants cannot rely wholly on potentially hostile governments for the collection of evidence for their cases.

Another idea, not in the current Draft Statute, that would considerably strengthen the fairness of the ICC would be the creation of a Defence Bureau, by analogy to the Prosecutor's Office. There is currently no defence office in the Statute.

3. Proof of Guilt Beyond a Reasonable Doubt

The Draft Statute requires proof beyond a reasonable doubt for conviction. (Draft Statute, art. 66) However, a note to the Draft Statute indicates, "[r]eservations have been expressed" about the phrase "beyond a reasonable doubt." (Note 185) The Statute should remain as drafted.

4. Right to Privacy

The guarantee against invasions of privacy – i.e., unreasonable search and seizure – s still in brackets. Draft Statute, art. 67(3). Human rights groups need to work to ensure that protection for privacy is placed in the final text. Moreover the guarantee needs to be strengthened. As written, the Draft Statute would allow warrants to be issued upon "adequate cause" (without definition of "adequate"). It should be amended to include a somewhat more specific – and more difficult to meet – standard of probable (or even

reasonable) cause. Additionally, the traditional guarantees of security of houses, papers and effects might be supplemented with security of the person and privacy of communications, to prevent such things as wiretapping and the involuntary taking of DNA samples without justification.

Second, human rights advocates should seek to eliminate or revise a provision allowing searches and seizures "on such grounds and in accordance with such procedures as are established by the Rules of the Court." (Draft Statute, art. 67(3)) This essentially allows legitimation, by Rule, of warrantless and perhaps standardless searches. It should be replaced by a provision prohibiting warrantless searches except upon probable (or reasonable) cause, and in the presence of circumstances making the obtaining of a warrant before the search impracticable (or impossible), consistent with the need to secure evidence.

5. Disclosure of Witnesses

While some prosecution witnesses need to be protected from retaliation, it is unfair to allow witnesses against a defendant to remain fully anonymous at trial, because it makes cross-examination nearly impossible. Protection against this is needed and should be included in the statute, most appropriately in Draft Statute art. 67.

6. Exclusionary Rule

The Draft Statute provides that evidence obtained by means of a violation of the Statute or internationally-recognized human rights, and possibly other relevant rules of international law, shall not be admissible if the violation "casts substantial doubt on its reliability" or the admission of the evidence "is antithetical to and would seriously damage the integrity of the proceedings." (Draft Statute, art. 69(6)) This author would prefer to exclude all evidence obtained in violation of internationally-recognized human rights norms. Whether or not this last change is made, human rights advocates should support inclusion of an exclusionary rule in the final Statute.

7. Compensation

Another progressive provision, still in brackets, would have the ICC compensate to persons wrongfully arrested, detained, or convicted. (Draft Statute, art. 84) Human rights advocates should support this proposal because it recognizes that an international organization should be accountable to those harmed by its own violation of international human rights norms. One additional class of wrong should be added to the final Statute: damage to a person (not necessarily a suspect or defendant) resulting from a wrongful search or seizure.

This note presents the barest outline of seven important issues to watch on individual human rights in the ICC Statute. The author would be happy to provide interested Delegates and NGO human rights activists with more information on any of them.

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- (All references in this Note are to the Draft Statute for the International Criminal Court, A/CONF.183/2/Add.1 (14 April 1998), pp. 2-167.)

Inhumanity and Impunity
by Larry Minear

These are hard times for humanitarians. Saving lives and easing suffering is proving more complicated now that the Cold War is past. Displaced by today's largely internal armed conflicts, those in need often remain within their own countries where they are harder to reach and more vulnerable to the abusive policies of governments and insurgents. During the Cold War, they tended to flee to more accessible and more secure refugee camps outside their own borders.

The behavior of today's belligerents constitutes a threat not only to humanitarian work but also to the lives of aid workers. The head of the United Nations refugee agency's office in North Ossetia, abducted in late January, is one of sixteen expatriates currently hostage in the Caucasus region. Aid workers have been killed in Chechnya, Burundi, the Sudan, and other troublespots. To make matters worse, the levels of outside aid to conflict victims are waning, both from the United States and other major donors.

A particularly gruesome example of post-Cold War inhumanity comes from Sierra Leone, where unspeakable atrocities are being committed by anti-government insurgents against small farmers and traders, students, and particularly women. The perpetrators of the mayhem have a very specific political objective: to mutilate rather than to kill. They even place messages to the government in their victims' pockets or on what is left of their appendages. Some of the mutilated are telling their stories in Sierra Leone; others have escaped to nearby West African countries. The chances of bringing the perpetrators to justice in their own country are negligible, where the judicial system is itself a casualty of the war. International appeals for restraint have gone unheeded.

What are the prospects that such inhumane practices can be reined in and essential humanitarian activities and personnel protected? There are several positive signs. One is the dialogue taking place among aid practitioners themselves. Formerly careful to distance themselves from the more "political" area of human rights, many aid agencies are now are seized with a new sense of such rights. Why feed people only to have them abused?

Aid groups still affirm that humanitarian assistance must express a non-political imperative. Yet they now realize that emergency aid, routinely administered, may

reinforce the hold of abusive authorities on civilian populations. Their more circumspect approach will require support from contributors who often prefer to direct their donations exclusively toward feeding hungry people.

There is also growing consensus that human rights are too important to remain the sole preserve of aid and human rights agencies. Instead, they require higher priority and profile throughout the entire international system. "Today's human rights violations," UN High Commissioner for Human Rights Mary Robinson has observed, "are the causes of tomorrow's conflicts." The United Nations is accordingly seeking to "mainstream" human rights protections throughout all of its activities. That means making them more central to its diplomacy, including its efforts to prevent and to end conflicts, and its development work.

A second positive sign is the current conference in Rome that is seeking to create an international criminal court to prosecute genocide, war crimes, and crimes against humanity. Building on ad hoc courts set up to try those accused of such crimes in Rwanda and the Former Yugoslavia, the new court would send a message to the forces of inhumanity that they may no longer expect to proceed with impunity. It may seem a bit of a stretch that perpetrators of abuses on the highways and byways of strife-affected countries will by restrained by the possibility of prosecution by a far-away court. Yet as U.N. Secretary-General Kofi Annan told the opening session last week, the creation of a court with effective prosecutorial powers will ensure that "humanity can strike back."

In an encouraging sign of the times, humanitarian organizations themselves are lobbying actively for the new court. In earlier years, they would have been hesitant to address such tricky "political" issues. Now, they are articulating their perceived stake in how wars are conducted and how warriors are held accountable. "It is no longer sufficient for humanitarian and human rights officials to denounce atrocities while unable to prevent their recurrence," senior officials of UN humanitarian and human rights organizations told the gathering. The new court, they said, would represent "the first effective weapon against the culture of impunity which has fueled cycles of violence in every part of the world."

Although it is too early to anticipate the outcomes in Rome, there are encouraging straws in the wind. One observer sees "a very real chance that this conference will produce a court by July 17," when it concludes. For the moment, the United States seems to be on the wrong side of some key issues, seeking to maximize the court's dependence on the Security Council, where the U.S. enjoys veto power. There is still time for the Clinton Administration to take a position more consonant with American humanitarian and human rights traditions and for conferees to resolve the many fundamental points of disagreement.

Unconscionable brutality in countless conflict zones lends urgency to the task. Inhumanity is likely to continue unchecked as long as impunity from accountability prevails.

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Command Responsibility: A Step Backwards
by Beth Van Schaack

The text of Article 25 on the Responsibility of Commanders and Superiors has been hailed by On the Record as an "important step forward in expanding law to modern wars." Unfortunately, the steps taken by the Diplomatic Conference with respect to this article go in the opposite direction. In fact, Article 25 significantly jeopardizes one of the pillars of the Nuremberg legacy – the doctrine of command responsibility – by eroding the mens rea (mental state) standard applicable to both military and civilian superiors.

The text of Article 25 treats the responsibility of civilian and military leaders separately and differently. Article 25(b)(i) dilutes the well-established mens rea standard that is applicable to all superiors – civilian and military – under well-established customary international law. The doctrine of superior responsibility in international law has always provided that all superiors who "knew or had reason to know" that their subordinates had committed, were committing, or were going to commit crimes are liable for those crimes when the superiors fail to prevent or punish them. Article 25(a)(i), on military commanders and persons effectively acting as such, maintains this standard.

In contrast, Article 25(b)(i), relative to other superior and subordinate relationships, attaches liability to superiors only if "the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes." In other words, civilian superiors are not subjected to the "should have known" standard of their military counterparts. Rather, they are liable for the criminal acts of their subordinates only if the former consciously disregarded relevant information. Thus, civilian leaders will escape liability where the circumstances are such that they should have known of crimes being committed.

The correct formulation of the doctrine of command responsibility appears in Article 7(3) of the Statute for the International Criminal Tribunal for the Former Yugoslavia and in Article 6(3) of the Statute for the International Criminal Tribunal for Rwanda. These articles provide as follows:

The fact that [a crime] . . . was committed by a subordinate does not relieve his or her superior of criminal liability if he or she knew or had reason to know that the subordinate was about to commit such acts and had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

These Articles in the Statutes of the ad hoc tribunals reflect a consistent body of case law developed since the Second World War, which has uniformly subjected civilian and military leaders to the same standards of superior responsibility. This case law includes the Case of Naoki Hoshino in the Judgment of the International Military Tribunal for the

Far East, the case against the Directors of the Roechling Enterprises, the case of United States v. Pohl, and the Trial of Friedrich Flick.

This standard applicable to military and civilian leaders has also been expressly incorporated into national laws addressing superior responsibility. For example, although the United States delegation has advocated a disparate standard applicable to civilian and military leaders in the Diplomatic Conference, the United States Army Field Manual 27-10 (1956), which is still valid and binding and constitutes an official enunciation of the United States Government's own interpretation of the requirements of international law, follows the international law standard. For example, pursuant to Section 498 (Crimes Under International Law): "Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." Likewise, the provisions governing the Force of the Law of War provide that:

In consequence, treaties relating to the law of war have a force equal to that of laws enacted by the Congress. Their provisions must be observed by both military and civilian personnel with the same strict regard for both the letter and spirit of the law, which is required with respect to the Constitution and statutes enacted in pursuance thereof.

This case law and the doctrine underlying it reflect the fact that there is no principled reason to distinguish the legal obligations of civilian superiors from their military counterparts or to raise the burden of proof when the Prosecution attempts to hold civilian – as opposed to military – superiors liable for the acts of their subordinates.

A second problem with Article 25 concerns sub-paragraphs 25(a)(i) and (b)(i), which significantly truncate the scope of the doctrine of command responsibility relevant to both military and civilian leaders. Both sub-paragraphs hold superiors liable where they knew that subordinates under their command "were committing or about to commit such crimes." A careful analysis of these provisions reveals that they undermine the failure to punish liability by dramatically narrowing the temporal application of the doctrine. Under the current formulation of Article 25, no liability attaches where the superior did not know that subordinates were about to commit or were committing crimes, but did know later that international crimes "had been committed" and failed to take steps to have them investigated and punished. Although the actus reus, with respect to each category of superior, does include the failure to punish, this failure is only applicable to the commander who was in power before or while crimes were being committed. Thus, Article 25 would not reach the superior who takes control of subordinates after international crimes had been committed and fails to punish the perpetrators.

Again, the United States has advocated this formulation even though it is contrary to US law. According to Paragraph 501 of the US Army Field Manual 27-10 (1956): "The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to

take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."

This result is contrary to the post-World War II jurisprudence in the High Command Case. In that case, Field Marshall von Kuecheler was held liable for failing to punish the crimes that had been committed under a predecessor superior and of which he was aware. This formulation of the doctrine of command responsibility sends the following message: once international crimes are committed by subordinates, the superior can be conveniently "gotten rid of" and no one at the level of command and control will be held liable for the crimes of the subordinates. This loophole combined with the current formulation of Article 32, which allows for the defense of superior orders, creates a lacuna in international criminal responsibility where it did not exist before.

In summary, it is the duty of all superiors to take all necessary measures to ensure the prevention and punishment of breaches of international humanitarian law by their subordinates. Where superiors fail to prevent or punish such violations, they bear individual criminal responsibility for the acts of their subordinates. Under international law, both civilian and military leaders are subject to the same legal standards. Defenders of the current formulation of Article 25 will argue that the formulation chosen was the result of a carefully negotiated compromise. But are political compromises appropriate where the international law on a subject is clear and unequivocal? Should diplomatic consensus be a substitute for fidelity to law? Observers to the Rome Diplomatic Conference should not be fooled by the illusion of progress born of such compromises.

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Superior Orders is No Excuse
by Francis Boyle

(From the editorial desk: The Rome Conference is close to agreeing an article on the important issue of superior orders. Under the draft article, superior orders would only be accepted as an excuse against criminal responsibility if the perpetrator of a crime were under a legal obligation to obey orders, and did not know that the order was manifestly unlawful. Genocide and crimes against humanity are described as "manifestly unlawful," but not war crimes. Here, Professor Francis Boyle suggests that this creates a potentially dangerous loophole.)

There follows the full text of Paragraph 509 of U.S. Army Field Manual 27-10(1956), "The Law of Land Warfare," dealing with Superior Orders. It speaks for itself:

"Section IV. Defenses Not Available

509. Defenses of Superior Orders

a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment. b. In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders (e.g., UCMJ, Art. 92). {This reference is to the US Uniform Code of Military Justice.}".....

US Army Field Manual 27-10 (1956) is still valid and binding and has never been revoked by the United States government. It sets forth what the United States government considers to constitute the rules of international law on the law of war. It was drafted anonymously by the late Professor Richard R. Baxter of the Harvard Law School and (I believe) Colonel in the US Army Reserve, who was later elected to the International Court of Justice. Despite his untimely death, Professor Baxter is still considered to be this country's foremost expert on the laws of war.

US Army Field Manual 27-10(1956) expressly incorporated this principle of international law that had been subscribed to by the United States government itself since the 1944 Change 1 to its predecessor, US War Department Field Manual (1940), and which was later incorporated into the Nuremberg Charter, Judgment and Principles – all of which were subscribed to by the United States government. [US Ambassador to the UN] Bill Richardson is attempting to reverse 54 years of American Jurisprudence on the subject of Superior Orders as well as to reverse the United States government's own official interpretation of the requirements of international law on this subject. The United States government is bound by the rule of international law articulated in Paragraph 509. It seems to me that the Delegates in Rome and the NGOs must insist on no less than Paragraph 509 in the ICC Statute. Otherwise, you will be reversing the gains of Nuremberg to the grave detriment of all humanity.

Superior Orders is no excuse, though it may be considered in mitigation of punishment. This principle of law was established by Change No. 1(1944) to the US War Department Field Manual 27-10 of 1940. It was later applied in the Nuremberg Charter, Judgment and Principles that were fully subscribed to by the United States government. It was later incorporated into Paragraph 509 of the US Army Field Manual 27-10 (1956), which is still valid and binding as of today. Although I am not going to quote the entirety of Paragraph 509 here, the relevant language goes as follows: "The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a

defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful." Richardson is trying to reverse 54 years of American Jurisprudence on this subject, together with the current US interpretation of the requirements of international law as articulated in US Army Field Manual 27-10(1956). I suggest that someone over in Rome challenge him on this point, among others.

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Letter to the Editors on Victims and Reparations
by Gerald Gray

In response to your article on the ICC and victims reparations (June 30) wherein you describe states' reluctance to consider social service to victims as part of reparations, social service appears a reparation that is both critical and inexpensive. Those of us providing clinical treatment of torture have done the work despite few funds; increasing the number and staffing of torture treatment centers is relatively inexpensive for state budgets. Moreover, treatment of torture, at least, is essential for many to recover from the experience – otherwise, other forms of reparation can make little difference. Indeed, it is worth discussing if strong, universal social services for victims may not be one of the best ways to spend money. Nor should the administration of social services for victims stand in the way of states' contribution to reparation – the states could simply contribute to the UN Voluntary Fund for Victims of Torture for administrative distribution of funds to support medical and psychological treatment, or approach an NGO such as Physicians for Human Rights to administer funds.

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