



On the Record for a Criminal Court

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From the AP Editorial Desk

Opinion:

ICC Dream Factory? by Willem Offenbergh

Could the Rome Conference produce a lame duck? Will the Hague find itself host to yet another bloodless UN-organization? Are governments serious about establishing a criminal court?

Listening to rhetoric during the first week of the Rome Conference, one could assume that everyone is in favor of a competent and independent criminal court. From China to Indonesia to Iran – all have expressed support. But outside the assembly, UN-watchers are skeptical. Doomsday scenarios are played out over the cappuccinos: What if the United States opts out? What if delegates agree not to include an independent prosecutor? What if the Security Council gets to dictate to the ICC, as it does with the rest of the UN system? One NGO describes the ICC as the "last war victim of this century." Others daydream about a shining new court that will prevent war crimes from ever happening again. *Nunca Mas!* No more Auschwitz!

There will be a court, but once the dust has settled it will probably seem underwhelming in its impact. This will disappoint the daydreamers, and doomsters, but it could well provide judges, prosecutors and counselors with tools they can use – even though the process of building the jurisprudence could take years.

Even then, only time will tell to what extent member states are inclined to cooperate. And herein lies the crux of the matter: on paper an ICC may look effective, competent, and strong, with universal jurisdiction, but this may result in only a few countries ratifying the statute, fearful of interference in their domestic affairs.

This will be more likely if the NGOs (dubbed the "new superpower" by Canada) win their argument. They want the ICC to have an independent prosecutor who will launch prosecutions on his or her own initiative, as well as acting on state complaints, or taking up suggested cases from the UN Security Council. The alternative is that the ICC will not be given the means to pursue war criminals. This would encourage states to ratify, but produce an empty shell.

Rome will probably produce something in between. But however strong or weak the court, its success will depend on the cooperation it gets from member states. Recent history warns against expecting miracles. Although the tribunal in Arusha has arrested a former Rwandan Prime Minister and acting Defense Minister, the two tribunals have netted relatively few big fish.

Other UN mechanisms have not produced much, either: in the past 15 years the UN has set up a fantastic human rights machinery with dozens of investigators. (rapporteurs). But when it comes to access, these investigators are often disappointed. China, Sudan, Iran, Cuba, and Indonesia, have all refused them access. Senior American government officials snubbed the UN's special rapporteur on Summary Executions when he visited the United States recently to inquire about the death penalty.

If these and other countries already hesitate – or outright refuse – to let these rapporteurs do their job as international civil servants, how will they react if a prosecutor comes to their country to start proceedings against their own nationals? UN Secretary General Kofi Annan, both mild and pragmatic, told governments this week that they simply cannot afford to let down victims of past and future war crimes committed during international and internal conflicts. But the UN can do nothing to force governments to comply. Even binding Security Councils resolutions are ignored. Until UN member states show more respect towards international standards, there is little hope for an international judicial order, with or without an international court.

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States Will Not Cooperate Voluntarily with ICC, Warns Hague Judge

Poor Bosnian arrest record seen as an argument for mandatory regime

Judge Gabrielle Kirk McDonald, president of the International Criminal Tribunal for the Former Yugoslavia (ICTY), has warned delegates against relying on voluntary state cooperation when establishing a new criminal court.

Judge McDonald's comments were part of an urgent plea that the new ICC learn from the two existing tribunals. "What better models for the international criminal court, whose function will also be to bring about peace through justice, albeit on a global as opposed to regional scale?

Speaking from bitter experience as the chief judge of a tribunal that has consistently been rebuffed in its requests for witnesses, material, and the surrender of suspects, McDonald said that the statute should insist on state cooperation, even when it comes to issues of national security.

"I know that it is tempting and well intentioned to assume that signatories to a treaty establishing the court will cooperate without reservation... [but] an honor system for States is not a substitute for an unequivocal obligation to comply with orders, not just requests, of the court. Grounds for refusing to comply should not be allowed."

The ICTY was established by a Security Council resolution in May 1993, and has 20 outstanding indictments against 59 individuals. Of these, however, 32 are still at large; almost all are Bosnian Serbs.

"Since it was established, our tribunal has been plagued by State non-cooperation," said Judge McDonald. Each instance, she said, is reported to the UN Security Council, but nothing gets done.

This warning is likely to be taken in several different ways. On the one hand, it illustrates the importance of enforcement if the ICC is to function effectively. On the other, it will suggest to many that an ICC cannot be forced down the throats of governments.

Judge McDonald and her colleagues view the matter entirely in the context of arresting war criminals. In a veiled reference to western governments, which have generally supported the ICTY, she said that even national security should not be used as an excuse to not cooperate. In deference to governments' sensitivity, the ICTY appeals chamber has agreed to review sensitive evidence in camera and assess requests for it to be excluded from evidence. But, she said, there had been no "blanket exception."

Such material has helped mount several key cases. US spy satellites were able to identify the location of mass graves near Srebrenica, by comparing the ground before and after the July 1995 massacres. While these photos were made available to the ICTY, the US has insisted on withholding other material.

Reviewing other possible lessons from the ICTY, Judge McDonald said that the ICC judges should be allowed to develop and amend the rules of procedures. This is an issue of some controversy, precisely because the French feel that the ICTY judges – who have the power to develop rules – have made too many changes. The French are also upset that the continental system of civil law has been downgraded. Other governments are also alarmed at the prospect of critically important rules on evidence and the like being left in the hands of judges from countries which have shown little respect for the law.

As a result, they would like the rules developed by a preparatory commission of states, once the ICC statute has been adopted. Judge McDonald argued that judges are the best qualified on how to run a court. Others fear that they would be politicized.

Although the thrust of Judge McDonald's comments were strongly supportive of an ICC, there is a growing concern among officials at the ICTY that the new court could erode the ICTY's authority, and also reduce its resources. Unlike the Rwanda tribunal, whose mandate only covered events during 1994, the ICTY is open-ended. It is conceivable not only that a new court would come into existence before the ICTY has finished its work, but that Serbia in particular

would rush to join as a way of deflecting pressure from the prosecutor in the Hague. The Bosnian government has expressed a similar fear.

As for money, the ICTY is budgeted to receive \$68 million this year, which is a huge sum to the financially-strapped United Nations. Depending on which formula is chosen to fund the ICC, states may be unwilling to continue at this level, particularly if the new court were able to assume the ICTY's caseload.

Aggression Splits the Rome Conference

Russia straddles the fence

Should crimes of aggression be included under the jurisdiction of a permanent International Criminal Court? How are crimes of aggression defined? These and other questions have confronted delegates to the Rome Conference over the past few days.

Wars of aggression, formerly known as crimes against peace, were first addressed and punished during the Nuremberg Trial. In 1974, the General Assembly adopted a resolution defining aggression. The problem with this definition is that it defines aggression as whatever the Security Council decides. This requires unanimity among the permanent five members, which is so difficult to achieve that even the Serb invasion of Bosnia went unchallenged.

Given this, many would like to see the ICC as a vehicle for preventing aggression. This has divided delegations.

One group argues that aggression should be included because it is the ultimate crime of international law. For example, Greece argues that it would be hypocritical not to have a crime of aggression included in the statute. After its devastating experience in the Second World War, Russia agrees. Ironically, another strong advocate is the country which invaded them both – Germany.

Second, there are those, like Norway, who argue that because aggression is hard to define, it could kill the entire package. Norway would include aggression as long as it does not antagonise the Security Council.

The third group includes those states, such as Pakistan, who would delete the crime of aggression altogether. Pakistan argued that aggression is a crime committed by states, whereas the ICC would deal with individuals.

Many NGOs agree that including aggression in the statute will jeopardize an independent court. "As international human rights law evolves, we are progressively civilising international relations. But it's a stage by stage process. These negotiations may not be able to establish a relationship between the UN Security Council and the ICC that would allow the Court to

prosecute the crime of aggression on a consistent and reliable basis," said Fergus Watt, Convenor with the Canadian Network for an International Criminal Court.

The real disagreement among delegations is over the Security Council. Bringing aggression under the aegis of the ICC could limit the power of the Council, which would satisfy many governments that resent its high-handedness. It is extraordinarily interesting that Russia finds itself on both sides of the argument. As one of the five permanent members, Russia is for preserving the Council's authority. As a survivor of aggression Russia would like to see aggression under the ICC. This may give Russia a solid reason to broker a compromise, and take this whole exercise seriously.

Relief Agencies Struggle to Win Protection for Threatened Aid Workers

Legal hurdles ahead in linking civilians and UN peacekeepers

Relief agencies, headed by the office of the UN High Commissioner for Refugees (UNHCR) are struggling to get attacks on relief aid workers defined as a war crime.

The issue has been dramatized by the UNHCR, which told the Rome conference that 140 UN civilian aid workers have been killed in recent years. There is wide agreement that this has to stop. The issue is also one of the least political on the Rome agenda.

UNHCR has joined forces at Rome with the International Committee of the Red Cross (ICRC) – its partner in many humanitarian emergencies. Several ICRC delegates have been killed in recent years, forcing the ICRC to suspend operations in Burundi and Northwest Rwanda.

The two agencies face an uphill battle. Many governments are opposed to the ICC statute covering crimes that are already covered by existing treaties, and a UN Convention on the safety of UN and associated personnel was adopted in December 1995.

The problem is that the treaty is generally taken to refer to UN peacekeepers. In addition, it has yet to come into force. UNHCR is convinced that something else is needed. A proposal to include a specific reference to personnel who are "impartial, humanitarian, and civilian" appears to be gathering support.

But this would exclude military peacekeepers, who are also vulnerable to attacks in dangerous missions, and Spain is pushing for a text that would cover them too. Spain has deployed peacekeepers on several UN missions – most notably in the Bosnian town of Mostar.

The problem with the Spanish proposal is that peacekeepers are covered by the existing 1995 treaty – even if it has yet to assume the status of law. As a general point, many governments are also concerned that singling out specific categories for protection will weaken the broad principle of civilian protection in the Geneva Conventions and their two additional protocols.

Delegates will have to scramble to reconcile these two positions, and it may not be easy given the hundreds of brackets that have to be removed from other more contentious clauses. In practical terms, however, this could have far more impact than many more theoretical – if contentious – issues. Once inserted into the text of the statute, such a reference could be useful to humanitarian agencies before the ICC even comes into being.

There is also important legal precedent emerging from the Hague tribunal for the former Yugoslavia. Ratko Mladic and Radovan Karadzic, the two Bosnian Serb leaders, have both been indicted for – amongst other things – ordering the taking of some 200 peacekeepers in May and June of 1995. The peacekeepers – many of them from East Europe – were chained to possible targets to deter NATO bombing raids. The fact that this is viewed as a prosecutable war crimes raises hopes that unarmed peacekeepers in the service of the UN might be counted as civilians, even if they are still soldiers of their own national army.