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SUPPORTING ADVOCATES FOR PEACE

On the Record for a Criminal Court

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From the AP Editorial Desk

Diplomatic Conference Accepts Plea of Superior Orders as Defense

War crimes omitted as manifestly unlawful

The Rome conference is close to accepting that members of the armed forces can escape criminal responsibility for war crimes if they can show that they were acting under superior orders.

The principle is contained in a newly revised article (32) in the draft ICC statute, which was agreed by an informal working group on Thursday. At the same time, it stipulates that a soldier will not be able to plead superior orders if he commits acts that he knows to be "manifestly unlawful." These are defined as genocide or crimes against humanity. One delegate said the prohibition also applies to civilians.

The text has left many governments deeply unsatisfied, for very different reasons. Germany and Chile oppose superior orders as a matter of principle, and the German delegation expressed concern that a major international conference should legitimise a principle that has been effectively outlawed since the Nuremberg tribunal – and indeed is seen as one of the foundations of international law. In sentencing 13 senior Nazis to death, the Nuremberg tribunal expressly rejected the plea of superior orders. Delegates also noted that the new draft article 32 does not define war crimes as actions that are "manifestly unlawful."

On the other hand, China suggested that crimes against humanity might have to be omitted from the crimes that are manifestly unlawful, because the conference has yet to define the term. This would allow a glaring loophole.

The debate has show, once again, the inherent tension between military doctrine and humanitarian law. Given that the bulk of today's war crimes are committed by soldiers against

civilians, the conference could hardly avoid extending the scope of the international court to the armed forces.

But armies depend for their effectiveness on discipline and obedience, particularly in times of war; soldiers can find themselves in a position where they are ordered to commit atrocities, on pain of death. In addition, said the delegate from New Zealand, a soldier can find himself receiving orders in the heat of battle, without any way of knowing whether they are illegal. Both views are reflected in the compromise draft.

There is also some disagreement about the German argument that superior orders are indeed disallowed under international law. The other view, put by the United States and several NATO members, is that superior orders has been accepted as a defense in jurisprudence, including the postwar Nuremberg trials. Under this view, the text reflects international law.

Editorial

A Positive Mood, A Good Start, But A Lot of Questions

By Iain Guest

There is a positive mood to the Rome conference. Whether this is because governments have made greater progress than they expected, or because the pessimistic predictions have not materialised is hard to say. But there can be no disputing the sense of quiet satisfaction at the progress so far.

This starts with the fact that these negotiations have not polarized and fragmented, as many had predicted in the run-up to Rome. In the United States, the Clinton Administration struggled to preserve its progressive image with human rights groups, while reassuring Congress that it would not sign on to a court that would prosecute American peacekeepers and presidents. It ended up by satisfying neither. Senator Jesse Helms, chairman of the powerful Foreign Relations Committee, called the idea of an independent criminal court "dead on arrival." Many US allies came to Rome convinced that the US will never ratify the ICC statute, no matter what concessions are made.

The nonaligned movement also sounded bellicose during the weeks leading up to Rome. A NAM ministerial meeting in Cartagena at the end of May resulted in a dour document aimed at limiting the powers of an international court, instead of trying to realise its potential. The ministers also issued a provocative call for the Security Council to be totally delinked from the work of the ICC.

Meanwhile, a series of preparatory conferences on the draft statute had produced a text that bristled with brackets and disagreement – setting the Rome conference a seemingly impossible challenge. Skeptics recalled that the International Law Commission has spent 20 years trying to draft one word – aggression. Would Rome also turn into a fiasco?

Nongovernmental organizations sounded discouraged, and began to talk about walking out if Rome failed to deliver on essentials, like an independent prosecutor. International lawyers raised the possibility that a draft statute might actually water down existing international law. The unexpected last-minute illness of Adriaan Bos, the popular and effective chairman of the preparatory committee, cast a pall over the meeting and heightened the possibility of procedural clashes in the opening days at Rome.

Many supporters of a court resigned themselves to a bruising five week battle, and the possibility of walking away and creating their own treaty, similar to the Ottawa agreement on landmines.

Discerning Progress

The fears have not been realized.

Procedural issues – committee chair and the like – were dealt with immediately. The conference went quickly and purposefully from the plenary to the committee of the whole. The interventions have been remarkably free from rancour, and from politics. The United States announced that it had come to negotiate and produced a blizzard of papers and proposals which suggested that that was indeed the case.

NGOs also organized themselves quickly and impressively. Within a week, ten leading NGOs had drafted a list of eleven principles, reflecting a spirit of compromise among some monumental NGO egos. The NGOs have set up 13 working groups that have tracked key issues: On the Record uses their material extensively. The mood in the NGO bear pit (Sudan room) has been focused and good humoured. There has been no NGO posturing, no walk-outs, and no demonstrations – with the exception of a predictable protest from Argentinean mothers of the disappeared. But they too were on a mission.

For all this, we can be grateful. There is now a very real chance that this conference will produce a court by July 17.

That said, it is very difficult to discern its shape, or the extent of progress. (In this issue of On the Record we review progress on the issues so far. As readers will see it is a very mixed bag.) Rather like the Law of the Sea treaty, many of the issues are interlinked. They are moving out of the committee of the whole into working groups. Particularly difficult issues are sent off to informal working groups and even informal informals. Very little has yet gone to the drafting committee – the first sign of broad agreement. Until more of these individual elements emerge, it will be hard to get a clear picture.

Legal Setbacks

The first question to ask is whether existing standards of law have been weakened. Cornelio Sommeruga, president of the International Committee of the Red Cross, raised the fear. He was

right to be concerned. The discussion on the applicable law that will be used by the court has raised several worrying possibilities.

A surprising number of governments – 14 by one count – have come out strongly against the court covering war crimes and crimes against humanity committed in internal armed conflict. This would be a huge step backwards, because the second optional protocol of the Geneva Conventions makes it clear that these egregious acts against non-combatants in internal wars are punishable. Over 140 governments have ratified the protocol.

Several governments have also argued that disappearances be excluded from crimes against humanity. Once again, this would reverse progress made in UN and OAS declarations, and even court judgments.

Third, the US delegation has proposed to dilute the fundamental principle that soldiers cannot avoid criminal responsibility by pleading that they were acting under superior orders. This has been a cornerstone of international law since Nuremberg, and has been pivotal in several cases before the international criminal tribunal for the former Yugoslavia.

Fourth, a move is afoot to remove "enforced pregnancy" from the list of crimes against humanity. This is alarming to the women's caucus because it would remove language that was featured in the Beijing declaration.

In addition, the United States has decided, at the very last minute, that many definitions are sloppy and vague, and proposed a rigorous approach that would have the effect of reopening the entire section on crimes.

Set against these possible setbacks, the advances thus far seem minimal. An informal working group has endorsed the inclusion of gender-based persecution among crimes against humanity. It is agreed that children under 18 will not be prosecuted. But it will be far harder to put an end to the drafting of children into war. One prominent government said that children as young as 12 should be allowed to defend themselves.

Humanitarian agencies are trying to extend the scope of law per war crimes to include attacks on aid workers, but they are running into the fact that a treaty already covers UN civilians. Peace groups are trying to get the use of landmines and nuclear weapons outlawed as war crimes, but they too seem unlikely to succeed.

Politicization

Prior to Rome, the main fear was of a politicized court and prosecutor. Rome has turned this on its head and raised the specter of governments politicising the court.

This centers on the role of the UN Security Council. The debate has revealed deep resentment at the way the Council sees its role in this troubled post Cold World era. This is partly explained by the Council's dominance and lack of transparency. But it also has to do with the irresponsibility of its five permanent members. There is particular anger at the way that the United States

lectures the world on the rule of law and uses the Council as a cloak for its own foreign policy, while refusing to pay over a billion dollars which it owes to the United Nations. While the permanent five appear ready to set up ad hoc tribunals, they hesitate to endorse a permanent court for fear that they too might be held to the same standards. "The selective justice efforts of the Council have been one of its greatest failures," says Bill Pace the NGO coordinator. Others would be less diplomatic.

But there has not been a consistent attempt to use this conference to undermine the Council's preeminent role, as many had feared. There is overwhelming support for the idea that the Council will refer cases to the court, and work with it. Many hope that the Council will help the ICC to enforce its decisions.

But there is also broad consensus that the Council will not be allowed to dictate the court's agenda; hold cases back; or sit on cases indefinitely in order to prevent the court from hearing them. The Americans would like strong Security Council involvement, but they will not succeed. A proposal by Singapore would require a majority of the Council's 15 members (and unanimity from the permanent five) to prevent the court from taking up an issue that is on the Council's agenda. Many are insisting that the Council could only act under its Chapter 7 mandate, which would further limit the Council's possibilities. Belgium has even proposed that the court could take steps to prevent evidence being destroyed while a case is under review by the Council – which would mean starting some kind of investigation. France, and possibly Britain, appear ready to accept much of this.

This is the best possible compromise. However irresponsible the Security Council might have been in recent years, it is not for this conference to challenge the Council's role under the UN Charter. Equally, the Council cannot expect to dictate to the new court. As we said in the first issue of On the Record, it has not earned the right.

Authority of the Court

How much authority and independence will be vested in the new court? The litmus test will be the function of its prosecutor. Will he or she be independent, and able to launch investigations proprio motu? Or will the prosecutor have to wait for the Security Council or states to refer a situation before investigating individual suspects?

The first idea is championed by NGOs, and by a large group of progressive (likeminded) governments who believe that the prosecutor must be independent. The United States opposes it. But the debate on this so far has been surprisingly constructive. The US has shifted its rhetoric. Instead of raising the spectre of "politicized" and mischievous prosecutions, aimed at causing embarrassment, the US now warns that a prosecutor will have a difficult time in sorting through the mass of complaints that are likely to come in. Given that a choice will have to be made, says the US, the prosecutor will need direction. This will come through situations that are referred from the Security Council.

Stripped of rhetoric, this is a respectable view that is shared by several countries. But the presence in Rome of Richard Goldstone, one of the first prosecutors of the Hague tribunal, has

suggested that the fear is exaggerated. Goldstone, and his successor Louise Arbour, have had no trouble in setting priorities, even if it means cropping cases. Both have argued strongly for an independent prosecutor, and point out that the real risk is for an unaccountable prosecutor. But there are so many checks and balances built into the ICC statute and the election of the prosecutor that this seems unlikely.

Germany and Argentina have proposed that once the prosecutor identifies a suspect, a pretrial chamber should review the case before an investigation is launched. This seems to be gaining ground. There are still many key questions about how it would work. One is whether the chamber would be able to halt the prosecutor if the suspect's rights seemed to be ignored. But the discussion has become very specific, suggesting that the basic idea may be close to being accepted.

The problem is that virtually everything in this statute is linked to something else, and while some governments may not oppose the idea of an independent prosecutor outright, they can still find other ways to weaken his impact. Britain, for example, is insisting that the territorial state (where the crime was committed) will have to consent before any investigation can be launched. This, says Britain, is essential if the investigation is to go forward without risk.

The Netherlands, however, responds that accepting the competence of the prosecutor must mean accepting his ability to investigate. They point to the precedent of the Hague tribunal on Yugoslavia, which authorized the exhumation of mass graves, against the consent of the Bosnian Serbs. Why, they say, should the ICC give states a chance to refuse, particularly as governments can change their mind? In this respect, Serbia has recently allowed the Hague prosecutor to exhume graves in Kosovo, after first refusing.

The British position on state consent highlights one of the most divisive issues before the conference. Some governments would like the court to exercise jurisdiction over any and all acts of genocide, war crimes, or crimes against humanity, regardless of whether the state in question has ratified the treaty. Others feel that states cannot be bound by a treaty they have not joined: that, they say, would make nonsense of ratification, and also usurp the enforcement power of the Security Council under the UN Charter. Some would even go so far as to give states that have ratified the right to refuse a request by the court to investigate.

So far there is no consensus on any of these positions, simply a lot of impassioned debate. But demanding state consent is clearly a useful device for states that are apprehensive about handing the court too much authority. Britain is prepared to appear progressive on some issues (such as allowing the court the last word on material that affects national security.) But Britain has staked out a tough position on state consent, which would allow the territorial state to refuse the court permission to investigate, regardless of whether it is a member of the treaty. This would have allowed Cambodia to reject a court decision to investigate the Khmer Rouge. The United States on the other hand, has come out strongly against the independent prosecutor, but reserved its position on state consent.

Both governments are unlikely to take a final decision until the shape of the entire package is clearer. NGO campaigners meanwhile, are dismayed to find so many third world governments

insisting on some kind of state consent as well. As Bill Pace says, this could result in 185 vetoes. This, of course, would hand the ICC over to the Security Council, which is exactly what NGOs do not want. This is one of the messages that must get out in the days ahead. In spite of progress so far, this conference is still very much in the balance.

Special Analysis of the ICC Statute 1 (Defining Crimes)

Over the next few days, On the Record will analyze the major sections of the ICC statute as they emerge from the Committee of the Whole. In this issue, we look at the ICC's subject matter jurisdiction: which crimes it will cover, and how they are defined.

There is wide consensus that the court's jurisdiction should be limited to the core crimes of genocide, war crimes and crimes against humanity. Each raises definitional issues that are discussed below.

Some governments (Algeria, Israel, Costa Rica, Russia, and India) favour the inclusion of terrorism. Some (Turkey, Thailand, Algeria, and Trinidad) have argued for including drug trafficking. But there is overwhelming opposition to including these crimes, on the grounds that they are already covered by treaties and handled by governments. There is a concern that any attempt to include treaty crimes such as these within the ICC's jurisdiction would unduly complicate the already difficult negotiations at the Rome Conference. A number of states have suggested that including treaty crimes could be considered at a review conference of states parties after a few years. Terrorism is also seen as extremely political.

The office of the UN High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC) have made an urgent plea to include attacks on aid workers. A treaty, however also covers this. Informal discussions are under way to resolve this.

Sixty states argued in the plenary for the inclusion of the crime of aggression, including Germany and Russia. The problem is that aggression falls under the mandate of the Security Council. If it were included, the five permanent members of the Council feel that the Council should first determine than an act of aggression has occurred before the case could go to the ICC. This is opposed by many. It is also difficult to see how aggression could be defined for the purpose of establishing individual criminal responsibility.

Genocide

The statute follows the 1948 Convention on Genocide, which defines genocide as acts committed with the "intent to destroy in whole or in part a national, ethnical, racial or religious group as such." This definition does not cover political or social groups, which limits its application. In addition, the two ad hoc tribunals (Rwanda and the former Yugoslavia) have found it hard to prove intent. But with very few exceptions (Cuba), these have not been an issue for this conference.

War Crimes

The ICC draws on existing laws and customs of war. These start with the Geneva Conventions, which were consolidated in 1949 and aim to protect non-combatants during war. Two additional protocols were added to the Conventions in 1977. The first extends protection in international armed conflict; the second covers non-international armed conflict, which covers most of today's conflicts. Taken together, these treaties outlaw a huge range of acts of violence.

The ICC statute sets out four different types of war crimes a: grave breaches of the Geneva Conventions (international armed conflict); b: violations of the Hague Conventions and protocol one (international); c: common article three of the Geneva Conventions – considered to be core violations, applicable in non-international; and d: protocol two (internal).

Section a has been accepted and passed to the drafting committee.

The most contentious issue is whether to include crimes committed in non–international armed conflict. (sections c and d). The overwhelming majority of governments favour the inclusion, because most of today's deadliest conflicts are internal. But a surprising number of nonaligned governments (including India, Syria, and Lebanon) have argued for their exclusion. Many of these countries are suffering from wars and clearly do not want international interference; On the other hand, Sierra Leone and Burundi have argued that the ICC could help to control the excesses of rebel movements.

There has been much debate about including the use of nuclear weapons, landmines and blinding lasers among war crimes (part b). Fifteen states have spoken in favour of a comprehensive ban on these systems that would also include future weapons systems. They included Iran and six other Middle Eastern countries. At the other extreme, several governments spoke in favour of a restrictive proposal (three permanent members of the Security Council – France, China, and Russia – and Sweden and Denmark), which would prohibit a limited number of already prohibited weapons systems (biological, poison gas etc.). This proposal also makes no reference to outlawing indiscriminate weaponry (weapons that do not distinguish civilians from armed personnel). The issue is now discussed in informal working groups. The most likely outcome is a compromise, based on existing international standards. This would not set the clock back; but neither would it include nuclear weapons or landmines.

There has been much debate in the corridors about whether to include "enforced pregnancy" as a war crime. Women's groups support inclusion because they want to outlaw not just the crime of rape, but the policies of the rapists designed to ensure that the rape contributes to a change in the ethnic composition of the population. Right to life groups argue that this could be a way to challenge abortion, which is prohibited in several countries. Kuwait, Lebanon, Saudi Arabia, Egypt, and Iran indicated that the term was unclear and should be reconsidered.

Seventeen states supported the inclusion of apartheid.

Several proposals aim to curb the drafting of children under the age of 15 into armed forces. China opposed any provision on the issue. Middle Eastern states favoured a limited curb against forcing children to take direct part in hostilities. Russia and Turkey were among the governments that favoured a broader curb against recruiting and using children. Cuba and Brazil argued for an

even wider curb against allowing children to take part in fighting. The United States has raised eyebrows by suggesting that children as young as 12 should be permitted to fight for self-defense.

Delegations don't want to spend the whole conference drafting definitions. A lengthy US paper on elements of crimes has been circulated.

Crimes against Humanity

Chapeau

Crimes against humanity were first developed at the Nuremberg tribunal, because some of the acts committed against civilian populations, and German nationals, were not covered by war crimes. This category would particularly useful to the ICC because it offers a broader net to catch criminals whose acts might not qualify under genocide or war crimes.

As a result, there has been intense discussion about the scope of crimes against humanity. One question has been whether these crimes need be "systematic or widespread," or "systematic and widespread." The latter would be much more restrictive, and could mean that a single massacre might not qualify. (For example, the 1981 massacre of the village of El Mozote by Salvadoran troops). The term "systematic" implies the need for planning by a government or de facto political authority.

Four of the five permanent member governments favoured "systematic and widespread": France, Russia, UK, and the US. The US has changed its position three times in the last two months. The UK argues that isolated acts should be excluded. Most other governments favour "systematic or widespread." These included Argentina, Belgium, Costa Rica, Cuba, Italy, Mexico, Slovenia, Spain, and Switzerland. Austria and Denmark argued that it should be limited to "systematic."

Nexus

At issue is whether crimes against humanity are independent of other crimes, and can be committed in peace as well as in armed conflict. Nuremberg made this link; the two ad hoc tribunals are much less clear. In the ICC draft it has still to be decided. China, Turkey, and several Middle Eastern governments want a nexus with international armed conflict. This is currently in informal discussion.

Several governments argued that crimes against humanity should not be limited to those committed against a civilian population. China, Cuba, and Russia disagreed.

Illegal detention in violation of international law

The division here is between governments who want an expansive definition that would cover all possibilities (including the Bosnian concentration camps) and those who favor a more narrow definition. Most delegations that spoke favoured an expansive definition (e.g. deprivation of

liberty). Japan and Israel argued for the more limited "illegal detention." Compromise seems possible.

Enforced disappearances. Disappearances have been defined as an international crime by a UN declaration and several decisions of the Inter-American court. Latin American NGOs hoped that the ICC statute would declare it a crime. Mexico, India, Syria, Japan, and Cuba argued for its exclusion; France, Chile, and Jordan favoured inclusion. The committee reached the following consensus: enforced disappearances would be included, as long as the conference could agree on a definition.

The statute also includes "other inhumane acts" in crimes against humanity. This would expand the ICC's jurisdiction over other crimes that are not currently included in the list. As a result, many governments want to know what it means more precisely. Ireland, Sri Lanka, Colombia, Mexico, and Sierre Leone all called for more precision.

From a legal perspective, the whole question of definitions is important because general principles of law require that there can be no crime without a law (nullum crimen sine lege).