On the Record for a Criminal Court Issue 9

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Editorial: After Two Weeks in Rome

From the Editorial Desk: After two weeks in Rome

The dust is beginning to settle after two weeks at Rome, and governments are beginning to show their hand. In this and Tuesday's issue of On the Record, we try to give a rounded picture of some of the most controversial sticking points. Readers will find stories arranged around the structure of the statute and issues that concern those in the nongovernmental community and international law. You will find references to the relevant articles at the end of each story.

As the conference progresses, we will try to define the shape of the court as it emerges from negotiations. We are getting a lot of encouraging messages from our readers, although some of you are still concerned by the length of stories. In this issue, we have attempted to shorten them. We are also breaking the issue into two parts, to make it easier to digest. Thank you for your feedback, and please keep it coming.

Wednesday's edition will feature a special campaigning issue on torture – how the ICC can help and what you can do.

General Principles: Compromise on Command Responsibility Could Bring Warlords and Civilian Commanders Within Scope of International Criminal Law

Important step forward in expanding law to modern wars

The Rome Conference has agreed that civilian commanders and paramilitary warlords should be held responsible for criminal actions committed by the forces under their command, even if they did not actually know that crimes were being committed.

The decision was taken by an informal working group last week, and is expected to be incorporated into the draft statute of the ICC. Many delegates agree it could represent an important step forward in controlling violence in ethnic and internal wars.

Military doctrine is built upon obedience and clear lines of command, so there are few objections to the basic principle of command responsibility. Moreover, the post-war Tokyo tribunal firmly established the notion that military commanders should be held criminally accountable for the actions of their subordinates. Admiral Yamashito was found guilty and executed, because he "knew or should have known" of the crimes committed by Japanese troops.

But modern warfare has blurred the clear military chain of command. Often, as in the case of Radovan Karadzic, the Bosnian Serb leader, civilians assume control of military forces. Or military commanders can find themselves in command of civilian or paramilitary forces. The nebulous nature of their command makes it harder to pin responsibility for crimes on commanders. This helps to make contemporary warfare more violent.

The United States has pushed for a clarification at the Rome conference. Under the draft that has emerged, military commanders and warlords "who control irregular forces" are held to be criminally responsible if they "knew or should have known that forces under their command were committing or were about to commit such crimes."

Civilians who command military forces are held to a slightly less rigorous standard on the grounds that they may have less control over their subordinates. The relationship between commander and subordinate is deemed slightly less binding.

Nonetheless, the standard is still high: "the superior either knew or consciously disregarded information which would have enabled him to conclude" that crimes were being committed. (Article 25)

Egypt Balks at Intoxication Compromise, As Alcohol Befuddles Rome Conference

Egypt is said to be resisting a compromise text that would permit war criminals to use "involuntary intoxication" as a defense against criminal responsibility.

Under the current text, "involuntary" drunkenness is one of a number of grounds that could be used as an excuse. This, however, has divided governments. On the one hand, Sweden has joined Islamic governments in arguing that people do not get drunk "involuntarily." On the other hand, Mexico and Argentina want a clear link made between the state of intoxication and the criminal act. European governments, (whose people consume formidable amounts of alcohol) seem inclined to agree with the latter.

Per Saland, the committee chairman, produced a staggeringly complex compromise under which "if the person has become involuntarily intoxicated under such circumstances that the person knew or disregarded the risk that the commission of a crime under the jurisdiction of the court was likely to occur, the person shall remain criminally responsible."

This wording is typical of the kind of compromises that are starting to emerge as the conference tries to reconcile different cultural, legal, social, and political systems and practices. But it may not survive, if Egypt holds out and other teetotalers rally round. (Article 31)

Definitions: National Abortion Laws will not be Undermined by Inclusion of Forced Pregnancy as a Crime Against Humanity, Pledges Women's Caucus

Bosnian government agrees, lobbies with Muslim countries

Women's groups have urged the Rome conference to define "forced pregnancy" as a war crime and a crime against humanity, and strongly denied that this would open the door to the ICC trying to promote abortion.

In a press statement issued on Friday after several days of intense internal discussion, the Women's Caucus for Gender Justice in the ICC stated that the aim should be to outlaw and prosecute the kind of outrages that occurred in Bosnia and Rwanda, where "soldiers raped women until they became pregnant and then continued to imprison them."

Forced pregnancy should be listed as a war crime and a crime against humanity, says the statement. "This will not affect national abortion laws, or the omission to provide abortion. The issue of abortion has no place in the current discussions."

Meanwhile, delegates say that the Bosnian government has been quietly lobbying for inclusion with other Muslim governments, who are known to be concerned about a possible link with abortion.

The debate over forced (also known as "enforced") pregnancy has been intense and emotional since the last preparatory commission meeting, at which the Vatican insisted that forced pregnancy be put in brackets, where it is listed among crimes against humanity and war crimes.

The concern was that if forced pregnancy were outlawed, the ICC would be able to prosecute doctors who refused to provide an abortion to women on demand. This worries some countries where abortion is illegal, including Venezuela, Peru, and in the Arab world. Supporters of the right to life have made the same argument in Rome.

The women's groups are reluctant to banish abortion from the debate altogether, because many feel that women who have been raped in war should be allowed the option of abortion if they don't want to keep the baby. This has caused immense anguish and even some suicides among rape victims in Bosnia and Rwanda, who are often torn between loosing their child and keeping a baby that was a product of violence.

In addition, some womens' representatives argue that the ICC should range wider than situations of conflict, and cover cases where women are being detained for breeding and denied a broad range of medical services that might to include abortion. While hard to imagine such a situation, the statement recalls that forced pregnancy occurred during the period of African-American slavery in the United States, when women slaves were routinely tortured if they refused to bear children. Slavery is still practiced in some parts of the Sudan.

While the women's caucus wrestled to find the right wording, their right to life critics began to question the wisdom of including the term in the statute.

In fact, says the women's caucus, the fears about abortion are totally unfounded. "So many countries limit abortion in so many different ways, that the ICC could not possibly find it a crime against international law," said Tina Doglopol, a lecturer from Australia. Others point to the many ways in which the court will be prevented from taking up "politicized" cases – ranging from state consent to the pre-trial chamber. (Article 5).

US, American Human Rights Groups Clash on Independent Prosecutor

A leading American human rights group has sharply attacked claims by the US that an independent prosecutor would politicize an international criminal court.

In a detailed paper, the New York-based Lawyers Committee for Human Rights points out that neither the UN Security Council nor governments have shown any interest in taking consistent action to stop massive crimes or genocide. This, says the paper, is a compelling argument for a "proprio motu" prosecutor, with power to take up cases.

"Political considerations have prevented states and the Security Council from reacting to mass atrocities in which hundreds of thousands, and in some cases millions, of people were killed over the last several decades. A proprio motu prosecutor is necessary to ensure that international crimes are investigated and prosecuted when states and the Security Council fail to respond for political reasons."

With support growing for an independent prosecutor in Rome, the US has stepped up its campaign to kill what it sees as a dangerous initiative that could easily lead to mischievous prosecutions. In a paper released last week, the US argued that an independent prosecutor will not be needed because states will use the new court, given that they would not have the burden of launching investigations. The US also feels that sensitive decisions on prosecution should not be left to one individual.

Besides which, said the US paper, individuals can lodge complaints under the so-called 1503 mechanism of the UN Human Rights Commission, and the first optional protocol of the International Covenant on Civil and Political Rights (ICCPR).

Ironically, both of these procedures are seen by many as strong arguments for an independent prosecutor. Under the 1503 procedure, a committee of governments sifts through complaints for evidence of a systematic pattern of violations. The identity of the individuals is irrelevant, the case is reviewed in private, and there is no legal recourse. In fact, many feel the procedure is so ineffectual that it should be abolished.

As for the ICCPR, most of the 818 complaints received since 1976 have been declared inadmissible. Many governments – including the US – have yet to accept the procedure.

"The ICC is being created to end impunity for such crimes and prevent future atrocities," say the Lawyers Committee. "Unless the ICC prosecutor is allowed to initiate such proceedings proprio motu, based on information from any source, this goal will not be achieved." (Article: 12)

Dutch, UK Spar Over Whether States Should Veto Pre-Trial Investigations

Britain has strongly opposed a Dutch proposal that a pre-trial chamber should be able to authorise the ICC prosecutor to launch investigations without the consent of the government in question.

The chamber is emerging as a key component for those who want an independent court, and there is growing support for a joint German-Argentinean proposal that the chamber would vet cases before the prosecutor embarks on an investigation.

Some see this as a way of controlling the prosecutor, and ensuring against irresponsible "politicized" prosecutions. Others see it as a way to help the prosecutor, by setting priorities and providing him or her with a second opinion on how the proposed case fits the overall statute. Still others feel that the pre-trial chamber will ensure that the rights of defendants are taken into consideration (for example, with habeas corpus requests).

Those who argue for an independent prosecutor, like the Netherlands, feel that the chamber should authorize investigations even if the state is opposed. Britain, however, argues that the territorial state (where the crime was committed) must give its consent before the court could intervene.

In a sharp exchange between these two allies, British delegates spoke witheringly of a court that has no police trying to conduct investigations without the cooperation of the local authorities. This, they suggested, would be dangerous and foolish.

Holland's position is that the practical difficulties might indeed be daunting, but that the principle must be established that states cannot veto investigations. The Dutch point to Bosnia, where the tribunal for the former Yugoslavia (ICTY) has successfully performed exhumations in the face of opposition from the Bosnian Serbs.

The ICTY prosecutor tried to send forensic scientists to Kosovo after the March massacre in Drenica, only for them to be turned away. But the Serbian government recently changed its mind and admitted the team after international pressure. The Dutch insist that the ICC should encourage such changes of heart, not give states ammunition to refuse. (Article 54)

Spain Muddies Water on Security Council Role

Proposal would allow the Council to suspend ICC investigations for two years

Spain has suggested that the UN Security Council should be allowed to prevent the ICC from launching a prosecution for 24 months, if the Council is "actively dealing with" the dispute or feels that it affects international peace and security.

The suggestions alarms some of Spain's western allies and NGOs, who feel it gives the Council far too much time to hold up a case. On the positive side, the proposal would also allow the ICC

to decide whether the Council has done enough. If not, the ICC could take the case over without Council permission.

The convoluted Spanish text reflects the difficulty that faces Western governments in finding a formula that would permit the UN Security Council to keep an international crisis under review, while at the same time permitting the ICC to investigate (and hence deter) crimes that might arise from the conflict.

Although many have complained of the Council's selectivity, there is general agreement that the ICC must not hinder the Council in discharging its responsibilities over issues of war and peace. Tension could, for instance, occur if potential war criminals are actually helping the Council (or UN) to fashion a peace agreement – as indeed has happened in Cambodia, Haiti, Bosnia, Mozambique, and even El Salvador.

This calls for close cooperation between the Council and court. Last December, Singapore proposed that a case should go to the court unless the Council decided against. This would limit the Council's veto power, because it would require the agreement of all five permanent members.

Several governments are now trying to make this more specific. Reflecting the generally tough tone of debate towards the Council, one government is circulating a text that would only allow the Council to suspend an investigation or prosecution on the basis of a formal decision under its Chapter 7 (enforcement) mandate. Any suspension could not exceed 12 months. Belgium has suggested that the court could take measures to ensure that evidence is not destroyed during the suspension.

Spain's proposal would increase the Council's power vis-a-vis the ICC, because it would allow the Council to hold up a case for a year, and then extend this for another year if need be. (Article 10)

State Consent

Battle Lines Form on States' Ability to Block ICC

As the Rome conference enters the critical phase of negotiations, governments are beginning to stake out a clear position on whether the ICC should be required to seek consent from states that ratify the treaty before the court could launch an investigation.

The issue is considered one of the most critical facing the conference. At one extreme are those who argue that all states that are parties to the ICC treaty should be automatically subject to its jurisdiction, and should not be allowed to give consent for the ICC to prosecute their nationals or investigate crimes that occurred on their territory.

At the other extreme are those countries that are determined to limit the court's ability. They are insisting that the court would have to seek consent from a state – even if it is a party to the treaty – every time it seeks to open a case.

Five options are currently on the table, and four have garnered considerable support. Jordan, Ukraine, Italy, and Belgium agree with Germany that the court will be addressing crimes (against humanity and genocide) that are already subject to universal jurisdiction. Most governments have assumed an obligation to prosecute culprits, regardless of their nationality or where they are living. This is why war criminals from the Second World War are still liable to prosecution, wherever they live.

Colombia, Canada, Egypt, and Tanzania are among the governments which support a British proposal under which the territorial state (where the crime was committed) would have to give permission before the ICC could take up a case. Many feel that this would severely limit the court's possibilities, because such states would be unlikely to agree: for example, it would have meant asking Cambodia for permission to prosecute the Khmer Rouge when they ruled the country.

The most popular proposal, put forward by South Korea, would accept consent from any of the four states likely to be affected by a prosecution: territorial, custodial (where the accused is living), the state of nationality, or the state, which is seeking extradition. The chances are that at least one of these four would agree. But it too would have prevented the ICC from intervening in Cambodia in 1976, or the Bosnian Serb republic in 1993.

At this stage it is impossible to tell which of these proposals, if any, will prove acceptable. State consent is just one of the ways in which governments can curb, or expand the powers of the ICC. Some governments, notably the United States, are not yet prepared to show their hand.