OTR ICC Volume 1, Issue 20

ON THE RECORD: Your link to the Rome conferences for the establishment of an international criminal court

July 14, 1998

In today's issue ...

Opting In on War Crimes Would Be "Retrograde Step for International Law" Warns Angry Red Cross

The International Committee of the Red Cross (ICRC) has warned the Rome Conference that any decision to allow states to pick and choose acceptance of the court's jurisdiction over war crimes would represent a "retrograde step for international law" that would "severely limit the court's effectiveness."

The Red Cross warning was delivered at the end of Monday's discussion on the latest draft to be issued by the Conference bureau. It comes amidst reports that a compromise deal may be near on the critical issue of whether or not the court will have the power to prosecute internal armed conflict.

The positions on this have polarised sharply in the last three days. According to a tally by the NGO Coalition, only 16 states spoke out against the inclusion of internal armed conflict during the public debate last week. Now the balance appears to have shifted, and reports of a deal are in the air. Unfortunately, the deal appears likely to water down the Geneva Conventions.

The current text would include internal armed conflict under the scope of the court. But as On the Record reported on Saturday, the crimes listed would be introduced by a highly restrictive chapeau that would exclude many of today's armed groups.

Another problem has now emerged following two US statements to the conference, both of which have insisted that the court must not have automatic jurisdiction over war crimes and crimes against humanity. This would mean, in effect, that any state that ratifies the court could at the same time declare a willingness to cooperate with the court over an investigation. If such a declaration were not forthcoming, the court would not be able to take it up automatically.

Worried observers feel that this has provided a huge opportunity for the nonaligned governments, which basically want to keep internal armed conflicts out of the statute. They can now accept the inclusion of such conflicts into the statute, knowing full well that they need not be bound by the court.

Some feel that this loophole has reassured China, Indonesia, and Algeria, all of which appeared to shift course yesterday. Indonesia and Algeria said they could accept the inclusion, if the concept of "internal armed conflict" was better defined. Even China appeared to soften its position and edge towards inclusion.

There is another element of the deal that appears to be a drastic reduction in the crimes that would be listed as war crimes committed in internal armed conflict. As reported last week in On the Record, the current draft proscribes a series of specific crimes that range from the conscription (recruitment) of children under 15 into the armed forces to attacking hospitals. This list is reportedly under such intense scrutiny that some fear it may be gutted completely in the compromising. One observer said there is talk of taking all the crimes out except for the recruitment of children and "direct attacks" on civilians, aid workers, and units carrying the Red Cross emblem.

All this has prompted yet another anguished protest by the ICRC. Late Monday, the Red Cross delegation announced: "It is essential that the International Criminal Court have automatic jurisdiction over war crimes and crimes against humanity, and not only over genocide. If it is to serve as an effective complement to national courts, the Court must be competent to try such cases as soon as a state becomes party to the treaty. By virtue of the principle of universal jurisdiction, every state has the right, and in many instances the duty under international law, to prosecute or extradite suspected war criminals.

"This principle reaffirms the fundamental rule that criminals are not immune from prosecution wherever they have committed their crimes and whatever their nationality. Any form of additional consent, such as an opt-in precondition for the exercise of the court's jurisdiction, gives the impression that states can lawfully

protect war criminals from prosecution. This could be a retrograde step for international law and would severely limit the court's effectiveness."

Fury at Proposal to Omit Aggression and Use of Nuclear Weapons from ICC Scope

Syria threatens to reconsider participation, US digs in on jurisdiction

Speaking on behalf of the nonaligned movement Monday, Iran protested angrily that the latest compromise draft omits the crime of aggression and the use of nuclear weapons from the scope of crimes to be considered by the ICC.

Referring to the draft, Syria also blasted the omission of aggression as an unacceptable concession to the "veto power" of the five permanent members of the UN Security Council, particularly the United States. This, said the Syrian delegate, did not reflect the opinion of the majority of states that had spoken, nor of the nonaligned movement. If the crime of aggression was not reinserted, he implied, his government would review its participation in the conference.

This deluge of criticism from the nonaligned, while not entirely unexpected, illustrates the extreme difficulty facing the bureau and its Canadian chairman, Philippe Kirsch, as the conference heads into its final week. In a third draft of the jurisdiction issues, released last Friday, the Bureau attempted to sum up the kind of consensus that they saw emerging. Inevitably, they have come under fire from all sides.

The United States delegate, David Scheffer, complained that the idea of an independent prosecutor, able to initiate investigations (proprio motu) was still in the text even though a "very substantial number of the countries that have spoken on the question Ð over a fourth by our notes Ð completely oppose [the idea]." "How can this position not be reflected in the Bureau's text?" asked Scheffer.

In addition to questioning Kirsch's decision on the prosecutor, Scheffer reaffirmed what has apparently become the bottom line for the United States Ð they would only accept a system under which states would be given the option to pick and choose whether to allow the court to take up cases of war crimes and crimes against humanity.

This would be combined with a very high threshold that would prevent the court from taking up isolated war crimes like looting or unlawful detention. While serious, said Scheffer, these "do not rise to the level of serious international concern that should motivate an international criminal court."

A third precaution would involve building in provisions by which the prosecutor would notify states before a case is taken up, so as to allow the state to take a first shot at a case.

Daily, it seems, the power of the court is being whittled away to the point where it would become almost impossible for the prosecutor to take any initiative. One numbingly complicated text, adopted Monday evening, concerns pre-trial investigations and whether the prosecutor could take any steps without the permission of the state. One disgusted delegate said the text contains so many concessions to governments that it might just as well have forbidden the prosecutor from trying to conduct pretrial investigations at all.

The discussion is far from over. The NGO coalition has compiled a detailed tally of the positions of delegates on the key issues last week, and found a strong majority in favor of a strong court. 76% of delegations that spoke support a low threshold on war crimes; 79% support the Korean proposal on state consent (under which it would only require one of the four relevant states to trigger an investigation), and 73% agreed that the court should have automatic jurisdiction for all the core crimes, once states have ratified.

To the NGO coalition, these figures amount to a powerful argument in favor of ignoring the threats from the US and from the Arabs, and pushing for a tough court, with automatic jurisdiction over war crimes, genocide, and crimes against humanity Ð the essential idea since the start of this conference. It might indeed trigger a walkout by Syria and an angry rebuff from the United States. But all along this has seemed preferable to a weak court according to many NGOs. They feel that a weak court would make it even more difficult to deter war crimes and other atrocities.

It remains to be seen whether the Bureau is prepared to confront the skeptics Ð something that would surely provoke a vote. Clearly exasperated by the maneuvering and the pressure from all sides, Chairman Kirsch pointedly reminded delegations that they Ð not the Bureau Ð are supposed to be drafting this treaty.

FINANCE

Three Proposals, One Deadlock

Governments that want a strong criminal court have proposed that it should be funded by the United Nations for an initial period Ð possibly between one and three years - after which the costs of the court would be born by states' parties.

The proposal was put forward by the Netherlands on behalf of the 59 likeminded governments on Friday. A counterproposal by the United States would have the court funded by states parties, although it would also allow the court to seek funds from the UN General Assembly for any investigation incurred by a referral from the UN Security Council. Japan is also proposing that the court be funded by states parties, although it too says that the court could seek UN funding "during the initial phase."

With less than a week of the conference to run, observers are relieved that the likeminded have finally put their support behind a funding formula. For much of the last three weeks, financing has been on the backburner, completely overshadowed by the more controversial issues of jurisdiction and definitions.

Yet the possibility is strong that this meeting will end without agreement, and some NGO experts who are well steeped in UN funding horror stories are reminding delegates that this is another way to cripple the court. The UN Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) failed to receive funding from states' parties, as was intended, and ended up paralysed for several months before approaching the UN General Assembly for funding.

The prospects for an agreement do not seem good, because the two formulas on the table reflect the underlying tensions that are overshadowing the entire debate. The United States is determined not to pay for a court that it will not ratify.

On the other hand, a funding formula that left all costs to the states' parties would certainly deter smaller, poorer states from ratifying. As On the Record has noted, these are precisely the states that would stand to benefit most from adherence. This was the experience of the committee that monitors the 1984 Torture Convention, in its early phase.

Nothing about funding international organizations is simple, so it is hardly surprising that this discussion has caused problems. But many are surprised and dismayed that it has taken this long for the disagreements to crystallize.

Even now, there remain major questions about the two main texts on the table Ð from the Dutch and the US. The Dutch text suggests that the states parties would approach the UN General Assembly for funds. But it is far from certain that the General Assembly would agree. If major UN members are opposed, the GA process would give them plenty of chances to dig in their heels.

Nor does the Dutch proposal specify the time that the UN would help with funding. The Law of the Sea secretariat received UN support for a year before turning to its states' parties, but many feel this was not long enough to put the

organization on a firm financial footing. As a result, many would prefer three years.

The US proposal, meanwhile, leaves open the possibility that the court could go back to the UN General Assembly to cover the costs of any investigations that result from Security Council referral. But this would certainly create a major flare-up, because Security Council activities are paid for under the UN peacekeeping budget. Peacekeeping uses a different method of assessment from the UN regular budget, and lays a heavier burden on the permanent five members. As a result, many feel that this part of the US proposal is also intended to minimize the costs to the US. Once again, it seems, the US priority is to ease the pressure on itself, rather than build the court.

FINAL CLAUSES

Assembly, Review, Reservations, and Amendments Offer "Way Out" on Disputed Articles

The final clauses of the ICC statute lack the drama and controversy surrounding the more political issues like jurisdiction and definitions. But they will have a major impact on the success of this conference. On the Record sums up the debate as it stands.

Settlement of Disputes: A dispute on the judicial functions of the court will be settled by the judges. A dispute between states' parties on interpretation will either be resolved through bilateral negotiations or Đ failing that- referred to the Assembly. The Assembly may decide to refer a dispute to the International Court of Justice. (Article 108)

Reservations: Many feel that there should be no reservations, and this is certainly the view of many NGOs, who feel that reservations would fatally weaken the statute. The argument against this is that reservations would allow states to join the statute, while opting out of articles they simply cannot support. States in support of reservations argue that in this way the treaty may get more ratifications and enter into force sooner.

Most delegations that have spoken say that no reservations should be permitted. Malaysia and Vietnam have said they are against any reference to reservations at all (option 4). This would mean defaulting to the Vienna Convention, and allowing states parties to reserve on any issue as long as the reservation does not contradict the purpose or object of the treaty.

The US, China, Russia, India, and Japan are among those that support reservations on specific articles, although here again there are variants.

According to one proposal, no reservations will be allowed unless this is expressly provided for in the actual article. Another proposal would allow a state to make reservations at the time of ratification. The nature of the reservation is not specified. (Article 109)

Amendments: Amendments offer governments the chance to make changes in articles. Under the present text, any state party could propose an amendment after a certain number of years have passed following entry of the treaty into force. Most states want five years, while the US suggests ten. Amendments will be taken up by the first meeting of the states parties at the first Assembly meeting that follows notification of the proposed amendment. The Assembly will decide whether to address the amendment, or convene a review conference.

If the Assembly cannot agree on the amendment by consensus, it can be put to a vote. At present, three different types of amendments have been identified: institutional, substantial, and amendments concerning Article 5 (definitions).

Different types of majority are being proposed for these three categories, reflecting their potential for controversy. Institutional issues (court organisation, registry, etc.) are relatively uncontroversial and could be decided by a 2/3 majority. There is more disagreement over issues of substance (e.g. what to do if a state refuses to cooperate). Those who favour a strong court want to ensure that a small majority cannot block the Assembly and might accept a 3/4 majority; others are so worried that they have proposed a majority of 7/8.

The US and UK have supported a special category of amendment for Article 5 because they are concerned that the Assembly might agree that the use of certain new weapons systems (or nuclear) could be declared a war crime at some future stage. As a result, the US and UK have proposed that if such an amendment is passed, it should only come into force if ratified by all states parties. The majority who disagree suggest 5/6.

Here, as elsewhere, the likeminded are trying to remain true to the notion of a rounded, complete court. "A la Carte" amendments would certainly not help. (Article 110).

Review: The UN Secretary-General shall convene a review conference, five or 10 years after the entry into force of the ICC treaty. The review conference would include, but would not be limited to the crimes contained in article 5. (Article 111)

Signature, Ratification, Acceptance, Approval, or Accession: The ICC statute would be opened for signature immediately after the successful conclusion of this conference. The number of ratifications required to bring it into force is not agreed. (Articles 112, 114).

Early Activation of the statute: Pending entry into force of the statute, states that have signed the statute will refrain from any acts that might defeat the "object and purpose of the Statute." They will also pay due regard to the relevant principles contained in the statute. This shows that the statute will exert an immediate impact, which may be good news or bad. If the text waters down key issues, such as the definition of war crimes or internal armed conflict, it would be very serious. (Article 113)

Withdrawal: A state can notify the UN if it withdraws from the statute. This would take effect a year later. But the state would still be obligated to pay contributions incurred during the period of membership. Withdrawal would not affect the "continued consideration of any matter which is already under consideration" by the court prior to withdrawal. In other words, once a case is under way a state could not avoid the court simply by withdrawing from the statute. (Article 115).

CICC Team Reports

Twelve NGO Teams of the NGO Coalition for an International Criminal Court (CICC) have been monitoring the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court which opened on June 15, 1998 in Rome, Italy. For more detailed information on the teams and the negotiations, please refer to the reports written by the CICC Teams which have been following the conference in detail. A second Bureau discussion paper which includes changes to the first one issued last week has been put online. They can be found on the CICC website: <http://www.igc.apc.org/icc>.

1. A Few Words From William Pace, Convenor of the CICC

On Friday afternoon, July 10, 1998, the CICC issued a special edition of the Rome Treaty Conference Monitor (the CICC daily newsletter). This edition presented numbers based upon country positions on key issues derived from observations of the CICC teams monitoring the Committee of the Whole deliberations on Wednesday and Thursday concerning the Bureau's Discussion Paper (see below for brief synapses). Furthermore, the special report also included key team reports outlining country positions and providing a detailed analysis on core issues. In particular, the CICC demonstrated the massive support for positions supported by the NGOs which would guarantee the effectiveness and independence of the Court. The CICC could not print enough copies to meet the overwhelming demand by governments. This issue is in the process of being faxed to most capitols around the

world to emphasize countries' positions to the Discussion Paper (L.53 which has been revised to L.59) issued by the Chairman.

Also on Friday, the American Bar Association (ABA) made a strong appeal to governments and NGOs regarding the establishment of the Court. Governments should establish a strong Court that the United States could join in the future should it choose not to sign on July 17. Furthermore, the ABA emphasized that the establishment of a Court should not be hindered by the reservations of certain countries such as the United States, France, India, Pakistan, the Arab nations, and so forth. They advocated interested colleagues at all national levels to press governments to push for the establishment of a strong Court.

2. Highlights From CICC Monitor Report

These figures may contain inaccuracies and are necessarily simplifications of the more elaborate statements of delegations. In general, state positions on key issues are as follows:

Threshold for War Crimes - 76% for or willing to accept Option 2 (The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a large scale commission of such crimes) Sections C and D: Internal Armed Conflict - 75% stated that internal armed conflict should be included within the jurisdiction of the Court. Acceptance of Jurisdiction - 73% chose automatic jurisdiction for all core crimes

States Required for Jurisdiction - 79% support for the Korean Proposal The Prosecutor - 76% for proprio motu powers

Role of the Security Council - 36% for Option 1 (allows deferral for a period of twelve months which may be renewed), 47% for Option 2 (allows for a modified version of Option 1. Several states supported the Belgian proposal to preserve evidence during the deferral. Several states preferred a shorter deferral period. Other states required a formal request or action of the Security Council.)

For a more detailed report on these figures and country positions, visit our website at http://www.igc.apc.org/icc

3. Today's Highlights

Finance Team

In regards to Court financing, intense internal debate within the Like-Minded Group has produced general agreement on the Netherlands proposal which proposes that both state parties and the UN be responsible for funding. UN funding would last for an initial stage of one to three years. Moreover, several other countries in the informals now join in this agreement. The United States continues to support funding by state parties rather than UN funding. There shall be an attempt to meld these two proposals although most of the Like-Minded feel this improbable.

Penalties Team

The outstanding issue remaining centers around the death penalty. A vocal minority continues to push for its inclusion in the statute although during a closed informal meeting on Saturday, they reportedly backed down. However, there has been suggestions made on statements regarding the death penalty to be included in the statute or the final act.