



## *On the Record for a Criminal Court*

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### From the AP Editorial Desk

#### **A Disappearing Crime Against Humanity**

Amnesty International released its annual report on Wednesday. It is a shocking indictment of governments. In particular, it shows clearly that the practice of enforced disappearances remains a favoured tactic for eliminating political opponents without having to face the consequences. As one Bolivian activist told the plenary, a person disappears or is tortured every three days in his country.

This is a stark reminder of what the Rome conference is all about. Its purpose is to prosecute those who commit atrocities and other international crimes. Disappearances must be included. It is a crime that has been defined, and outlawed, by declarations of the United Nations and by the Inter-American system, as well as by decisions of the Inter-American Court of Human Rights.

But to have any impact, this modest progress must be backed by a criminal court. And on this, the Rome Conference is profoundly disturbing. As the draft statute reads, disappearances is a crime against humanity. But this has been challenged by several governments in the conference committee of the whole, headed by India. It demonstrates why many fear that this conference will turn back the clock on the laborious efforts to regulate the behavior of governments.

Delegations will ignore the Amnesty report at their peril. Two days ago, in the plenary session, mothers of the Plaza de Mayo put on their white scarves, unveiled their banner, and screamed protests during the speech of the Argentinean justice minister. It was shockingly discourteous to a democratic government.

But this is what impunity produces -- a group of women who lost their children twenty years ago to their country's so-called "forces of order." That is the shocking part. This conference has a

chance to ensure that it does not happen again. They must criminalize the abhorrent practice of disappearances.

### **Attempt Begins to Water Down Crimes Against Humanity**

*Syria, India, and Gulf States, insist on link to armed conflict, removal of disappearances*

Governments have made a concerted attempt to weaken the existing definition of crimes against humanity, as the Rome conference embarks on a detailed review of the draft ICC statute.

The move entails an attempt to link the concept of crimes against humanity with armed conflict, possibly including international armed conflict. In addition, some governments also favour raising the threshold of such crimes by requiring that they should be both "systematic" and "widespread."

Finally, in a surprise move that has deeply alarmed NGOs, India has proposed removing disappearances from the category of crimes against humanity. This would set the clock back on decisions by the Inter-American Court of Human Rights, and the general thrust of international law. Worried NGOs are now trying to raise support among delegates from Latin American democracies, which have been in the forefront of efforts to fight the crime.

Crimes against humanity is one of the three core crimes that would fall under the ICC jurisdiction. Unlike genocide, it is not necessary to prove intent. Nor until now, has it complicated by the kind of definitional problems associated with war crimes.

But what makes crimes against humanity particularly important is the fact that they can occur in peacetime as well as war. Most of the 59 persons currently under indictment by the Hague tribunal on the former Yugoslavia have been charged with crimes against humanity. Dusan Tadic, the first indictee to be sentenced, was convicted on several counts. International practice is also moving towards defining enforced disappearances as a crime against humanity.

Governments have launched four broad attempts to undermine this progress. In the first place, India has proposed excluding disappearances. This could put brackets around a clause that seemed to be agreed, and it has stunned NGOs.

Second, several Arab governments have proposed linking crimes against humanity to conflict, and limiting the conflict to those that are international. This too would drastically restrict the application, and could rule out atrocities committee in internal wars, rebellions, and massive acts of repression. The only exception would be "widespread and/or systematic acts against civilians." But here again, there is an attempt to raise the threshold, by requiring "systematic and widespread."

This is a serious setback at such an early stage of the Rome Conference. The committed will have no alternative but to send the issue to a working group.

## **Dutch Disbelief at American "Defeatism"**

*US concern at independent prosecutor irritate allies*

The Foreign Minister of the Netherlands has expressed "disbelief" at American ambivalence towards the proposed international court.

The comments, by Dutch Foreign Minister Hans van Mierlo, followed the address to the Rome conference by Bill Richardson, the American ambassador to the United Nations.

Richardson warned that the proposal for a self-initiating prosecutor was premature. The US, he said, wants to avoid the creation of a court that appears sound on paper "but collapse[s] under the weight of its own mandate." Richardson believes that addressing every unpunished crime would be unrealistic and overload the court.

Additionally, he warned of a court flooded with numerous complaints and an overburdened prosecutor making decisions that would, no doubt, be regarded as political. "We must not turn an International Criminal Court, or its prosecutor, into a human rights ombudsman open to, and responsible to, any and all complaints from any source."

Richardson's speech was met with disbelief by the Dutch Foreign Minister van Mierlo, "The United States stood at the cradle of an international criminal court. They helped to found the ad hoc tribunals on Rwanda and the former Yugoslavia," said van Mierlo.

Van Mierlo was surprised at America's stance because it never voted against starting negotiations on a permanent court in the UN General Assembly. "So, what am I to think now? That the United States is suddenly against an independent prosecutor for the permanent court? That the United States will refrain from signing the statute and go-it-alone like with the landmine-treaty? I refuse to believe that. I refuse to even think about it."

He described this line of reasoning as defeatist. "We are winning here. This afternoon I have heard a great number of diplomats expressing their support for an independent prosecutor, backed up by independent financial means. You have to understand the Americans. They have a two-pronged approach. They have to convince Congress, first of all, and simultaneously the international community," he said.

The US feels that the UN Security Council should have the power of veto over which issues are taken up by the ICC. As one of the five permanent members of the UN Security Council, France also argues for a close affiliation between the Council and the Court. However, France has also supported the idea of a pre trial chamber that would review proposals by the prosecution before any investigation goes forward.

France's Foreign Minister Hubert Vendrine described this as an "innovative solution." He also expressed support for close cooperation between the prosecutor and NGOs, although he did not specify launching investigations on the basis of NGO information -- a key NGO demand.

Mr Vendrine also stopped short of endorsing the so-called Singapore proposal, under which the Security Council would have to ask the court not to take up a matter that is on the council's agenda. This would require unanimity by the Council, and so would not be vulnerable to a single veto by one of the permanent five members. "No one wants to see the court turned into a political forum," he said.

In spite of this, he refused to explicitly support the Singapore proposal, which is still opposed by Russia, China, and the United States. Later, in a briefing to NGOs, Mr Vendrine asked for patience on the part of the NGOs, and stressed that it was still early days. The implication was that France might endorse the Singapore compromise, if it feels satisfied with other aspects of the emerging draft.

Jelena Pejic, a legal expert at the Conference, considered this "a very positive shift," that France had actually acknowledged the Singapore. Richard Dicker, from Human Rights Watch, observed however that "France's statement on Singapore could mean absolutely nothing, or it could really be a move away from rigidity."

### **New Zealand Protests Security Council "Secrecy"**

#### *Devastating precedent of Rwandan genocide cited*

Any attempt by the UN Security Council to dictate ICC investigations behind closed doors would be "totally unacceptable," according to the government of New Zealand.

In one of a number of interventions expressing concern at the implied politicization of the Security Council, New Zealand's ambassador to the UN, Judith Trotter, said that the Council has to be transparent and open in its links with the proposed court.

"Allowing the Security Council to discuss a case behind closed doors in 'informal consultations' only, or allowing the President (of the Council) merely to write a letter to the Court asking it to withhold action, would in our view be totally unacceptable," she said.

The link between the Court and the Council is one of the hottest items on the menu at Rome. While the US feels strongly that the Council should have veto power over the Court's investigations, many governments feel this would result in unacceptable politicization, and subject the court to a veto by the Big Powers.

New Zealand is small in size but hugely committed to democracy, and Ms Trotter said that it has witnessed first-hand how manipulative the Council can be. The UN Charter allows all member states to participate in discussions with the Council, precisely to prevent the Council from exploiting its dominance. But, said one New Zealand delegate, this is often bypassed by the Council under a practice that allows for "informal consultations."

This tends to play into the hands of the five permanent members of the Council. The ten other seats rotate, leaving smaller states at a distinct disadvantage when it comes to pushing their agenda.

One particularly serious example followed the mass genocide that occurred in Rwanda in April 1994, after the President's plane was shot down. Acting on a carefully prepared plan, Hutu militia instigated the murder of between 500,000 and a million Rwandans, mainly Tutsis.

The Hutu government of Rwanda was on the Council at the time, and used its position to downplay warnings from the head of the UN's peacekeeping force (UNAMIR) in Rwanda to the Council. When a resolution was finally passed, it made no mention of genocide, but rather suggested that this was an extension of an ancient ethnic feud between Tutsis and Hutu. This played a key role in persuading the Council to order the reduction of the already tiny UNAMIR force.

This sequence, which continues to infuriate the current government of Rwanda, and caused Kofi Annan to be snubbed during his recent trip to Rwanda, took place in "informal consultations." In the view of governments like New Zealand, which are committed to an effective court, this is one more reason for insisting on full transparency in any decision by the Council about transferring a case to the court.

### **Canada Slammed by Peace Activists for "Timidity" on Landmines**

*Peace Caucus also pushes to outlaw nuclear weapons*

Canadian peace advocates have warned that Canada's "timid" position on landmines at the Rome conference is weakening efforts to have indiscriminate weapons declared as a war crime.

The charge represents an extraordinary challenge to Canada's reputation as a pioneer in disarmament. Deeply impatient with the UN's weak efforts to curb the use of landmines, Canada sided with NGOs and launched a unilateral to ban the use, production, and sale of mines. The so-called Ottawa treaty has attracted 123 government signatures.

Over 30 NGOs have formed a caucus to push peace issues at the Rome conference, and they would like to see three types of weaponry defined as war crimes. These are nuclear weapons, landmines, and blinding lasers.

This, they say, is consistent with the broad aim of international humanitarian law, which is to outlaw weaponry that cannot be justified in military terms, or which causes unnecessary suffering. The 1907 Hague Conventions introduced the notion of "indiscriminate" weapons that do not distinguish between civilians and soldiers.

The draft statute for an ICC lists four possible options. The first, proposed by the United States, comprises a list of weapons systems that is exhaustive, but does not include nuclear weapons or landmines.

Another proposal option, from Canada, would expand the list to weapons systems as they assume the status of customary international law. This is a clear attempt to include landmines as the Ottawa treaty gains ground. But campaigners worry that the treaty may never obtain the status of

customary armed law as long as the United States, China, and Russia are not members. As yet, no government has ratified the Ottawa treaty.

But the real problem with these two proposals is that they do not specifically define indiscriminate weapons as war crimes. "Both would be a step backwards," said Barbara Bedont, from the Women's International League for Peace and Freedom who is working with the peace caucus at Rome. "Canada is too timid on the landmines issue. It is missing an opportunity to continue work through fear of the political fall-out."

Challenged by Bedont at a briefing for NGOs, Lloyd Axworthy, Minister of Foreign Affairs for Canada, ducked the issue altogether. This further alarmed peace advocates.

The third proposal under discussion at Rome would, in essence, maintain the status quo and existing language: in other words, it would ban weapons that are indiscriminate, superfluous, and cause unnecessary suffering.

The fourth option, which the advocates strongly support, lays out general principles, but also sets out a list of weapons that is neither exhaustive nor selective. This list includes landmines, blinding lasers, and nuclear weapons.

The inclusion of nuclear weapons is highly controversial, particularly in the light of the recent tit-for-tat nuclear tests by India and Pakistan. The United States has also made it clear that it will not join any treaty that tries to ban nuclear weapons under the guise of a war crimes court. There is little doubt that if forced, this could prevent consensus on the entire package.

Still, many peace groups feel that nuclear weapons is a reasonable and necessary target. "We want to avoid the absurd situation whereby the Court would have jurisdiction if someone killed one person with a poisoned arrow or dum-dum bullet, but would not have jurisdiction if the person incinerated a hundred thousand with a nuclear weapon," said Fergus Watt, another leading member of the NGO peace caucus.

**Profile: Ben Ferencz: "All Roads Lead from Nuremberg to Rome..."**  
by Rochelle D. Jackson

The road to the Rome Conference has been a spiritual sojourn for Benjamin Ferencz. Having witnessed the atrocities of the Second World War and served as a chief Prosecutor during the Nuremberg trial, he has dedicated three quarters of his life to the development of peace. The Rome Conference picks up what he began at Nuremberg over fifty years ago.

"Nuremberg taught me that creating a world of tolerance and compassion would be a long and arduous task," Ferencz told *On the Record*. He hopes this conference will result in a permanent international criminal court building on the Nuremberg foundation, and that it will be able to prosecute acts of aggression -- a hot-button item in Rome. "The primary purpose of the Nuremberg Trials was to make warmaking itself illegal."

Ferencz found himself at Nuremberg at the tender age of 27. Along with about 50 researchers, he was sent to the offices of the Nazi party in Berlin. Here they uncovered evidence and detailed plans of mass genocide. As Chief Prosecutor, Ferencz prosecuted 22 defendants. All were all convicted, and 13 were sentenced to death. "I stood in a courtroom at Nuremberg and accused 22 high-ranking German Storm Troopers of deliberately murdering more than a million men, women, and children."

Ferencz came to this crucial arena of peace through the military. After graduating from Harvard Law School in 1943, Ferencz enlisted in the US Army, where he served for two years before receiving an honorable discharge.

In 1970, increasingly concerned about the need for peace, Ferencz withdrew from private law practice and devoted himself to studying and writing about world peace. Five years later, he published his first book, "Defining International Aggression -- The Search For World Peace."

"Supreme crime needs a Supreme Court," insists Ferencz. "Aggression is a supreme international crime." For Ferencz, there is little point in denouncing aggression, terrorism, and other crimes against humanity unless aggression is included as well. Nuremberg established that "armed aggression is not a national right; it is an international crime."

Not everyone agrees. Many feel that aggression is a nebulous legal concept. For example, they point out that the International Law Commission spent 20 years unsuccessfully trying to define it. In addition, they say, aggression is performed by governments, not individuals. Most controversial, however, it is the Security Council's task to prevent aggression: this should not be assumed under the guise of a legal convention, by a criminal court.

But Ben Ferencz still remembers what Nazi aggression did to millions upon millions of civilians. He also remembers seeing Goering and Frank in the dock at Nuremberg. He has no doubt that aggression and individual responsibility go hand in hand.

"Excluding aggression from international judicial scrutiny is to grant immunity to those responsible for the supreme international law. Omission encourages war rather than peace."

Establishment of an international criminal court is a substantial step on the road to peace. "War provokes all human rights violations and the protection of peace is the greatest contribution that an international criminal court can make," he said.