<u>*On the Record for a Criminal Court*</u>

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Contents:

- **Rome Conference Divides Over Independent Prosecutor**
- **"Rebellious" Rome Conference Demands Curbs on Security Council Veto Power on ICC**
- **Burundi Repeats Calls for Ad Hoc Tribunal on Burundi**
- **Children: Effortless Compromise for Prosecutor**
- **Golden Advice: Profile of Richard Gladstone, First Prosecutor of the Hague Tribunal**

From the AP Editorial Desk

Support Growing for an Independent Prosecutor

Make or break issue for NGO Coalition

A clear majority of governments support an independent prosecutor for the international court, who would have the power to launch investigations without first requesting permission from the Security Council or member states.

As expected, the role of the prosecutor has emerged as a make or break issue as the Rome conference heads into its second week. At issue is how cases would be referred to the ICC. While it is essentially agreed that situations (cases) could be referred by states and by the Security Council, many feel that in practice this is unlikely to happen.

They recall how the Khmer Rouge killed over a million Cambodians in the 1970s, without being so much as accused of human rights violations. Another searing example was Iraq's use of poison gas against Iraqi Kurds in 1988. In both cases, realpolitik triumphed over justice: even after they were driven from power, the Khmer Rouge were recognised by the West as part of Cambodia's government in exile. For its part, Iraq was seen as such a friend of the West that Western governments provided much of the material for its arsenal.

The US argues that the world situation has changed, and that governments would be more likely to use the ICC because the burden of making the case would be left to the court. Many NGOs and governments are unconvinced, and this explains their fervent support for an ex officio prosecutor who would have the power to launch a case.

Many see this as the sine qua non of an effective court. One leading NGO representative predicted that the role of the prosecutor might well come to a vote if no compromise can be found in the next three weeks. This issue may be what prevents consensus on the whole of the court statute.

At present, a compromise seems unlikely, although there is growing support for an independent prosecutor. According to an NGO tally, 39 governments spoke in favour at the committee of the whole today, and 24 against. The number in favour may well be much higher. Fifty-eight voiced support during the plenary.

While the majority is healthy and appears to be growing, the NGO optimism is tempered by the fact that Russia, China, and the United States have all restated their opposition. China was terse, the US verbose. The US promised a paper on its position tomorrow.

The position of the other two permanent members is less clear. France has come out in support of an ex officio prosecutor, on condition that a pre-trial chamber would vet cases first. Britain, which caused a splash in December 1997 when it appeared to break with the US on the issue, is more nuanced. British delegates are now backing off, and letting it be known that they are concerned the prosecutor might be overburdened by cases. This appears to reflect a major split between the Ministry of Defence, which is opposed, and the Foreign Office, which is in favour.

Many agree with France, that a pre-trial chamber could help by vetting cases first. But there are different views about whether this should be comprised of state parties or judges. There is also some talk of establishing a panel to help the prosecutor make a choice. Once again, this is vague.

Among non-aligned countries, the greatest opposition, as expected, is coming from Syria, India, Pakistan, Uruguay, Nigeria, Algeria, and Turkey. To the surprise of many Uruguay has also come out against. Echoing the concern of these states, Nigeria voiced concern that the prosecutor would be granted "enormous power."

"Rebellious" Rome Conference Demands Curbs on Security Council Veto Power

Britain accused of backtracking on Council referral

Governments appear increasingly determined that the UN Security Council should not be able to prevent the court from taking up a case unless all of the five permanent members agree. There is also growing agreement that in the event that the Council requests a delay by the court, the delay should last for well under 12 months.

In yet another attempt to limit the Council's involvement, Belgium has proposed that the prosecutor should still be able to prevent evidence from being destroyed or removed, even after a delay has been granted.

Taken together, these proposals show the degree of resentment felt by many at this conference towards the Council, and the intense desire of governments to deny it veto power over the new court. Underlying this is deep resentment at the dominance of the Council – a dominance that

that is not always exercised responsibly. One delegate called it "out and out rebellion."

Virtually everyone agrees that the Council will have to be able to refer cases to the court, because in the course of maintaining international peace and security the Council is likely to be handling the kind of crises that are producing genocide, crimes against humanity, and war crimes – precisely those that would fall under the court's jurisdiction.

In spite of this, many governments have argued that the Council is not the only UN body dealing with international peace. They recall how the General Assembly passed the resolution, "Uniting for Peace", that sent UN forces into Korea. Some have even suggested that the UN Human Rights Commission should be able to refer cases to the court.

The Council is also under attack for its position on aggression. If aggression is included in the court's jurisdiction – still a big if – the permanent five are demanding that only if the Council decides that aggression has taken place will the case proceed to the court. The problem with this, as Syria pointed out, is that in the past the Council has never made this determination, usually for political reasons. The real goal of the permanent five is clearly to block any cases against themselves.

The third, and in some ways most controversial, issue centers on the Council's ability to hold back a case under its purview from the court. The original draft of the statute, from the International Law Commission, would have allowed any one of the permanent five members to veto a transferal. Last December, Singapore proposed the reverse, under which a case would pass to the court unless all five permanent members united in opposition. Britain and Canada have refined this further, by suggesting that the Council would only be able to hold a case for a 12 months.

Instead of forming the basis for compromise, this proposal seems to be creating more division. A growing number of governments feel that even if the Council does withhold a case, it should do so under a formal resolution and under its mandate for peace enforcement (chapter 7 of the UN Charter).

They also feel that a delay of 12 months is excessive, and that this would allow governments to dispose of evidence. This is grounded in precedent: evidence was removed or tampered with at the Ovcara mass grave near Vukovar and the killing fields of Srebrenica. In an effort to prevent this, Belgium as proposed that the prosecutor should "take measures to preserve evidence," even if a case has been assumed by the Council. Exactly how this could be done without the investigation proceeding has still to be clarified, but it is gathering support.

Britain's position in this debate has caused considerable comment. After appearing to support the Singapore proposal, Britains Labour government appears to be backtracking rapidly. Britain is arguing that the Council should be able to keep control of any case that comes under its purview while it is discharging any of its responsibilities – which would be much broader than a Chapter 7 resolution. Taken together with Britain's lukewarm support for an independent prosecutor, and Britain's restrictive position on state consent, this is being seen as a major case of backsliding.

Burundi Repeats Calls for Ad Hoc Tribunal to Prevent "Genocide" by Hutu Rebels

Burundi's Justice Minister has asked the UN Security Council to establish an ad hoc tribunal to punish and prevent acts of genocide by Hutu rebels in Burundi.

Speaking before the plenary at the Rome Conference, Mr Therence Sinunguruza said that he had requested such a tribunal in October 1996, but received no reply. He said that a tribunal is still needed to prevent atrocities against civilians by Hutu rebels, who are trained and aided by Burundi's neighbours. It could be modeled on the Rwanda and Yugoslav tribunals, and would not be incompatible with an ICC, once it was established.

Burundi has suffered from periodic outbreaks of ethnic murder since independence in 1959. The last five years have been particularly grim. The first elected (Hutu) president was murdered on October 21, 1993. The current government, which is dominated by Tutsis and headed by General Buyoya, seized power in a coup on July 25, 1995. But Hutu rebels have been fighting in several provinces.

Mr Sinunguruza said that Burundi is emerging from the abyss. Peace talks have resumed in Arusha between the Hutu and Tutsis, education is recovering, and the judicial system is slowly improving. But, he said, rebels are still crossing from neighbouring countries, and committing acts of genocide. An ad hoc tribunal, he said, would force these governments to extradite or punish those responsible.

Few would dispute that Burundi's cycle of ethnic violence needs to be broken. At the same time, there is little doubt that much of the killing is being done by Burundian government troops, which has treated Hutu civilians with total disregard in their military operations. After Hutu rebels attacked Bujumbura airport on January 1, 1998, furious government troops put their guns down and used machetes and hoes on locals. Hundreds were killed. These acts, presumably, would be carefully scrutinised by any war crimes tribunal, along with ethnic massacres by the rebels.

Children Under 18 Will Not be Prosecuted by ICC

In an important and encouraging decision, the Rome Conference has agreed that the ICC will not prosecute children under the age of 18.

The decision, made today, which will now pass to a drafting committee, refers exclusively to the jurisdiction of this court and does not amount to a general legal principle about the age of legal responsibility, which could have wider legal repercussions and possibly even affect national legislation.

Advocates for children are aware that children who are drafted into war often commit atrocities and other crimes which makes them liable for punishment. 4,000 children are currently detained in Rwanda on a charge of complicity in the 1994 genocide. In Uganda, children have been kidnapped by the two rebel groups – the Lord's Resistance Army (LRA) and the Alliance or Democratic Forces – and forced to fight in their ranks. (The Ugandan army has recaptured many,

and detained them on charges of treason.) Thousands of children were forcibly recruited by RENAMO, the rebel force in Mozambique, and forced to kill civilians, including their own families.

To child advocates, these young warriors are as often victims as they are violators. But this does not square with the views of many national law enforcement authorities, which are increasingly inclined to ascribe criminal responsibility to children for acts of violence. In America one 11-year-old was recently charged as an adult for opening fire in a school and killing classmates.

Aware that any attempt to reach consensus on the age of responsibility would probably end in disagreement, delegates have chosen a more pragmatic course and decided to treat this as sui generis, pertaining only to the ICC. An additional argument is that the ICC has a punitive function, and would not be set up to ensure that children were sentenced and detained in accordance with international standards. The Convention on the Rights of the Child and other instruments all agree that the goal must be to rehabilitate children. The Convention also calls for children to be imprisoned apart from adults.

In spite of today's success, major challenges still lie ahead at Rome. Keen to shift the focus from the child soldier to the recruiter, child advocates argue that recruiting child soldiers should result in an aggravated penalty. At present this is a mere footnote. It will take a lot more persuasion to introduce it into the ICC statute.

Profile: Richard Goldstone

Golden Advice from a Former Prosecutor

By Rochelle Jackson

As the debate over an independent prosecutor grows more contentious, the first Chief Prosecutor of the Yugoslavia and Rwanda tribunals came to Rome to speak from experience. Richard Goldstone delivered a grave message to the Rome Conference: "If the International Criminal Court or its prosecutor are made subject to the control of political bodies... it will have no credibility and international justice will be seriously compromised."

Goldstone has acquired considerable stature in his native South Africa, where he served as chairman of a commission on police violence during the waning years of the apartheid era. He is currently a judge on South Africa's Constitutional Court.

But it is as the first chief prosecutor of the International Criminal Tribunal for the former Yugoslavia that Richard Goldstone made his mark internationally. He arrived at The Hague in July 1994, when spirits at the tribunal were at low ebb and skepticism was rife. A full year had passed while the UN Security Council squabbled over the choice of a prosecutor, until South Africa's president Nelson Mandela asked for Goldstone. Such was Mandela's own prestige than not even the permanent five members felt able to disagree.

After taking up his post, Goldstone spent the first year on the road, trying to establish the Tribunal and reassure governments that he was not a loose cannon. He accepts that there are many parallels between his work there and the controversy in Rome over the proposed ICC prosecutor.

How does he respond to US fears of a prosecutor out of control? He finds the idea ludicrous. But this does not mean that prosecutor would not be accountable. "No one should be unaccountable. Judges are accountable, presidents, prime ministers, and cabinet ministers are accountable and can be impeached in any country. There's provision for kicking out incompetent, dishonest, and insane people. No matter how high their office."

According to Goldstone, the prosecutor should not be allowed to launch an investigation on his or her own initiative based solely on information received from NGOs and other sources. Instead, he suggests that once the prosecutor establishes a prima facie case and determines that it warrants investigation, this decision should then pass for review before a panel of judges. The judges could come from the ICC itself, or be appointed by states parties. The latter formula would avoid any question of impropriety stemming from judges having to review a case that they might subsequently rule on. Goldstone also feels that this separate panel of judges could be called upon to address complaints and charges of misconduct against tribunal judges or the prosecutor.

Goldstone has plenty of other advice for the ICC as a result of his Hague experience. Much of it has to do with money. His own investigations were hamstrung by a shortage of funds in the early days, and the cost of investigations, he says, was "huge." He also feels that the International Criminal Court should be financed by states that ratify the statute. "I can't see any basis for UN funding because it would be grossly unfair on those members who don't ratify the treaty.... Why should China have to pay for a court which they want nothing to do with?"

He has strong views about the value of NGOs, and admits that they alerted him to the importance of rape and other gender-related war crimes. He also stresses the importance NGOs have played in the provision of witnesses and information to the prosecution, as well as to the psychological and medical assistance provided to witnesses. "The NGOs played and are playing a very vital role."

Goldstone's work in South Africa, combined with his time at the Hague, has given him a unique perspective on the link between national and international jurisdiction. In 1991, he burst into prominence as head of a new commission on police brutality in South Africa. Even though a national peace accord was in the making, the country was on the brink of a blood bath. President De Klerk suggested the commission as part of the Accord.

The African National Congress, as well as other liberation organizations, said they would agree if all the parties unanimously chose the judge and commission members. "They were not prepared to have De Klerk appoint a commission which would be just another apartheid government commission."

It took two months to find five names that were acceptable. Initially, Goldstone was unwilling to accept, but he was told that it would take months to find another acceptable candidate. "So I felt I had a sort of duty and responsibility. I'm glad now that I did." He began with a staff of 5 commissioners, 15 police investigators and a staff of about 10 people. The Commission grew to 150 in 1994 when the Chairman of the Independent Electorate Commission requested its assistance in investigating pre-election violence.

The Commission gave Goldstone unique insights into the structural nature of violence under apartheid. For years, Third World governments argued that apartheid was a crime against humanity. Does he think an ICC should have launched prosecutions if it had existed at the time? "It's a difficult issue. Some of the things done during the apartheid years, when looking at it from an international perspective, deserved a trial and punishment. And I say that from an international perspective because deterrence is an important issue. The world should know that if you do those sorts of things to your own people you're going to get punished for it by the international community."

The ICC and its prosecutor should have decided this on its merits. The work of his own (Goldstone) commission was irrelevant, because it was "not a criminal body and hence not a substitute for any form of justice." But South Africa's Truth and Reconciliation Commission (TRC), which has been established under Archbishop Desmond Tutu, has a very different role. The TRC is offering amnesty to those who confess and apologize to their victims. The question is whether this exercise – which is part of a much wider political effort to heal the wounds of apartheid – would satisfy an international court or be viewed as an inadequate response, triggering an ICC prosecution.

Goldstone would have felt happy either way. He feels the ICC should make such decisions, but that they should depend on a wide range of factors – including the gravity of the crimes, the adequacy of the investigation, and the national guidelines. In such a situation, he feels, the ICC should also be guided by whether the national body is established by a democratic government, and by the views of victims.

"A sensible prosecutor and sensible judges would feel that if they (the national authorities) were dealing with the situation as the victims wanted, then (the ICC) should not start getting involved." On the other hand, he would not criticize an ICC prosecutor who decided, notwithstanding the Truth Commission, that he had a duty to indict and to put on trial the leaders who are responsible for terrible crimes against humanity. "I would feel comfortable both ways."