



## *On the Record for a Criminal Court*

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### From the AP Editorial Desk

#### **Definitions: Atrocious acts, withholding of food aid, and sexual violence ignored by Canadian compromise on crimes against humanity, warn legal experts**

In an effort to satisfy Britain, the United States, and France, the Canadian delegation has proposed a definition of "crimes against humanity" that could prevent the court from prosecuting singular atrocities not part of a widespread or systematic attack.

Experts say that the Canadian proposal, which was discussed Wednesday and returns to informal discussions, could also rule out the murder of unarmed soldiers who have thrown away their arms, the starvation of isolated communities, and even acts of sexual violence during war.

An angry statement by the Women's Caucus pointed out that acts of sexual violence in war are often spontaneous and impossible to link to any "governmental or organizational policy," as required by the Canadian text. "[This] effectively writes sexual violence out of the jurisdiction of the ICC under crimes against humanity," said the statement.

Canada's proposal is aimed at bridging one of the widest, and most serious, disagreements before the Rome Conference. Crimes against humanity are one of the three core crimes proposed under the ICC jurisdiction. Many governments, including the five permanent members of the Security Council, have been trying to whittle down the definition in an attempt to limit the court's scope.

In an effort to find middle ground, Canada has proposed a formulation that many find understandable given the political pressure from Security Council members, but totally unacceptable from a legal perspective. It reads:

"For the purpose of the present statute, a crime against humanity means any of the following acts when knowingly committed as a part of a widespread or systematic attack directed against any civilian population."

A footnote explains that an "attack directed against any civilian population" means a "course of conduct involving the commission of multiple acts...directed against any civilian population pursuant to or in furtherance of a governmental or organizational policy to commit those acts."

This wording is a concession to Britain, France, and the United States, and is intended to win their agreement to the wording "widespread or systematic." Requiring widespread and systematic – as the three governments wanted – would have put virtually the entire category beyond the scope of the ICC.

But observers fear that the Canadian compromise could seriously weaken the court's ability to deter and punish atrocities. For example, they point out that the word "knowingly" means that a perpetrator would have to be aware that he was acting as part of a larger plan in committing a crime. This would be extremely difficult to prove, and could mean that individual acts – not matter how barbaric or massive – would not be covered.

Legal experts say that this subjective notion is not found in any legal instrument. Moreover, they say, it could be difficult to establish the chain of command: if the subordinates are allowed to plead ignorance of a "policy"; it could become quite difficult to establish the identity of the ultimate responsible commander who designated such "policy."

There are several other problems with the Canadian compromise. In the first place, it talks of an "attack." But crimes against humanity can also occur through omission – for example, in starving a population. Nor is it clear whether the practice of "ethnic cleansing" would qualify.

Second, by referring specifically to any "civilian" population, the definition could exclude unarmed combatants, who may have surrendered. Some feel, for example, that the slaughter of unarmed Iraqi soldiers who fled from Kuwait was unacceptable.

All in all, many feel that Canada has paid too high a price for winning agreement from the Americans, French, and British – even if some kind of compromise had to be found.

The issue is not completely signed and sealed. On the one side, China wants an even more limited wording, but advocates are reassured that Mexico, Tanzania, and Turkey all warned against accepting the Canadian text.

**Children: Like-minded Concession to Lebanon Could Weaken Curbs on Child Recruitment**

The "like-minded" governments have accepted a demand by Lebanon that could weaken efforts to prevent the recruitment of children and their direct engagement in wars.

Under the proposal, it will now be a war crime to recruit children under the age of 15 "into national armed forces, or use them to participate actively in hostilities." While this will certainly improve the protection of children, it has been complicated by Lebanon's insistence that armed forces must be "national."

This is intended to ensure that the forces of Hezbollah, which are fighting Israel in Southern Lebanon, would not be covered. In return for receiving this concession, Lebanon has reportedly agreed to swing the entire Arab bloc behind the proposal.

This has angered and dismayed observers and human rights groups. They say it is unconscionable that the like-minded would bow to the demands of one state, particularly when the intention is so transparent and when it could implicitly permit the involvement of children in a violent and dangerous war zone like Southern Lebanon.

The addition of "national" could broaden the circumstances in which the recruitment of children is permissible. One observer said that "national" implies a link with the national government and nation state. This presumably would exclude many of today's rebel movements.

Curbing the involvement of children in war is a major goal for many NGOs at the Rome Conference. The ICC statute sets the minimum age of recruitment at 15, which is consistent with the UN Convention on the Rights of the Child. This is still too young for many.

Given this, NGOs want to keep the protection as broad as possible and they are reassured that the article prohibits not just the recruitment of children, but using them to participate actively in hostilities. But the introduction of "national" into the definition limits the protection.

Many will find it deeply disturbing that the like-minded were prepared to yield on such a sensitive issue as child recruitment. Lebanon's position is hard to defend, especially since many Arab governments already agree on the need to better protect children and appeared ready to agree to tougher wording.

### **Penalties: Conference Escapes Death Penalty Noose**

The Rome Conference has sidestepped a potentially fatal clash over the death penalty.

As expected, Trinidad and Tobago speaking on behalf of the 14 Caribbean states (CARICOM), made a strong statement in favour of the death penalty during Tuesday's debate, which was echoed by several other governments. But it has not developed into a broad call that the death penalty be included in the statute of the ICC. Instead, the debate has shifted to life imprisonment – and whether this actually means life, or simply a lengthy term in jail.

A written statement released on Wednesday by Trinidad insisted that nothing in the ICC statute would affect Trinidad's right to impose the death penalty under their domestic law.

Many had predicted a major clash in the debate over penalties. Globally, the move to abolish the death penalty is gathering momentum and many governments were adamant that it not be permitted in the ICC statute. Even the United States, which executes more convicts than any other Western country, has remained silent.

But some death penalty countries have been concerned that failing to support the death penalty in the statute could erode their own national law. They also fear that an ICC statute without the death penalty might further the global abolition movement. Trinidad – which executed a former soldier on Tuesday – has been most vocal in expressing the concern.

There has been little support for this argument in the public debate. Twenty-three delegations spoke against including the death penalty on Tuesday, and ten in favour. Significantly, among those who spoke against inclusion were several countries that still use the death penalty nationally – Japan, Sierre Leone, Turkey, Kenya and Singapore.

These governments appear ready to accept life imprisonment. This, however, has opened up another debate because many countries oppose life imprisonment as cruel and unusual punishment.

There are many other issues to be resolved over penalties. One concerns fines, and whether these should include disqualification from office. There is also a dispute over whether reparations should be dealt with under penalties, as well as elsewhere in the statute. But at least the conference appears to have escaped the noose over the death penalty. (article 75)

### **Trial: The ICC Should Determine Whether National Security Claims are "Legitimate", Says Croatia**

Croatia has proposed that the pre-trial chamber of the ICC, or the court's trial chamber, should be authorized to determine whether states should be allowed to withhold information from the court on grounds of national security.

The Croatian proposal comes just as the Rome conference is about to discuss the sensitive issue of national security, and whether the Court should be able to override a States determination of what constitutes "national security." Some governments want to claim national security in order to withhold information, including evidentiary materials and other documents, from the Court.

Croatia's proposal hands significantly more authority to the court than an earlier British proposal, under which the Court could only compel the State to disclose if the grounds for withholding were "manifestly unfounded" and not in good faith. Many feel that this sets an unreasonably high threshold for the Court. Further, it would require the Court to accuse a State of bad faith – a task that judges may be reluctant to undertake.

Croatia is proposing that the ICC should establish the "legitimacy" of state claims. It notes that the Security Council established this procedure for the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. Certainly, in order to be effective, the ICC should operate with at least as much facility as the ad hoc tribunals.

On the other side of the argument, Mexico is reported to be arguing strongly in favour of the states making the determination, on the grounds that the disclosure of certain information could threaten national security interests. The United States also holds this view. The UK proposal is seen as a compromise between these views and the position of other States which would give the Court broader authority.

This discussion is being held under the rubric of trials. If it can be resolved here, it could have major implications for investigations and cooperation between states and the court. The discussions on national security will be held Thursday evening. (Article 71)

### **Finance: Conference Divided on Court Financing**

The Rome Conference is split three ways over how to finance the ICC. The issue has less profile than some of the more political issues before the conference; but finding a stable source of funding will be crucial for the long-term success of the court. The two ad hoc tribunals were starved of money in the early years of their existence, and this undermined their effectiveness. Some fear that the same fate could befall the ICC.

Intensive negotiations on financing have just begun, and it is already apparent that consensus will be difficult to reach. UN officials, delegates, and NGOs are concerned that if the delegations become bogged down on this issue, contention could spread to other issues and stall progress at the conference as a whole.

Three options exist in the draft statute. One would have the ICC funded by states that become parties to the treaty. A second option would finance the court from the UN's general budget. A compromise between the two would fund the court with a mixture of UN and state funding.

Eleven states spoke in favor of state funding, twenty-nine for UN funding (Trinidad and Tobago represented the position of several other Caribbean countries) and twenty in favor of a mixture of state and UN funding.

According to a recent report by the United Nations Association of the USA, it could cost as much as \$100 million to fund "one or two major investigations" by the ICC. This year, the International Criminal Tribunal for the former Yugoslavia (ICTY) is budgeted to receive \$68 million.

Those opposed to funding the ICC through the contributions of its states' parties fear that it would discourage smaller, poorer countries from ratifying, because they would have to bear the brunt of the cost. In addition, the money might come in erratically. To take one worrying precedent, governments which have ratified the International Covenant on Civil and Political Rights have failed to fund its implementing committee.

The United Nations itself has had difficulty in the past securing funds pledged by member states. The United States, for example, presently owes \$1.3 billion of its assessed contribution to the UN's general budget, and faces the possibility of losing its vote in the general assembly if it does not resolve its arrears.

Delegations opposed to the second option – funding through the UN general budget – are concerned that if the court were to receive its funding from the UN's general budget, it would be forced to compete with other UN programs. This is especially problematic when viewed in the context of the UN's current financial crisis- brought about to a large extent by US arrears. Tight budgetary constraints at the UN could make ICC funding difficult.

If the court's funding were to come from the UN budget, the financial burden would be shared by all member states, regardless of whether they are parties to the treaty. This option, though in contrast to state funding, would be less burdensome for states that are members of the court, providing a financial incentive to sign and ratify the final statute.

If the court is funded from the UN's general budget, allocations will be dependent on approval by the General Assembly and could become a politically sensitive issue. Some delegations feel that a financial linkage to the UN might jeopardize the independence of the court. Of concern is the potential for political interference if the money were to come from the general budget.

A third option would have the court funded from a mixture of both state and UN funding. This option, if adopted, would represent a novel approach to funding UN programs. But it is not yet clear how it would take shape.

### **Perspective: Faith and the Preamble**

by Anna Bliss

"It is the power of moral, ethical, and spiritual revulsion that is motivating the [push for a] international court," says John Washburn, from Washington.

How right he is. It is all too easy to lose sight of the bigger picture and get mired in legal technicalities as committees struggle their way through seemingly innumerable brackets, options, and encoded propositions.

Washburn, and his colleagues from the NGOs' Faith-Based Caucus, is pursuing a unique route to influence the ICC. Recognizing that the body of the statute cannot, by its binding nature, adequately evoke the importance of values, the Caucus has been working on the Preamble to the statute.

When you think of religion, you think of diversity. The Caucus does not want to create antagonism between religious groups, but it does want to transcend diviciveness with basic, positive principles, which are inclusive rather than exclusive.

The Caucus has drawn up a draft Preamble that would place the statute in a moral and ethical context. It expresses firm belief in the inseparability of justice, reconciliation, and permanent peace. The purpose, according to Professor Johan van der Vyver of Emory University, a member of the Coalition, is "not promotion, but refinement. It is too soon for direct promotion [of values]. What we need is a general, enabling language so that in the future it will be in the jurisdiction of the language of the court to make necessary changes."

The Caucus draft has been submitted to the Spanish delegation, which has been particularly receptive. In a meeting with the NGOs Tuesday, Ambassador Juan Antonio Yanez-Barneuvo asserted, "We are here to complete the statute, so it is not too soon to discuss the preamble [which will not be determined until the end of the conference]."

The Caucus and the Spanish delegation agree that the preamble must be oriented toward victims' needs. In addition to punitive and retributive justice, the court must be committed to reconciliation and victims need to feel that they have been heard. This can happen by pursuing evil through institutions, according to Washburn. Otherwise, victims are denied closure and acknowledgment.

The Caucus has also submitted a letter to delegates, exhorting them to transcend political self-interest and give priority to the dignity and integrity inherent in all human beings. The letter also reminds delegates that most of the world's population are either members of faith-based communities or claim to have religious beliefs. Delegates are asked to create an international ethic, in addition to an international law.

Whether or not delegates will actually hear the message is far from certain. Independent academic Victor Conde points out that "the international community doesn't want to discuss religion and values. It's too touchy, too delicate." But he asserts that religion is actually "a great rallying point" for the ICC. In international law, religion is defined as the orientation of an individual to the ultimate truths of reality. Religious beliefs, Conde says, are both internally and externally inviolable. A violation of religious, moral, or spiritual freedom is a profound violation of humanity.

### **Feedback: What You are Saying About On the Record**

In the past three weeks we have received a volume of correspondence from you, our readers. On the whole it has been positive and we have taken this opportunity to share with you some of the responses. We enjoy the chance for communication and encourage you to keep it coming.

I just wanted to thank you for a wonderful service. As a law student who worked with one of the NGOs currently active in promoting a strong and effective ICC, it is a genuine pleasure to get critical, concise, daily information on the work of the Conference.

-Rhodri Williams

On the Record lets the peoples of the United Nations know what governments are doing in their name. The Leo Kuper Foundation is very grateful to have this reliable update.

-Bernie Hamilton, Leo Kuper Foundation

Thank you very much for all the work you are doing, keeping those of us who cannot be in Rome all the time informed. THANK YOU!

-Paul Stoop

Thank you for a wonderful service. I received this via a colleague and it is vital to my work.

-Beth DeGrasse

Thank you for the excellent coverage of the Rome conference and its background. For those of us interested in this vital conference but not able to attend, your coverage fills an important gap without which we will be left in the dark. The occasional and inadequate newspaper coverage of the event does not even begin to explain the stakes. I hope you plan to publish a compilation of your coverage for purposes of future reference material once the conference is completed. Thank you again.

-Hrair Balian

It's been great getting your updates. They've been helpful as the media asks for sound bites and analysis at this end.

-Ralph Steinhardt

Thanks for keeping us informed. We are all with you!

-Julie Shaw, Urgent Action Fund