

ANALYSIS

International Criminal Court
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Int'l justice under pressure p.1-2
Rwanda suspects in Europe p.3
Interview: Luís Moreño Ocampo p.4

Int'l criminal justice under pressure

International judges and prosecutors claim to do their utmost to ensure that the practice of international criminal law satisfies fundamental principles. In practice, however, those principles often take second place to notions of human and humanitarian rights.

The principle of guilt, which guarantees that persons are held responsible for the actions for which they have personal responsibility, was emphatically embraced by judges at the International Criminal Tribunal for the former Yugoslavia (ICTY) in their very first verdict. They echoed the principle of the Nuremberg judges "criminal guilt is personal". The principle of *nullum crimen* - presumption of innocence - has been emphatically identified as a starting point of international criminal law. The ICTY judges in the Celebici trial regarded it as a "solid pillar." And the third principle, fair labelling - the clear description of the crime and qualification which result in the suspect being prosecuted and potentially convicted for criminal facts which match his behaviour - was adopted as a starting point by the ICTY.

However, when these principles are applied to the reality of the violence and cruelty of wars and other major conflicts, notions of human rights and humanitarian rights dominate. While the fundamental principles of criminal law forbid an expansive interpretation of norms, in the human rights system and in international humanitarian law this expansion represents a victory over states and their system. The rights and interests of the victims and of humanity and the human race as a whole have been wrested from states.

The rights of suspects seem to have been relegated to second place. The ICTY's website is less than reassuring in this respect. 'Bringing

war criminals to justice, bringing justice to victims' it proclaims on its homepage. A revealing play on words.

Human rights and victims' rights

You would expect that human rights organisations would have expressed concern about this violation of the rights of suspects. In the field of international criminal law, however, human rights organisations have not only been present at the genesis of tribunals and the International Criminal Court (ICC), they have also forged strong links with prosecutors, with the obvious exception of organisations of defence attorneys and bar associations.

In an era when human rights are primarily victims' rights, criminal proceedings are regarded as an instrument of peace and security, representing an end to impunity, exemplifying deterrence and atonement.

This practice can partly be explained by the simple fact that when, years after Nuremberg and Tokyo, a tribunal was quite unexpectedly set up, there was a serious shortage of specialists in international criminal law. Which is why the first steps were taken primarily by international and human rights lawyers.

Countless questions needed to be addressed for the first time. However, the wings of political correctness and genuine concern carried this work of legal interpretation to a level where proof of personal guilt or intent became almost irrelevant. In the extensive interpretation of genocide and the all-embracing construction of the joint criminal enterprise, personal responsibility gave way to structure-based, organisational responsibility.

In case from the ICTY, some of the leading thinkers and practitioners

Argentina's Videla faces new charges

Former Argentine military leader Jorge Rafael Videla has been charged with an additional 49 cases of kidnapping, torture and murder. He will also be tried in September for stealing 33 babies of political opponents.

Videla, who ruled Argentina from 1976 to 1981, was sentenced to life in prison in 1985 for human rights abuses committed during Argentina's Dirty War, including the murders of 66 people and the torture of 93 others.

Most of the latest charges are related to the discovery of human remains by forensic experts in unmarked graves in cemeteries across Buenos Aires. Among them was the body of Rolf Stawowiok, an Argentina-born German citizen who vanished in 1978 at the age of 20. A German court issued an arrest warrant for Videla, but German prosecutors say it is unlikely he will be extradited.

Videla has to appear in court later this month in the city of Cordoba to account for the torture and murder of 32 political prisoners in a separate case.

A trial date for the new charges has not yet been set.

Videla served only five years of his life sentence after then-president Carlos Menem granted him a pardon. Last year, a court ruled that the 1990 pardon was unconstitutional and he was returned to prison.

Tens of thousands of people were disappeared and murdered during Argentina's Dirty War.

Belgium votes to ban burqa in public

Belgian lawmakers voted overwhelmingly on Thursday to ban wearing the Islamic burqa or niqab in public. Other European countries might follow suit.

In the lower house of the Belgian federal parliament, 136 deputies voted for a nationwide ban. There were no abstentions, and no one voted against the bill. The ban will be imposed in all public spaces.

Violators of the new law risk a fine of 15 to 25 euros and/or a prison sentence of one to seven days. All governing and opposition parties agreed on the law, based on the argument that women wearing burqas cannot be identified. The upper house of parliament has two weeks to object to the decision.

The move was condemned by Muslim and Catholic leaders, and by human rights group Amnesty International.

A similar ban is being considered in other countries, including Denmark and France. French President Nicolas Sarkozy has already ordered legislation paving the way for a ban on the full Islamic veil.

In the Netherlands, a burqa ban is one of the main planks of Geert Wilders' Freedom Party manifesto for next month's general election. Wilders claims that Islamic veils are a sign of a "backward culture" in which women are considered inferior to men, in violation of Dutch law.

Imam Fawaz Jneid of the al-Sunna mosque in The Hague says, "This isn't about the niqab or the headscarf. The cause is the fear of the arrival of Islam in Europe. They're trying to stop this in a roundabout way."

Chaista Khan was born in the Netherlands and wears a burqa. She said she will leave the country if a burqa ban is introduced. "It's not easy. This is the country in which we were born, in which we were raised, so this is a last option. I love Holland as well."

of international criminal law are now starting to express their doubts whether what happened at Srebrenica was indeed genocide. Former ICTY president Antonio Cassese gave us a glimpse of this changing mood in a 2009 interview. "I can tell you that some time ago in a discussion with other international lawyers, many argued that what happened in Srebrenica was not a genocide. The Krstic judgement is well argued, and probably, if I had been there, I would have made a huge effort to say that it was genocide. But probably one could also argue that it only amounted to a whole range of crimes against humanity, namely persecution plus forcible expulsion plus extermination. Probably the Serbs did not want to destroy the whole Muslim group as such but only remove the group from its area. Of course, it would be politically unacceptable to say so."

Recently changes have begun to emerge. At last criminal lawyers dare to take a stand, no longer hampered by the 'don't rock the boat' and 'it is still a fledgling institution, so be careful' arguments. In the sea of publications about international criminal law as an instrument to fight impunity, to enforce human rights and to support the victims, a serious critique of international criminal law is developing, echoing the critique on a domestic scale of the 1970s and 1980s.

Justice at the ICC

So will things be different for the ICC? Not necessarily. Certainly, some major steps were taken in Rome when the ICC statute was drawn up. The decision to codify the elements of crimes and to discard the joint criminal enterprise give those who care about the principles of *nullum crimen*, fair labelling and guilt something to hold on to.

At the same time, however, because the ICC is a world court it has to make an ever greater attempt to break away from the sometimes claustrophobic embrace of political powers and human rights lawyers and organisations, who are formidable powers in their own right.

None of the developments at the ICC can be understood if we are not prepared to acknowledge that from the first day of the 1998 founding meeting of the ICC in Rome until today, there

has been a struggle to determine who controls the ICC prosecutor: the states, under the veil of their international organisations or otherwise; the human rights organisations; or the judges of the court.

Following the euphoria surrounding the court's foundation, a pattern soon developed: all states were reluctant to subject themselves to the legal authority of the ICC. Some openly so, like the United States, others whilst paying lip service to the idea of universal jurisdiction but who are in reality more inclined to support the ICC against enemies than against friends. The underlying attitude of states is saturated with the concept of sovereignty. Thus the ICC has to function in a double bind with states. On the one hand it is dependent on states for their membership and cooperation, on the other hand its role is to break through the boundaries of sovereignty when massive crimes occur and the states are not willing or able to act or prosecute themselves.

In the early years, ICC chief prosecutor Luís Moreño Ocampo capitalised on this duality by only initiating criminal investigations when a state itself referred its situation to the ICC. This resulted in opportunistic self-referrals by Ugandan President Museveni and President Kabila of the Democratic Republic of Congo.

In Rome the concept of referral by a state to the ICC was mainly considered as referral by a third-party. In fact, it turns out that there is scope for states to attempt to use the chief prosecutor as an instrument of internal politics.

We now see states which are 'willing' to recognise the authority of the court over a single suspect or group, but who are not themselves prepared to prosecute, which seems like a strange contradiction.

Far more than at the *ad hoc* tribunals, the idea that the ICC is a court for victims has taken root. Guarantees for victims to participate at the many levels of the criminal proceedings have been established. But, far more disconcerting, many human rights organisations are pressuring the prosecutor to investigate, prosecute and even to expand charges, again siding with the prosecution and the victims and risking the growth of an unbalanced system with the fundamental rights of the defendant cast overboard.

Liberia considers war crimes tribunal

Liberia is considering trying perpetrators of the worst crimes committed during its 1989-2003 civil war, Justice Minister Christiana Tah said last month. President Ellen Johnson Sirleaf has set up a committee to advise on whether prosecutions should go ahead.

"We want accountability," said Tah, a member of the committee. "This is not over. We'll advise the government on the way forward."

Liberian presidential candidate George Weah supports the initiative. "There's no peace without justice," he said. "A criminal court... might encourage respect for human rights. When people don't respect human rights, they'll be taken to court. That's an important message."

Liberia suffered two decades of civil war after Sergeant Samuel Doe took power in 1980. Charles Taylor staged a counter-coup in 1989, starting a five-year civil war. In 1999, a second war broke out and lasted until 2003, when a peace agreement was signed and Taylor resigned as president.

The country's Truth and Reconciliation Commission issued its final report last year and recommended the prosecution of those suspected of the worst crimes, including gross human rights violations and crimes against humanity.

The International Criminal Court only has jurisdiction over crimes committed after 2002, so can't take on the case. Liberia could, however, ask the United Nations to support an *ad hoc* tribunal.

TRC president Jerome Verdier warns that "it would take the next ten years to put all the resources in place to do prosecutions." Still, he adds, it's a necessary step: "We cannot claim to have ended the conflict in the absence of justice."

Rwanda suspects living in NL

"I am the victim of a politically-motivated slander campaign by Rwanda's dictatorial government," says Pierre-Claver Karangwa. This former major in the Rwandan army is being accused of participating in the 1994 genocide in his home country.

Now living in the Netherlands, and a Dutch citizen since 2004, Karangwa says he is being targeted by Rwandan president Paul Kagame, as part of a vendetta against his political opponents.

Relying on an extensive report by human rights organisations African Rights and REDRESS, Dutch newspaper *NRC Handelsblad* reported that Karangwa was involved in a 1994 massacre committed in the small town of Mugina, during which an estimated 20,000 people were killed.

Church massacre

The report accuses Karangwa, now 54, of serious crimes committed in the Mugina region where he lived, and the Rwandan capital, Kigali. He is said to have set up, armed and funded Hutu militia. It is also alleged that he lured Tutsi refugees to Mugina's church with the promise of protection, whilst simultaneously organising the militiamen who would later massacre them in that same church.

African Rights and REDRESS quote several witnesses in their report, both victims and perpetrators. "I regard Karangwa as the organiser of the genocide in our village. Villagers were involved in the killing of Tutsis because he enticed them," says one of the militia members. "Not only did he behave as the head of the organisation. He also shot dead several victims," adds another. According to the report, Karangwa was also involved in the murder of the mayor of Mugina, who was doing all he could to protect the Tutsis from Hutu militia attacks.

Karangwa dismissed the report and questioned the credibility of the rights organisations. "They are biased and on the Kigali payroll," he told the *NRC*. "They are destroying people who have done nothing wrong."

Dozens, perhaps hundreds of people accused in connection with Rwanda's 1994 bloodbath are believed to be living in Europe currently. "A considerable number of genocide suspects are living in the Netherlands," says Rakiya Omaar, director of African Rights.

The Rwandan ministry of justice has already provided its Dutch counterpart with incriminating evidence concerning 16 Rwandans living in the Netherlands who are suspected of involvement in the genocide.

In an interview with the *NRC* last week, Karangwa said he had tried to protect the victims in 1994, not harm them. He claims he filed an official complaint when the Rwandan courts sentenced him to death for his involvement in the massacre. "All the evidence has been fabricated," he said.

Link to opposition

According to Karangwa, a campaign was started against him after he joined one of Rwanda's main opposition leaders, Victoire Ingabire, who was also living in the Netherlands. Ingabire recently returned to Rwanda to run in the upcoming August elections, where she was briefly detained last month on charges of 'spreading ethnic division and propagating a genocidal ideology'. "Obviously I constitute a threat to the Rwandan regime," says Karangwa, "and I must be discredited."

Rakiya Omaar disagrees: "The first witness statements against the Major date back to 2005, 2006 - long before Victoire Ingabire entered the stage as opposition leader." She says it is "incomprehensible" that Karangwa has not been arrested and recalls the Dutch justice minister's statement that "the Netherlands can't be a safe haven for war criminals." Asked to comment, the prosecutor's office said that the statement still stands, but it refused to respond to the new report "in the interest of the investigation and privacy."

Koert Lindijer and Dick Wittenberg co-authored the original article which appeared on April 24th, 2010 in the NRC Handelsblad.

UN pushes for piracy tribunals

International tribunals should be established to try pirates, the UN said last week. The 15-member Security Council unanimously adopted a resolution aimed at making it easier to prosecute and imprison pirates operating off the coast of Somalia. In recent years, dozens of ships have been seized by pirates in the Indian Ocean and Gulf of Aden.

War-torn Somalia has not had an effective government for almost two decades so many suspected pirates are handed over to neighbouring Kenya and the Seychelles for prosecution. Some have been released because it was unclear who would prosecute them.

According to Radio Netherlands Worldwide defense correspondent Hans de Vreij, the UN resolution is facing a number of problems. "The US never ratified the Law of the Sea treaty and there are countries which haven't included piracy in their legislation. What would be feasible...are dedicated piracy chambers in existing court systems."

To try pirates at least three conditions have to be met, says De Vreij. "The pirate has to be caught in the act, the affected country has to be willing to try them, and the head of the ship or its personnel have to be willing to testify in court. But in the vast majority of cases none of these three conditions are met".

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Ocampo in Kenya "to listen"

Chief Prosecutor for the International Criminal Court (ICC) Luís Moreño Ocampo will be visiting Kenya next week as part of his investigation into the country's 2007-8 post-election violence. Before leaving for his week long trip to Nairobi, Ocampo spoke to the IJT about the case.

Why did the ICC authorise you to start investigations in Kenya?

Normally states have their own police and judiciary. When the people are protected by the national judiciary, I should not intervene. Colombia for example has national prosecutors doing the job so I do not need to intervene. However, when people are not represented, when no one takes care of their interests, the ICC can step in.

That's what happened in Kenya after the 2007 elections. I told the ICC judges that prominent Kenyans organised and financed the violence, guided by political motives to gain or regain power. They allowed me to probe the violence, so I will go to Kenya to start investigations and talk with the victims.

Don't you think the Kenyan justice system is strong enough to deal with the issue itself?

No, we are not making any judgements about the Kenyan justice system. In fact, the judge in the Kenyan ICC is a Kenyan judge. The main reason to step in is that there are no national proceedings in Kenya about the post-election violence. And that's the issue. When there is no case, we do the case. We are an independent part of the international judiciary system, supported by Kenya and many other states. We investigate crimes, follow the evidence and prosecute those most responsible.

How can the ICC be involved in the process of reconciliation?

We help peace in the effort to overcome crime. The common goal is to be sure that the next Kenyan elections in 2012 are peaceful elections.

I'm going to Kenya in May and I'd love to meet the local leaders, the tribal leaders, the people in the slums, discussing how to help them. For me – coming from Argentina where we had these serious crimes - the way to

reconcile is the law. If someone rapes my daughter, no one can force me to reconcile with this person. However, according to the legal system, I cannot kill him. That is why the justice effort could help to reconcile people. As a prosecutor, I have to be impartial. My duty is to investigate, so I am willing to meet the people involved, and listen to them.

The last time you came to Kenya the victims were really looking forward to meet you but most of them were disappointed.

I know but I could not meet the victims before the judges authorised my investigation. At that time, I came to discuss with the Kenyan authorities what I should do. I had to inform them that I would open investigations and I had to request their authorization. I said I would return to Kenya as soon as the judges approved my investigation and that's what I'm trying to do right now.

Why should Kenya agree to let its citizens be tried by the ICC when other nations, including the US and Israel, are not even members?

I think being a member of the ICC is a sign of sophistication. For South America and Africa, it is important that [the people] don't think they can be protected by armies, that they are protected by the law. Kenya is an example of how we can use the law to do justice to the victims and to prevent violence for the future. It is an example of working together, the Kenyan authorities, the Kenyan people and the court.

What will you tell the Kenyan population during your visit?

I'll go to Kenya to listen to people's stories about what happened and to talk about their expectations of the ICC. I will tell them that I can only request justice for them, I cannot send people to jail. People have to understand that if you commit violence, you will go to jail.

Kenya is a democratic country. That's why its leaders agreed with our investigation, wherein we'll mostly listen to the people. If we keep on requesting justice, eventually it will prevail.