

ICC Prosecutors' Performance Reviewed

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Three years after they started work, ICC prosecutors' record comes under scrutiny at wide-ranging public meeting.

NGOs, pressure groups, journalists and several ICC prosecutors last week discussed both the performance of the world court's prosecution arm since it was established three years ago and the challenges it faces.

The September 26 debate, which was chaired by the head of the Office of the Prosecutor, OTP, Luis Moreno-Ocampo, examined issues such as the jurisdiction of the court; conducting investigations in situations of ongoing violence; and the execution of arrest warrants.

An OTP report, issued ahead of the meeting, outlined lessons learned, and its strategy for the coming three years.

Since the summer of 2003, the OTP has received three referrals - requests for an investigation - from Uganda, the Democratic Republic of the Congo, DRC, and the Central African Republic, CAR.

So far, the court has managed to arrest one individual, Thomas Lubanga from the DRC, but arrest warrants issued over a year ago for five members of the Lord's Resistance Army, LRA, in Uganda have yet to be executed.

Raska Lukwiya, one of the "LRA 5", was killed in fighting two months ago, and the Ugandan government has now entered into peace talks with the rebel militia, trying to find an end to violence that does not rely on ICC prosecutions, and may even result in offers of amnesty.

THE CHALLENGES

One of the main criticisms the OTP has faced thus far is that all investigations are centred on Africa, where it is conducting "focused" investigations into allegations of war crimes.

Christopher Hall from Amnesty International said that if prosecutions only take place on one continent, and only for members of armed groups and not governments, "this is a serious problem", adding that "justice must be seen to be done during the selection of cases".

Acknowledging that the situations selected for investigation contributed to a "problematic perception of a geographically-based prosecution strategy", the OTP report is adamant that "regional balance is not a criterion for situation selection". Instead, the OTP is "guided by the standard of gravity", and the gravest crimes it has been confronted with so far are in Africa.

The report says that through investigations and subsequent indictments, the OTP will "represent the entire range of criminality", and that incidents will be selected to "provide a sample" that is reflective of the gravest crimes committed, and the main types of victimisation.

However, many of the pressure groups represented at the public hearing are adamant that the entire range of criminality is not being dealt with under the OTP's current strategy, pointing out that war crimes suspect Thomas Lubanga is only being tried on suspicion of having conscripted child soldiers to fight in his rebel militia.

They argue that Lubanga is responsible for orchestrating rafts of crimes against humanity and war crimes, and are concerned that these are being ignored, despite the OTP's promise to review charges in the indictment at a later stage.

GRAVITY OR EXPEDIENCY?

Given the chance to address the audience, and representatives of the OTP, NGOs expressed their concerns over the first three years of OTP activity. Mariana Goetz from REDRESS, an international human rights organisation for torture survivors, said the OTP is using the "gravity" test as an "expediency" test - only focusing on the most serious crimes to get cases tried quickly and judgments secured.

Some NGOs say that only issuing arrest warrants for members of one side of an ethnic conflict, such as the LRA in Uganda, or Lubanga from the Union of Congolese Patriots in the DRC, may fuel further hostilities.

However, the OTP report stressed that the ICC is complementary to the efforts of the countries themselves in prosecuting war crimes, and that "national measures against other offenders should be encouraged".

Nonetheless, some human rights organisations say that opening up other investigations and cases into all sides of an ethnic conflict is essential, otherwise the OTP will not be regarded as impartial.

The executive director of the International Federation for Human Rights, FIDH, Antoine Bernard, said that this is most urgent in the DRC, where only Lubanga has so far been charged. He stressed that it is "urgent to make it known that there is going to be another case against someone else, or there will be a loss of confidence in the OTP".

He also said that there would be a knock-on effect of a loss of confidence in NGOs, human rights organisations and journalists working for justice in the DRC.

Geraldine Mattioli from Human Rights Watch added that any prosecution of the Janjaweed militia by the ICC could have a "very strong impact" in the Darfur region of Sudan, where the OTP is currently not able to operate because of violence and the non-cooperation of Sudanese authorities.

Nonetheless, the OTP report stressed the impartiality of the court's prosecution arm, and reiterated that situations and cases are dealt with in a "sequenced" order, according to their gravity. It points out that in 2003 the Ugandan government referred the situation of the LRA to the OTP, which then informed the government that in order to be impartial, the OTP would "interpret the referral to include all crimes committed in Northern Uganda".

A CURIOUS POSITION FOR WAR CRIMES TRIBUNALS

Unlike a country prosecuting a crime committed by a citizen, international war crimes tribunals such as the ICC and the International Criminal Tribunal for the Former Yugoslavia, ICTY, are in a curious position. They deal with war crimes suspects, but without the backing of a foreign affairs ministry, a justice ministry or a police force.

However, unlike the ICC, the ICTY is guided by a United Nations Charter, and is able to demand the full compliance of any state.

Anton Nikiforov, spokesman for the ICTY's Office of the Prosecutor, told IWPR that "our charter gives us primacy, and a greater possibility to force the state to cooperate". He explained that whereas the ICC is a treaty organisation, and not the UN, the ICTY is a UN criminal tribunal.

Unlike the ICC, the ICTY can take any case from any country affected by the 1990's Yugoslav conflict and investigate "without limitation".

But Nikiforov explained that even this power does not work with some states, or heads of states who resolutely refuse to cooperate - as was the case with Slobodan Milosevic, the former president of Serbia who was on trial at the ICTY when he died in March this year.

The ICTY's OTP told the UN Security Council that Milosevic was not being fully cooperative with investigations, but because the Security Council could not agree on sanctions, their efforts to pressure Milosevic into cooperation did not work.

Turning back to the ICC, the primary right to investigate is always given to the state where the war crime has been committed. It is only if a country is "unwilling or unable" to investigate and prosecute that their situation is referred to the ICC.

Therefore, the court is reliant upon the countries it is investigating to cooperate with investigators, and help to execute arrest warrants once they are issued.

THE PROBLEM OF SECURING ARRESTS

The OTP report referred to securing arrests as the "most critical and difficult issue of the system", as countries in which the court operates "often have difficulties executing arrest warrants".

This is primarily because violence continues to plague the Congo, Uganda and Darfur, countries torn apart by years of ethnic conflict.

David Tolbert, the ICTY deputy prosecutor, told the audience at the OTP debate that the biggest challenge for the ICC is gaining state cooperation in the apprehension of suspects.

He said that the OTP needs substantial information on the whereabouts of suspects, and “strong information to be able to enter into diplomatic talks”.

Tolbert said that the ICTY was in the fortunate position, because it had the “carrot” of accession to the European Union to use when negotiating state support in executing arrest warrants for war crimes suspects with some of the Eastern European states.

However, there is no such carrot for countries such as Uganda, DRC and Sudan, where the civilian populations – many of whom are living in camps for internally displaced persons – desperately want to see an end to violence.

Uganda is even resorting to peace deals, hosted by South Sudan, rather than wait for arrest warrants to be executed - something locals are not confident will ever happen without the muscle of an ICC police force.

THE WAY FORWARD - OPENING UP NEW INVESTIGATIONS

Michel de Smedt, the operational head of the OTP’s investigations division, said that over the coming three years, the prosecution service is aiming to cooperate more with states in order to more effectively investigate suspects.

He said that the OTP planned to improve relations with victims; complete two trials of war crimes suspects “expeditiously”; and conduct six new investigations into situations where war crimes have allegedly been, or are still being, perpetrated. Smedt forecast the provisional timeframe of 15 months per trial, allowing nine months for an appeal.

VICTIMS AND WITNESSES

The OTP has acknowledged that it needs to find new ways of dealing with victims - in particular children and people who’ve been subjected to sex crimes - so that their opinions are sought without exposing them to risk.

Interviewing victims of sexual violence necessitates specially trained investigators and perhaps increased protection measures. Brigid Inder from the Women’s Initiative for Gender Justice said that so far the OTP has not properly investigated gender-based crimes, which “sends out a clear message that they can carry on with impunity”.

So the OTP plans to reach out to, and protect, victims through both a strong relationship with intermediaries, such as community groups, and what the chief prosecutor describes as “respectful relationships” with countries like Sudan, because this is the “only thing we can do to protect victims”.

For example, the OTP is reliant on the country it is investigating to grant travel permits and visas to protected witnesses it needs to take out of the country for safety. Indeed, the protection of victims and witnesses has been one of the reasons cited for delays to investigations and pre-trial hearings in several of the situations the OTP is involved in.

Nonetheless, in the last three years, the OTP report says that the prosecution service has learnt how to approach possible witnesses without exposing them to risk; identify safe sites for interviews; and move them to safe locations without attracting attention.

A CALL FOR SUPPORT

Smedt said that over the next three years, the OTP plans to expand cooperation with the UN, the African Union and the EU, because “proving criminal responsibility is not linked to investigators, but to cooperation and support of the state and conditions in the field”.

In fact, Smedt was so bold as to say that “if there is no assistance in addressing security issues, the office is not in a position to investigate”.

The chief prosecutor then threw the net wider, calling for the continued help of NGOs to giving training about the court across Africa, supporting witnesses and victims, and even collecting evidence, as “we cannot present a case without evidence”.

He told the audience that “I want to increase your participation so that you help me to get gender-based evidence. To enlarge victim participation, we encourage your help”.

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Location: Africa
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Focus: International Criminal Tribunal for the former
Yugoslavia

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