

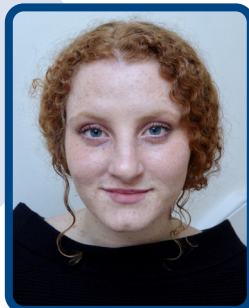
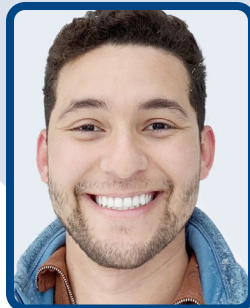
International Bar Association



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The findings, interpretations and conclusions expressed herein are the work of the authors and do not necessarily reflect the views of the International Bar Association.





Spoils of war: criminalising forced pregnancy in international criminal jurisprudence

Introduction

Increasingly, international criminal law has become attuned to women's experiences of war. In particular, progress has been made in prosecuting crimes of sexual violence which are committed primarily – although not exclusively – against women and girls. Advances have included the recognition of rape as a war crime and an act of genocide in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)¹, along with the enumeration of sexual violence crimes in the Rome Statute of the International Criminal Court (ICC).²

Despite an increasing focus, however, other types of gender-based violence remained invisible in the jurisprudence of international criminal law until now. Violations of reproductive autonomy have long been a feature of war and are repugnant to the values that international criminal law protects. That is why *Ongwen* case³ is a significant step forward in this regard. Not only is this the first case in any international criminal court to include the successful prosecution of 'forced pregnancy', but it is also one of the only cases in which reproductive violence has been understood as a crime under international law outside of the genocide context. This discussion situates this landmark case in its historical context and raises broader concerns about the deficient response to forced pregnancy in the development of international criminal law, proposing that further attention to reproductive violence and autonomy is of paramount importance to the development of international criminal justice and vindicating the lived experiences of women.

Conceptualising the crime of 'forced pregnancy'

Reproductive assault is not an unfamiliar terrain of atrocity. In fact, its perpetration gained contemporary prominence in the Second World War where the forced sterilisation of Jewish and Roma people, and experiments on pregnant Jewish women, was widespread.⁴ Indeed, the Nazis were also responsible for what was considered 'collateral' reproductive violence, which included forced impregnation through rape.⁵ Yet, no utterance to these forms of violence was referenced in the Nuremberg Charter of the International Military Tribunal (IMT), nor were they mentioned in the instruments that influenced the Nuremberg Charter.⁶

Even so, the distress of reproductive violence garnered attention during the Nuremberg Trials in the course of witness testimonials. In fact, one witness recalled that Jewish women were 'subjected to abortion' in the camps.⁷ While the judgment acknowledged aspects of this evidence, it did so only fleetingly and only in so far as it related to the persecution of the Jews, consequently omitting the sterilisation of other groups and the forced abortions or forced miscarriage mentioned at trial.⁸

More developed jurisprudence emerged in the *RuSHA* case, which focused on crimes committed by the Rasse-und Siedlungshauptamt (Race and Settlement Main Office) and other agencies of the SS. Of the nine acts charged, two focused on the use of reproductive violence.⁹ These cases from post-war Germany suggest that in the mid 1940s, the harm that most troubled the international community was not the interference with the victim's reproductive autonomy of women, but with the attempted destruction of their national, ethnic or racial groups, confirming that reproductive violence was viewed only through the lens of 'genocide'.¹⁰



It was not until the establishment of the ICTY in 1993 that these themes resurfaced, as sexual and reproductive violence were endemic in the Yugoslav Wars and references to ethnically motivated forced pregnancies evolved the jurisprudence of the ICTY. In the *Gagović* case, the initial indictment referred to several rapes in which one of the victims was told that she would give birth to ‘Serb babies’.¹¹ Yet, while some elements of this conduct were captured by other charges, specific charges for forced pregnancy through applying the residual crime against humanity of ‘other inhumane acts’ were not brought forward.

Forced impregnation was also widespread in the conflict that prompted the establishment of the ICTR in 1994. The issue of reproductive violence received close attention in the *Akayesu* judgment, which helped to ameliorate its perpetration in the context of the Rwandan genocide. Ultimately, however, the case did not challenge the perception that such violence merits individual prosecution under international law. Rather, its recognition was determined by its incorporation through concerted attacks on national, ethnic, racial or religious groups. After *Akayesu*, charges for acts of forcible impregnation were absent in the ICTR, although some accountability was achieved for the associated rapes.¹²

In 2002, the enumeration of ‘forced pregnancy’¹³ was finally expressed in the ICC Statute to criminalise ‘the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law’.¹⁴ While a significant achievement breakthrough, particularly given the glacial pace of incremental litigation, the hard-won crime would not be successfully isolated and charged as a stand-alone offence for a further 19 years.

The Ongwen case

On 4 February 2021, Dominic Ongwen was convicted by the ICC on 61 charges of war crimes and crimes against humanity.¹⁵ The Prosecution had placed sexual and gender-based violence (SGBV) at the heart of the case, emphasising reproductive choice, and Ongwen was found guilty *inter alia* on the historic charge of forced pregnancy as a crime against humanity and a war crime. Among their arguments, the prosecution insisted that,

‘[T]he value protected by the criminalisation of forced pregnancy is primarily reproductive autonomy’,¹⁶ and alleged that many of the women and girls abducted by the Lord’s Resistance Army (LRA), including those who were raped by Ongwen himself, ‘became pregnant without any choice in the matter.’¹⁷

Consistent with this approach, in its confirmation of the charges decision, the Pre-Trial Chamber found that ‘the essence of the crime of forced pregnancy is in unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy.’¹⁸ By placing the notion of ‘choice’ in the vanguard, the prosecution exposed the denial of reproductive autonomy, a harm that had seldom been recognised in international criminal jurisprudence. What is more, charging ‘forced pregnancy’ in the setting of the LRA demonstrates that the crime has utility outside the genocide context.’

Judge Schmitt, Presiding Judge of ICC Trial Chamber IX, gave detailed descriptions of the horrific crimes committed by the LRA, observing that, ‘[A]s a result of these crimes, women and girls experienced “barely imaginable physical and mental pain.”’¹⁹ This reflected outgoing Prosecutor Bensouda’s commitment to address this overlooked charge, going to the heart of the gendered dimension of the crimes in her pre-trial brief: ‘Women were treated as spoils of war, awarded as prizes without any more say in the matter than if they had been animals or inanimate objects.’²⁰

Unquestionably, the Court’s judgment acknowledges the narrow definition applied to ‘forced pregnancy’ when compared with other crimes under the ICC’s jurisdiction. Not only must the prosecution prove two physical elements—confinement and forcible impregnation—but they must also prove that the accused committed the act intentionally *and* with the specific intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.²¹ The deprivation of reproductive autonomy resulting from the crime of forced pregnancy is an unequivocally distinct and harrowing crime. It does not require such a significant burden of proof to differentiate it from other offences, nor should the fears of repressive regimes be the basis for undue barriers to justice. The Court should be commended for winding the narrow path to accountability in the *Ongwen* case, but the international community has an obligation to broaden the track for the future.

Going forward

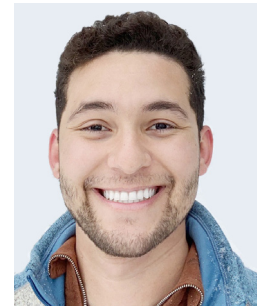
Placing the ICC's first 'forced pregnancy' case on a historical timeline allows us to appreciate how groundbreaking the *Ongwen* case is, marking a coalescing of international legal understanding around sexual and gender based war crimes, while drawing attention to the omissions surrounding reproductive violence in international criminal law to date. While the case establishes a roadmap for the incoming prosecutor of the court to effectively charge and prosecute SGBV, it also reinforces the unduly burdensome standards applied to reproductive violence. It is hoped that the *Ongwen* case will enhance the Court's capacity to make full use of its progressive and explicitly gender-sensitive legal framework to deliver on the expectations that are written into the Court's design: to vindicate victims of mass atrocity.

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Danilo Angulo-Molina,¹



Assessing whether China committed acts of sexual violence against its Uighur population in violation of Article 7(1)(g) of the Rome Statute

Trigger warning: Graphic description of sexual violence.

General findings of crimes against humanity in Xinjiang, China

As part of my IBA legal internship, I conducted research and drafted memos on which, if any, crimes against humanity and human rights violations likely have been committed by the People's Republic of China against the Uighur community in Xinjiang Province. Uighurs are a Muslim Turkic minority group concentrated in East Turkistan, also known as the Xinjiang Uighur Autonomous Region in China, which is 92 per cent ethnically Han Chinese.² My research relied in part on reports gathered by Human Rights Watch,³ Amnesty International,⁴ the Australian Strategic Policy Institute (ASPI),⁵ undercover journalists⁶ and the BBC.⁷ Those reports, in turn, were based on testimony from former detainees, interviews with victims of sexual violence and witnesses, videos and satellite imagery. Collectively, these reports support a finding that ten of the 11 crimes against humanity enumerated in Article 7 of the Rome Statute of the ICC likely have been, and continue to be, committed by China against the Uighur Muslim minority in Xinjiang, China. The ten crimes are: (a) murder; (c) enslavement; (d) forcible transfer; (e) imprisonment; (f) torture; (g) sexual violence; (h) persecution; (i) enforced disappearances; (j) apartheid; and (k) other inhumane acts, with only the crime of (b) extermination considered potentially inapplicable as of February 2021. This article will focus solely on sexual violence as a crime against humanity directed against China's Uighur population.

Sexual violence in international criminal law

Sexual violence is a crime against humanity under Article 7 (1) (g) of the Rome Statute of the International Criminal Court (ICC), adopted in July 1998.⁸ The crime is specifically defined as 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'.⁹ Sexual violence also has been largely condemned by nation-states and international tribunals in the last decades.

For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) issued charges of sexual violence from 1994 to 2016 against 32 individuals for inciting and ordering this crime against civilians during the Yugoslav Wars between 1991-2001.¹⁰ Additionally, the International Criminal Tribunal for Rwanda (ICTR) issued charges of sexual violence in 1998 against Jean-Paul Akayesu for inciting this crime in the form of rape against the Tutsi ethnic group during the Rwanda genocide in 1994.¹¹ Over a decade later, the Special Court for Sierra Leone (SCSL) in 2009 issued charges of sexual violence against the three surviving leaders — Augustine Gbao, Issa Hassan Sesay and Morris Kallon — from the Revolutionary United Front (RUF) for inciting and ordering this crime in the form of rape, sexual slavery and forced marriage against civilians during the Sierra Leone Civil War between 1991-2002.¹² Moreover, the ICC also issued charges of sexual violence in 2016 against Jean-Pierre Bemba Gombo for inciting and ordering this crime in the form of rape against civilians during the armed conflict in the Central African Republic (CAR) between 2002-2003.¹³

However, this decision was later reversed by the Appeals Chamber in June 2018.¹⁴

Evidence of China's commission of sexual violence in violation of Article 7 (1) (g) of the Rome Statute

Out of the ten crimes against humanity China may have committed against its Uighur population, sexual violence directed against the Uighur community remains one of the lesser known in the international community. Some of the crimes chronicled in the reports include sexual violence in the form of forced sterilisation against Uighur women, who are forced to undergo training in government run 're-education camps'. One former detainee, Tursunay Ziawudun (who is currently in the United States), alleged that 'women were forcibly fitted with IUDs or sterilized'.¹⁵ Additionally, Ziawudun went on to describe her efforts to prevent Chinese authorities from sterilising a 20-year-old woman, claiming '[w]e begged them [Chinese officials] on her behalf'.¹⁶

Chinese officers also have committed sexual violence in the form of rape against Uighur women. For example, Ziawudun also alleged that she was 'tortured, and later gang-raped on three occasions',¹⁷ each time by two or three different Chinese men. Additionally, she also alleged that many other women were similarly removed from their cells 'every night'¹⁸ and raped by Chinese men who used masks. Ziawudun stated 'They don't only rape but also bite all over your body, you don't know if they are human or animal'.¹⁹ It is important to note that Ziawudun's description of the re-education camp in the Xinyuan county and the methods of sexual abuse are consistent with the statements from other former detainees. Similarly, former teachers who were forced to work in the re-education camps, such as Sayragul Sauytbay, alleged that 'rape was common'²⁰ and the guards 'picked the girls and young women they wanted and took them away'.²¹ Additionally, Sauytbay recounted a specific rape event on a woman who was approximately 21 years old, alleging that 'in front of everyone, the police took turns to rape her'.²²

The use of enslavement along with sexual violence are also crimes that Chinese officials have committed against Uighur women in Xinjiang. One of the former detainees, Gulzira Auelkhan (who was detained for 18 months) alleged that she was used as a slave to 'strip Uighur women naked and handcuff

them, before leaving them alone with Chinese men'.²³ Aulkhan went on to say that 'My job was to remove their clothes above the waist and handcuff them so they cannot move[...] Then I would leave the women in the room and a man would enter – some Chinese man from outside or policeman. I sat silently next to the door, and when the man left the room, I took the woman for a shower',²⁴ said Aulkhan.

International Criminal Court's response

In July 2020, The Office of the Prosecutor (OTP) of the ICC received reports of China's alleged violation of crimes against humanity, including the crime of sexual violence under Article 7 (1) (g).²⁵ However, in a report issued in December 2020, the ICC stated that the *actus reus* of the presented crimes were committed by Chinese nationals within the territory of China, a state over which the court lacks jurisdiction because it is not a party of the Rome Statute.²⁶ Therefore, the ICC concluded it was not able to prosecute or proceed with the investigation based on the preconditions to the exercise of jurisdiction stated in Article 13 (2) (a) of the Rome Statute. In response to the ICC's report, Sophie Richardson, China Director for Human Rights Watch, stated: 'The facts remain: The Chinese government is committing grave violations on a massive scale in Xinjiang, and those responsible should be held to account'.²⁷

Conclusion

There is sufficient evidence to establish that China likely has perpetrated crimes against humanity including sexual violence directed against the Uighur community in Xinjiang, China. The ICC statement is not a judgment on the quality of the evidence, and instead focuses solely on the Court's determination that it lacks jurisdiction over the matter. Therefore, the international criminal justice community must explore other options to investigate and potentially hold the Chinese government accountable for past and ongoing systemic attacks directed against the Uighurs that it is alleged to have committed. For example, the international community might explore the viability of an ad hoc tribunal or universal jurisdiction, the latter of which was employed recently by a German Court²⁸ to indict a former Syrian official for crimes against humanity in connection with the ongoing Syrian civil war.



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The danger of internet shutdowns to the right of peaceful assembly in the digital age

Introduction

The Covid-19 pandemic forced thousands of people to transfer their activities to digital platforms, including protesters and human rights defenders. However, governments around the world enjoyed this tendency to silence these people by restricting their right

to freedom of assembly through internet shutdowns. An internet shutdown is an intentional disruption of internet connection or electronic communications, rendering them inaccessible or effectively unusable for a specific purpose. On 1 February, the government of Myanmar employed this

João Stuart



technique to cut off the internet connection in the country, preventing anti-government activists from communicating among themselves through their mobiles. This article will demonstrate why this narrows the right of peaceful assembly online and violates International Human Rights norms.

Intervening on the right to freedom of assembly online

The UN Human Rights Council has declared that human rights must be equally preserved regardless of whether someone is online or offline. In that sense, before restricting the right to freedom of assembly either online or offline, states must fulfil certain conditions. Article 21 of the International Covenant on Civil and Political Rights affirms that intervening on this right is not possible, unless it is 'in conformity with the law' and 'necessary in a democratic society'. The UN Human Rights Committee in its general comment n^o 37 concluded that Article 21 also protects digital forms of assemblies, or any other peaceful reunion, that depend upon a digital platform. Moreover, the Committee stated that blocking or hindering internet connectivity cannot be tolerated as methods to interfere with people's right to peaceful assemblies online, even when states claim the provision of Article 21 of the ICCPR. Furthermore, the general comment explains that every assembly carries out a presumption of being peaceful. A mere disruption or an isolated case of violence is not enough to allow the state to make an assembly non-peaceful.

Why internet shutdowns are unlawful according to Article 21 of the ICCPR

Article 21 enshrines peaceful assemblies. However, the broadness of the term 'peaceful' grants states a large discretion in determining what it means. It allows authorities to shape this content to fill their interests and silence others. To avoid that, assemblies must be assessed individually because authorities need to take into account their particularities before determining if it is peaceful or not. Digital blackouts represent the exact opposite of that. Since they hit thousands of people blindly, the blackouts ignore whether an online meeting is peaceful or not. It shows that they neglect any presumption of peacefulness that might exist. Therefore, internet shutdowns suppress individuals' right to speak freely against government policies as well as document and disseminate human rights violations.

Moreover, shutdowns are also unnecessary and disproportional in terms of Article 21 of the ICCPR. An intervention that respects the criteria of being 'necessary in a democratic society' meets a pressing social need. It means that it chooses the least intrusive instrument to achieve the desired result. In addition, it considers the interests of those who suffer because of the intervention by balancing the impact it will have on their rights. Nevertheless, a restriction that lacks proportionality becomes ineffective in achieving its objective, and then turns into an unnecessary thing.

Internet blackouts are collective punishments. They do not include any form of targeting or selection, which makes it impossible for authorities to measure the impact that internet shutdowns cause on people's lives. As a result, they hit everyone indiscriminately, hindering people's access to all sorts of online content, including vital information. In the middle of a pandemic, cutting off digital connection might endanger people's lives, as individuals cannot obtain accurate information on the situation of the pandemic in their countries. Besides, the current social distancing measures, combined with the lack of connection, prevent everyone from questioning the government's unlawful acts. It shows that internet shutdowns are blanket instruments that totally compromise people's rights to disagree with public measures online.

Therefore, internet shutdowns violate the requirements of necessity and proportionality of Article 21 of the ICCPR. As digital blackouts jeopardise opportunities for people to gather and manifest their ideas freely and peacefully online, they are far from being the least invasive alternative for states to intervene on the right to freedom of assembly. Consequently, they turn into an excessive restriction of Article 21, which also makes them unnecessary. Despite the shutdowns' aim to satisfy a pressing social need, its capacity to blindly strike millions of people causes a damage that is more severe than the one it aimed to curb in the first place. Then, it is not necessary for any democratic society to implement something that will worsen the current situation.

Conclusion

In conclusion, digital blockages, or any other attempt to harm internet connections, represent a threat to the online right to

freedom of assembly. They prevent individuals from gathering online to criticise public policies and legislations and hinder the efforts of human rights defenders and journalists to denounce a government's illegal acts and inform society about them. It transforms internet shutdowns into a disproportionate, intrusive and unneeded form of intervention that contradicts Article 21 of the ICCPR and shrinks the democratic space. Thus, states must protect and promote human rights either online or offline equally by assessing assemblies using a case-by-case method to assess its conformity with the law, instead of using indiscriminate methods.

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The situation of human rights defenders in Nigeria

How do we protect human rights defenders?

20 October 2020 was a horrific day for many Nigerian activists and citizens that spoke out against police brutality. They were met with armed militia who shot live bullets into the crowd reportedly killing at least 12 protesters. This event was a blatant attack on the right of citizens to protest in Nigeria and an attempt to intimidate human rights defenders. This attack did not stop there. Following this event, Nigerian citizens who joined the protest reportedly had their passports and other travel documents seized and their financial accounts frozen. Furthermore, some activists were fined heavily for participating in the protests and some have been arrested for their continuous outspokenness on this subject. Any attempt to suppress legitimate protests and concerns from citizens is an infringement of international human rights law and should be a top concern for human rights practitioners around the world.

As disheartening as the conduct of government officials in Nigeria is, it represents a greater problem: the abuse that human rights defenders are faced with around the world, even in seemingly

democratic nations. The constant reports of abuse of power and the frequency of attacks launched against human rights defenders and their families is disconcerting. Front Line Defenders reported that more than 304 human rights defenders were targeted and killed because of their work in 2019. 40 per cent were defending environment or land rights. In 2019, Global Witness reported 212 murders of environmental human rights defenders – the highest number ever recorded in a single year. It shows that as an international community, we are lagging behind in providing suitable structures to support and protect human rights defenders who risk their lives to speak out for us. It is clear that there needs to be a comprehensive framework to protect human rights defenders and provide them with the resources and tools needed to fight against assaults from corrupt government forces that seek to silence any opposition against unethical and undemocratic acts by governments and their institutions. Currently, the only major resource on the protection of human rights is the United Nations Declaration on Human Rights Defenders, however, this document is not a binding document for nations. Therefore, it is insufficient as a protective

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mechanism towards the protection of human rights defenders.

The international community often speaks out on human rights violations happening around the world. However, the situation in Nigeria teaches us that there needs to be more focus on the aftermath of such issues or events, particularly as it relates to the protection of activists and citizens that stand up for their rights. Civil society and freedom of expression are at stakes in Nigeria and many countries around the world. Governments have employed judicial techniques to silence the voice of human rights defenders. This includes

the criminalisation of protests as was done in Nigeria, false charges and arbitrary arrests, harassment, funding restrictions, administrative barriers and restrictive laws designed to clamp down on dissent. It is imperative that the international community creates a firmer system to check the power of a government to carry out such acts against human rights defenders. The rule of law and sustainability of democratic principles depend on it.

Sadaf Azimi



Greater protection for UN whistleblowers: considering effect of the 2019 EU Directive

Introduction


In 2018, the United Nations (UN) Joint Inspection Unit (JIU) launched a landmark investigation into the protections afforded to whistleblowers, which revealed the UN's culture of impunity and retaliation against whistleblowers.¹ The 2021 case of WHO whistleblower Dr Francesco Zambon demonstrates that UN whistleblower protections remain inadequate.² However, the landscape of whistleblower law has dramatically changed due to the *2019 European Union Whistleblower Directive*, which requires Member States to establish whistleblower laws by the end of 2021.³ With many EU Member States also sharing UN membership, this prompts the question: what does the Directive mean for UN policy?

Current UN whistleblower policy

The UN's Protection against Retaliation (PaR) policies have historically afforded little protection to whistleblowers, due to several oversights in their drafting. Firstly, the scope of the protected class is too narrow. While the majority of policies extend to all staff, they generally deny protection to 'non-staff', such as interns, volunteers and consultants, as well as former employees.⁴ Although several organisations extend this

protection to non-staff categories, this is not standardised across the UN, for instance, Section 55 of the ICAO's whistleblower policy specifies that only those working for ICAO are protected from retaliation.⁵ This is an oversight, because 45 per cent of UN staff are defined as 'non-staff' and the highest levels of underreporting come from this class.⁶ The current UN whistleblower policy also excludes former employees, which silences the claims of those dismissed in retaliation. For instance, UNHCR whistleblower Miranda Brown was blacklisted, and despite her claims being validated by an independent panel, she was still dismissed.⁷ Considering that a common form of retaliation is dismissal, excluding former employees from the scope of the policy is a serious omission.

The second issue of concern is the lack of independence of UN mediator bodies supporting reporting, such as the UN Ombudsman, Ethics Office and Office of Internal Oversight (OIOS). There are no term limits for approximately 45 per cent of Ethics Officers, 50 per cent of heads of Oversight and 20 per cent of Ombudsmen, which is problematic for ensuring the effective review of complaints without political pressure.⁸ Further, smaller organisations have dual-functioning Ombudsmen/Ethics Officers, which are clearly not structurally independent.⁹ The lack of independence



of reporting bodies has historically caused conflicts of interest for reports against organisation Directors. For instance, WIPO whistleblower Wei Lei reported allegations against then-Director Francis Gurry for breaking procurement protocol.¹⁰ Following the investigation, the OIOS report came into Gurry's hands, exposing Lei to retaliation.¹¹ Such conflicts of interest must be mitigated by imposing employment term limits, and annual reporting to ensure compliance.¹²

Finally, the UN must standardise reversing the burden of proof across all organisations. Six UN organisations disregard the reversal, which would shift the onus onto the organisation to prove that it would have taken the same alleged retaliatory action in the absence of the protected activity.¹³ Whistleblowers experience difficulty accessing the documents needed to satisfy this burden, given the asymmetrical power imbalance between a reporting person and the organisation.

The 2019 EU Whistleblower Directive

In comparison, the *2019 EU Whistleblower Directive* encompasses the current best practice provisions for reporting persons and is the strongest development in whistleblower law in a decade.¹⁴

The directive requires EU Member States to introduce laws necessary to comply with the Directive by 17 December 2021. For some States, this involves enacting standalone whistleblower laws for the first time.¹⁵

Compared to UN policy, the Directive's scope of protected persons is considerably expanded, as it applies to consultants, volunteers and interns, in addition to formal employees.¹⁶ For the latter, the Directive has moved beyond the JIU report, and includes 'persons for whom a work relationship has yet to begin', in cases where the information on breaches was obtained during the recruitment process, or during pre-contractual negotiations.¹⁷ Worthy of consideration, the Directive also extends to relatives of reporting persons, a class that is entirely foreign to UN policy.¹⁸ For the UN to have a whistleblower policy of comparable strength to the EU, the scope must be expanded to respond to the reality of the organisation. At a minimum, the UN should amend its policy to include non-staff and former employees, as many UN staff are interns and volunteers, and several UN whistleblowers are former employees who were dismissed for reporting. A robust policy,

with human rights at its centre, would protect broader classes, such as relatives or UN job applicants.

The Directive tackles conflicts of interest in reporting bodies by requiring States to establish both internal and external reporting bodies.¹⁹ Further, only staff members from the reporting authority have access to its information.²⁰ While most UN PaR policies allow for external reporting, this does not address the absence of reporting protocol when the complaint is against the head of the organisation, or the head of the Oversight Office.²¹ Wei Lei's case is just one example of the historical nature of this issue in the UN. Consequently, the UN should follow the EU in establishing an external reporting body to safeguard independence for complaints with a potential conflict of interest.

Finally, the highest standard for the burden of proof is enshrined in the Directive.²² In Article 21.5, the Directive reverses the burden of proof onto the person who took the detrimental action once a prima facie case of retaliation has been established, who must prove the disclosure did not affect the action 'in any way'.²³ The UN should implement a similar provision, which not only standardises a reversal of the burden of proof but places a high threshold for the alleged retaliator to satisfy.

Conclusion

With its 'enhanced observer' status at the UN, the EU is a strong global player with the capacity to influence outcomes of UN retaliation cases. On the one hand, the Directive may impel state support for tighter whistleblower laws, to protect their citizens working in the UN System. On the other hand, the outcomes of UN OIOS investigations often defer action to UN Member States, which sometimes proves unsuccessful. Take, for example, Wei Lei's OIOS report which concluded that the Member States should take action against Gurry, however they failed to do so.²⁴ Where UN Member States have historically opted for inaction, it is hoped the Directive will encourage them to deter retaliation, reflecting the spirit of their new and improved municipal whistleblower laws.

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Francisca
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2019: The year of the worldwide social uprisings

2019 was a year of multiple social uprisings. The international community witnessed massive demonstrations around the globe in Bolivia, Chile, Ecuador, France, Haiti, Hong Kong, Iraq, Lebanon, Spain and more. Not since a wave of 'people power' back in the 1990s has the world experienced such a coinciding 'outpouring of popular anger'¹. Massive protests – some peaceful and others more violent – reportedly sparked a 'contagion effect' prompting movements demanding deep social change around the world². While the Covid-19 crisis recently diverted attention away from the uprisings, this wave of upheavals seems to be reviving and regaining its space, even more encouraged by each country's crisis management. The current health crisis has further exposed the lack of credibility this work identifies.

The natural reaction that arises when witnessing such simultaneous manifestations suggests that it is worthy to look closer and identify how should we make sense of these uprisings. In light of the latter, the aim of this article is to propose a debate on the

question whether these upheavals are part of the same common phenomenon. In other words, is there a common factor that explains why small economic policies sparked demonstrations around the world?

At first, the multiple protests might have seemed like independent, but coincidental, events. Also, it could be understood that one uprising motivated the other one, thanks to the globalised communication and information about protests through social media and fast organisation. Economist Branko Milanovic defines this phenomenon as 'the first revolution of the globalization era'³. He concludes that 'if there is a single ideological glue to them, it is desire to have one's voice heard'⁴. Consistently, the access to new communication technologies has augmented the outreach of 'social, political, economic and even symbolic demands'⁵. Although this could be a wave of protests, it contradicts the idea that revolutions come in waves driven by the dynamics of great powers. Accordingly, it was small countries, such as Bolivia and Ecuador, that started it and maybe other countries felt inspired as a result. Today, the different social media platforms



allow protests to spread efficiently and effectively, allowing ‘would-be participants’ to track events and campaigns with minimum information-gathering costs⁶.

As the protests began with specific complaints, it was difficult at first to make sense of them as a common wave. Many sparked as ‘an assault on citizen’s pocketbooks’⁷. For example, with a gas price rise in Iran or a rise on the tax applied to WhatsApp in Lebanon. In other cases, more general grievances drove the protests, like in the case of Colombia and France. In some countries, politics provided the spark like in Bolivia, with corruption in the presidential electoral processes, or with unpopular laws in India and Hong Kong. In other cases, it was the own government’s passivity that created such grievance, for example regarding climate change⁸. Nevertheless, after a few days of these unexpected social outbursts, it was clear that they were not specific events but had ‘a broader meaning and to embrace broader demands’⁹.

This sudden phenomenon raised a number of questions. Firstly, why did these protests broaden from a spark into flames? By way of illustration, in Chile protests sparked against a CLP \$30 rise on the public transport fare but morphed into charges against the government’s ‘indifference to income inequality and about constitutional provisions put in place by the military regime, thirty years earlier’¹⁰. Consequently, the signature phrase that led the social manifestations was ‘it is not about 30 pesos, it is about the last 30 years’¹¹.

Secondly, ‘why now?’ Answering the question on why this wave of social uprisings happened to occur specifically in 2019 has different interpretations. First, one may understand that this reaction corresponds to a delayed effect of the 2008 financial crisis. In this sense, 2008 would have disclosed that the ‘there is no alternative’ answer was no longer definite and lost all credibility¹². It could also be said that there is a kind of social fracture generated by a ‘democratic deficit’¹³. Democracy allowed people’s grievances to be channelled through formal political processes and allowed the system to respond efficiently. But now, there is a common sentiment that this is not effective anymore, as people are not willing to be channelled their grievances through traditional political channels. This loss of legitimacy was backed by a deep disappointment of leadership corruption and incompetence around the world. The

latter was reflected on a poll that backed this sentiment, as ‘85% of citizens in Mexico are not satisfied with the way democracy works in their country; 83% of Brazilians, 70% of Tunisians, 64% of South Africans, and 63% of Argentines are likewise dissatisfied’¹⁴.

This framework of the multiple questions and astonishment at the impact of such a sudden outcome in different parts of the world explains the unexpected and disproportionate reactions of police violence in many of the upheavals. There was a profound disconnect between political leaders and what was happening in the streets. For instance, in Chile, the President announced that the country was in a ‘war against a powerful enemy’¹⁵, while not realising that those protesting were not an extremist minority but the majority of the Chilean population. In some cases, like the latter and in Hong Kong, such state repression only encouraged the protests more strongly, as opposed to discouraging them¹⁶. Police violence in response to the protests reflected the misleading way these crises were handled. This could be seen as a product of the political elite’s disconnection, which will have irreparable social consequences.

It is at least curious to analyse how countries so diverse and immersed in such different contexts arrive to the same breaking point and socially exploded almost at once. This will certainly continue to take place after the Covid-19 pandemic gives us a break.

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Sanity in the courtroom: mental health of lawyers in the adversarial system

*'The first thing we do, let's kill all the lawyers' –
Dick the Butcher, Henry VI Part II, Shakespeare*


Dick the Butcher remains the voice of the centuries-long scholarly paradox about a lawyer's place in civil society. Are they the gatekeepers of corrupt aristocracy, and thus their murder prioritised by the Cade Rebellion on moralistic grounds? Or is their death a practical necessity for a successful rebellion due to their role as the first line of defence against anarchy?¹ Perhaps to marry this dichotomy, the adversarial system of law pits two parties against each other, both of whom usually believe they embody the latter of the paradox, and when these two adversaries compete, truth will (hopefully) prevail.²

Though idealistic in its outcome, however, the adversarial process encourages the exploitation of human weakness by parties that each have a vested interest in the other's demise. Freiberg writes that this is consequently reflected in cultural, political and economic relationships outside of the law that 'discourage apology, admissions of wrongdoing and acceptance of responsibility'³, as all of this is exploitable in the adversarial trial. A necessary evil, perhaps, but how does it affect the wellbeing of advocates who are then forced to mask their imperfections not only at trial, but also among their peers?

Take, for example, what Wigmore described as 'the greatest legal engine ever invented for the discovery of truth': cross examination. Along with many jurisdictions around the world, courts in the US explicitly regard memory problems arising from one's psychiatric history as something directly relevant to a person's credibility.⁴ Counsel may use courtroom demeanour and gaps in testimony to establish and exploit mental instability in a witness for the purposes of discrediting them in the eyes of the jury.

In the case of Alger Hiss, the defence sought to discredit the prosecution's key witness, Whittaker Chambers, by suggesting that he had a 'psychopathic personality' based on 'symptoms' ranging from 'alcohol and drug addiction' to 'untidiness'.⁵ One can hardly blame the defence's attempt at an assertion that Chambers had a psychopathic inclination to make false accusations. In fact, the adversarial system demands such an attempt, for had they been correct, this would have been justice manifest. Reverting again to Freiberg's proposition, however, when members of a profession habitually expose and exploit the mental vulnerabilities of their opposition, does this impact attitudes towards mental health within the profession itself?

In the IBA's most recent study on mental wellbeing in the legal profession, 90 per cent of respondents reported having experienced



negative health outcomes as a result of work-related mental wellbeing issues. Of these respondents, the fear of the repercussions on their career was the most cited reason for their reluctance to discuss their concerns with their employer. Why is it that despite conflict resolution and fairness forming the very core of their legal training, lawyers cannot trust their employers to afford them such a luxury in the workplace?

Perlin argues that the profession's notorious inadequacy at managing this crisis is rooted in a 'social attitude' that lawyer-physician Morton Birnbaum coined 'sanism' – the prejudice that the legal community holds against so-called mental instability. Mentally ill clients are viewed as ticking timebombs that may lack capacity to give instructions, neglect professional advice, compromise case strategy or be exploited by the opposition.⁶ The World Health Organization has identified that in some countries, people with mental illness are 'dumped' into the prison system at disproportionately high rates simply due to the lack of access to mental health resources.⁷ Perlin further explains, 'Just as lawyers are sanist towards clients with mental disabilities, they are sanist towards their peers with mental disabilities. And this sanism manifests itself in utterly inconsistent ways (ignoring the reality of mental illness in the practicing bar, blaming attorneys for their mental illness in disciplinary matters, and, again, ignoring the impact of mental illness on representation in the criminal trial process), an inconsistency that is a common mechanism that allows us to avoid confronting both the realities of mental disability and the stereotypical ways that we seek to deal with it in legal contexts.'⁸

In this environment of stereotyping and exclusion, it is no wonder that many lawyers fear the adverse repercussions that could arise from voicing their struggles.

In all fairness, however, legal employers are walking a tightrope too. Though the past decade has seen the rise of several economic incentives (such as retention rates⁹) and regulatory incentives (such as fair work legislation), for them to prioritise and destigmatise mental health in the workplace, they are also constrained by the

incentive to 'win' the adversarial battle at all costs. Counselling, generous sick leave and mentorship initiatives prove futile where an employee is still expected to appear in control when engaging with clients, judges and (most importantly) opposing counsel.

How does one reconcile the 'sanist' need to maintain an illusion of perfection throughout a trial process that weaponises mental vulnerability, with the stigmatisation of mental vulnerability that then bleeds into the internal workings of the legal profession and shrivels the wellbeing of advocates? Should there be a universal standard of civility required of adversaries that could dim the intense vitriol of cross-examination and make space for compassion and candid discussion of mental illness in the adversarial process, without compromising the discovery of truth?

Perhaps as a profession we will continue to ponder these riddles for years to come. Ponderance itself, however, is vital. Without such questioning, it will not matter whether a world full of Dick the Butchers view us as the gatekeepers of justice rather than corruption, for there is no greater injustice than implicitly endorsing the demise of our very own.

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EU budget conditionality- protecting the rule of law by protecting the budget?

The European Union is a community of Member States founded on common values listed in Article 2 TEU: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”. The Regulation on a general regime of conditionality for the protection of the Union budget (the “Regulation”) seems to have been conceived as another tool for the EU rule of law enforcement. However, the scope and purpose of the Regulation has been contentious. This article will lay out some of the key debates surrounding the Regulation: whether it is appropriate to use budget conditionality as a method of enforcing the rule of law, and the tensions between different institutions within the EU.

Existing EU rule of law enforcement mechanisms and perceived deficiencies

The EU already has a set of rule of law enforcement mechanisms:

- The Justice Scoreboard looks at “efficiency indicators” of the justice systems of Member States. This includes information such as the spending of financial resources in each justice system, the processes on managing caseloads, the appointment processes for prosecutors, and the disciplinary proceedings against judges.
- The Commission’s EU Rule of Law Framework, which at various stages allows the Commission to issue a formal opinion raising concerns about systemic threats to the rule of law and formal rule of law recommendations before resorting to triggering Article 7 TEU.
- The Council has its own Annual Rule of Law dialogue, whose stated aim is to promote and safeguard the rule of law without undermining the principles of conferred competences and respect for national identities.
- The well-known Article 7 TEU, triggered

in proceedings against Poland and Hungary, details the process through which the Member State breaching the values of Article 2 TEU may lose certain rights (including voting rights) under the Treaties.

- Article 19(1) TEU which states that “Members States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law” imposes an obligation on Member States to maintain the independence of their judiciaries.


However, over the last decade or so the rule of law has been declining in various Member States and the existing measures have been regarded as insufficient.¹ In some Member States, the weakening of the rule of law has allowed financial corruption in relation to EU funds. So, some have argued that to effectively enforce the rule of law, the EU should “go for the wallets” of problematic Member States.

These arguments for rule of law conditionality have been advanced by academics and MEPs alike. Popular arguments state that financial sanctions may “reduce the rents that an anti-democratic politician may offer to allies who are hostile to an existing democratic order” and “increase the likelihood of regime change” leading to better democratic outcomes.² The sanction could also curb frustrations in Member States which are net contributors and may object to their contributions being given to net beneficiaries who violate EU norms.

On the other hand, some are more weary of the concept of budget conditionality. Oliver Garner and Teodora Milojkovic have argued that using financial sanctions as a “weapon in the battle over foundational constitutional values” gives the impression that values can be “bought and sold”.³

The Regulation

In order to address these challenges,



on December 16, the EU introduced the Regulation on a general regime of conditionality for the protection of the Union budget. This Regulation, in force as of January 1, 2021 establishes the “[the rules necessary for the protection of the Union budget in case of breaches of the principles of the rule of law in Member States” (Art. 1).

Article 3 gives an indicative list of possible “breaches of the principles of the rule of law:

- (a) endangering the independence of the judiciary;
- (b) failing to prevent, correct, or sanction arbitrary or unlawful decisions by public authorities...
- (c) limiting the availability and effectiveness of legal remedies”.

Where the Commission finds that it has reasonable grounds to consider that breaches of the principle of the rule of law affect or seriously risk affecting the sound financial management of the Union budget a conditionality mechanism will be triggered against Member State, cutting or suspending EU payments. The Council will usually have one month (or three months in exceptional cases) to vote on the proposed measures by qualified majority.

The European Parliament took a strong view of the Regulation being a rule of law enforcement tool, whereas the European Council places more emphasis on the Regulation as a tool to protect the Union budget. The European Parliament’s press release stated: “the new law does not only apply when EU funds are misused directly... It will also apply to systematic breaches of fundamental values that all Member States must respect...when those breaches affect- or risk affecting- the management of EU funds”.⁴

Tensions between EU Institutions

On December 10 and 11 2020, European Council came up with a set of “conclusions” on the implementation of the Regulation which demonstrated a tension between the various institutions of the EU. In contrast to the European Parliament’s strong stance on enforcing the rule of law, the European Council assured Member States that “the mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism”.⁵ It should be noted that the European Council’s conclusions were a compromise “originally crafted by the German Presidency in close contact with Budapest and Warsaw” to get around Poland

and Hungary’s veto of the EU budget.⁶ To be passed the budget has to be unanimously agreed upon by members of the Council of the European Union. It may argue that there was pressure to come up with a compromise so that Member States who do not violate the rule of law would not lose the benefit of the budget due to the behaviour of Member States in breach of the rule of law.

The European Council’s conclusions were significant for three reasons. Firstly, they state that the Commission must develop and adopt guidelines on implementation of the Regulation in consultation with Member States. Secondly, the conclusions require the Court of Justice of the European Union to rule on the legality of the Regulation before it is used. The guidelines on the implementation of the Regulation have to be finalised after this judgment. Thirdly, they require that any use of the Regulation is preceded by a dialogue between the Member State in question and the Commission. These three requirements are not in the text of the Regulation.

Conclusions

The conclusions of the European Council have led to criticism by commentators. It has been argued that the added requirements (the guidelines and the dialogue mechanism) constitute a legislative change of the Regulation, which would mean that the European Council is acting *ultra vires*.⁷ Another strand of criticism focuses on the practical aspects of these changes. The funds protected by the Regulation (the Covid-19 recovery fund) are designed to be spent quickly and the Regulation can now only be triggered once the funds have been misspent.⁸

The other institutions have responded by arguing that the European Council’s conclusions have not changed the substance of the Regulation. On December 14 2020, a European Parliament’s resolution on the issue has stated that the European Council’s conclusions are “superfluous...[the] purpose and scope of the Rule of Law Regulation is clearly defined in the legal text of the Regulation” and goes on to cite Article 15(1) TFEU which states that the European Council shall not exercise legislative functions.⁹ Similarly, the EU Commissioner for Justice has publicly said that the conclusions have not changed the Regulation and the Commission is ready to act.¹⁰

However, it has now been 3 months since

the Regulation came into force and it has not yet been enforced, despite ongoing concerns in several Member States. This may prove the earlier arguments that the European Council has created an undesirable delay, as the Commission is currently producing the guidelines required by paragraph 2(c) of its conclusions on the Regulation.¹¹ Furthermore, on March 11, 2021, it was reported that Poland and Hungary have launched a legal action against the Regulation, and it is anticipated that a judgment will be announced in May 2021.¹² This could lead to greater changes to the Regulation and greater delays. It may be argued that since all Member States voluntarily signed up to the values included in Article 2 TEU (including the rule of law), the EU should take strong action to enforce these values in Member States. However, these developments show that actual enforcement is still a difficult and contentious subject (especially when the entire EU budget is at stake), not only among the Member States, but also the institutions of the EU.

Notes

1. For example in Poland since 2015 there has been a series of “judicial reforms” affecting institutions such as Constitutional Tribunal, the Supreme Court and the National Council of the Judiciary which the European Commission described in their 2020 report as “rais[ing] serious concerns some of which still persist”. Similarly in Hungary changes to there have been changes to the Supreme Court (Kúria) and the European Commission notes weaknesses in the anti-corruption framework: “deficient independent control mechanisms and tight interconnections between politics and certain national businesses are conducive to corruption”. The

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 10. CEU Debate on the Rule of Law (2021) <https://www.youtube.com/watch?v=jCVrfqJJhM&t=1050s>
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The democratisation of international criminal justice? How user-generated evidence has fallen short of its promise

Jessica Lawrence



A decade ago, in the infancy of user-generated content, the concept of ordinary citizens recording information on a smartphone that evidences an international crime presented many promises in advancing international criminal law (ICL).¹ This piece attempts to unpick one particular promise: the democratisation of international criminal justice.

At the International Bar Association's 2020 – Virtually Together conference, a session entitled 'Using digital evidence in human rights cases: lessons learned from capture to courtroom' was dedicated to discussion of the initial aspirations user-generated evidence and whether the anticipated transformations of justice have taken place. The democratisation of evidence collection, and consequently international criminal justice, was briefly identified as a formative potential for this innovative form of evidence.² It was, and still is, an easy assumption that ordinary citizens capturing photographs or videos of atrocities on their personal devices, and transmitting them through the internet, would empower individuals within the international criminal order, giving witnesses and victims agency in the pursuit of redress. Yet the complexities of the international legal system and of the technical requirements of user-generated evidence have interrupted this democratic involvement. Though user-generated evidence is able to bridge some gaps in the investigatory landscape of ICL, it has not drastically altered the relationship between affected communities and the delivery of international criminal justice.

User-generated evidence can undoubtedly assist in overcoming certain shortcomings of international criminal investigations. As Lindsay Freeman commented during the aforementioned IBA session, user-generated evidence can serve to counteract the 'temporal and geographic distance' between investigators and the acts and scenes

under investigation.³ Indeed, the Office of the Prosecutor (OTP) at the International Criminal Court (ICC) itself has observed the potential for user-generated evidence to counteract the loss of critical evidence due to the 'time gap' between alleged crimes and the presence of ICC investigators.⁴ Yet time and space are not the only 'distance' measures to consider within investigations and international criminal justice more broadly. Phil Clark has explored the alienation of African communities from institutional ICL, particularly the ICC, at length in his book 'Distant Justice'. The location of the ICC, its languages, jargon, the legal ceremony, technicalities, the neutral and impartial philosophy behind the justice it delivers, even the nationalities of its employees, all contribute to a separation between the ICC and communities that is far less easily calculated than time and space.⁵

With 51.1 per cent of the world's population using the internet in 2019, and the trend predicting a significantly greater number of users in 2021,⁶ cyberspace could serve as familiar territory enabling technology-literate citizens and investigators to collaborate over the evidence collection process. Witnesses and victims of atrocity who have collected digital evidence could become the authors of their own history, enshrined in international legal narrative.⁷ Thus, the meeting of investigative needs of international criminal law and civilian agency could make sense of an unfamiliar legal order, bringing justice 'closer to home'.

Despite these hopes, significant obstacles prevent this transformation coming to fruition. The following are just a few. First, to be admitted in court, user-generated evidence must be legitimate and meet admissibility requirements of the jurisdiction concerned. Digital alteration, including deepfakes and the loss of original metadata, presents serious barriers to admission. As such, footage captured on smartphones and posted to

social media or sent to civil society groups introduces considerable, labour-intensive verification conundrums that may be impossible to solve. EyeWitness, for example, has developed an app to negate these problems. Even so, the app is generally aimed at human rights defenders and individuals purposefully engaged in documentation, rather than individuals within general society. Second, the content requirements of evidence of international crimes are complex and often unintuitive. Though an individual may be compelled to document grieving individuals, images and footage conveying factual information is likely to be more useful in proving a crime.⁸ Third, given the sheer amount of user-generated content available on social media, verifiable and relevant or otherwise, it is impossible for all witnesses and victims related to this content to have their suffering recognised by law. For example, it was reported that by March 2020, there was more footage relating to the Syrian conflict available on YouTube than hours that had passed in the conflict itself.⁹

Of course, not every individual documenting atrocities intends for the information to be used in court. However, as this piece has shown, the limitations of user-generated evidence undermine the hope for democratising international criminal justice through user-generated evidence broadly, whether it is the specific intention of individuals or not.

Notes

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Monica Murray



A Bill too far: will the UK fail in its obligations under the Rome Statute?

In December 2020, the International Criminal Court (ICC) formally closed its investigation into activities carried out by the United Kingdom during the Iraq conflict between 2003-2008, following an extensive examination.¹ The Court has jurisdiction over all situations involving nationals of parties to the Statute², so despite Iraq not being party to the treaty, the ICC can investigate (and potentially prosecute) allegations, since the UK is a Member State.

The report from the Office of the Prosecutor concluded as follows:

‘There [was] a reasonable basis to believe that various forms of abuse were committed by members of British forces against Iraqi civilians in detention. This includes the war crimes of murder, torture, rape and/or other forms of sexual violence, and forms of mistreatment amounting to inhumane and cruel treatment or outrages against personal dignity’.³

Summarily, there is evidence suggesting that members of the UK armed forces committed war crimes while stationed in Iraq during the conflict. The report stated that it could not be concluded that the UK was unwilling or unable to investigate or prosecute these alleged crimes. As such, unless new evidence came to light, the Prosecutor was satisfied that the UK was sufficiently placed to address these allegations and therefore no case was opened at the ICC.

It perhaps seems paradoxical that the ICC can decline to prosecute international crimes. However, the ICC is founded upon the principle of complementarity – whereby it will only instigate proceedings when domestic courts are unable or unwilling to investigate or prosecute international crimes, and complementarity is explicitly contained within the Statute.⁴ This principle strikes a balance between the protection of state sovereignty and the need to prosecute the most serious international crimes. Considering that the International Criminal Court was created by multilateral treaty and as such, must bend to a degree towards the wishes of Member States

– and the limited budget of the Court – this is an unsurprising inclusion within the Statute.

However, for this principle to work effectively, it relies upon states actively fulfilling their obligations to investigate and/or prosecute international crimes. It is perhaps difficult to see how the ICC determined this to be the case in the UK, since the state’s inaction is highly apparent. The UK has failed to send one case for prosecution in the past ten years.⁵ This is in spite of the creation of the Iraq Historic Allegations Team – a body created to investigate claims stemming from the conflict made against the British military.⁶

Moreover, the Overseas Operations Bill, soon to undergo the committee stage at the House of Lords, creates a five-year presumption against the prosecution of former or current personnel for alleged offences carried out during the course of duty overseas. Any attempt at prosecution concerning events that occurred more than five years ago would have to be approved by the Attorney General.⁷ Should this Bill be passed by the House of Lords, it is reasonable to suggest that there would therefore be immense difficulty in attempting to prosecute any alleged crimes committed during the Iraq War.

In light of this Bill, could the UK now be considered as being unable or unwilling to investigate or prosecute the events of the Iraq War? And consequently, could the ICC reopen its investigations? Article 17. 2 of the Rome Statute defines unwilling states as:

- ‘(a) shielding a person from prosecution.
- (b) (causing) an unjustified delay.
- (c) (having a) partial and disingenuous intent to bring to justice.’

Only one of these conditions has to be met for the ICC to determine that a state is unwilling, and therefore open a case. The Overseas Operations Bill creates what is essentially a statute of limitations for prosecutions (despite the Secretary of

State for Defence arguing differently)⁸ and certainly could be considered to shield those involved in alleged war crimes during the Iraq War. Although the presumption against prosecution can be rebutted by the Attorney General, the UK's previous reluctance to adequately respond to Iraqi war crimes allegations (previously detailing them as 'vexatious',⁹ although this has since been retracted¹⁰) does not lend itself to a belief that this will substantively take place.

One would subsequently presume that should the UK pass this Bill, the ICC would reverse its previous decision, finding the UK to be unwilling to fulfil its obligations and reopening its investigation. In fact, correspondence between the Prosecutor and the UK has alluded to this fact – 'were the effect of applying a statutory presumption be to impede further investigations and prosecution of crimes allegedly committed by British service members in Iraq – because such allegations would not overcome the statutory presumption – the result would be to render such cases admissible before the ICC, as a result of State inaction or alternatively State unwillingness or inability to proceed genuinely under articles 17(1) (a)- (c)'.¹¹ In a roundabout way, one could be forgiven for hoping that the UK will indeed adopt this Bill into law, since this theoretically should transport the allegations concerning events in Iraq from the domestic domain – perhaps finally resulting in some form of positive action.

However, the ICC has previously closed the investigation into the UK, despite acknowledging the previous inaction of the British Government – and why should this time be any different? The argument of the

Prosecutor that the UK was able and willing to fulfil its obligations prior to its consideration of the Bill was tenuous at best, and the ICC risks delegitimising itself by continuing to accept the lame attempts and excuses of states failing in their obligations. If the Bill is approved by Parliament and made law, the ICC must adequately and immediately respond, or run the risk of endorsing impunity.

Notes

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