

The ICC and Moreno-Ocampo are Also on Trial

Gabriel Dolan

9 October 2009

I don't envy Louis Moreno-Ocampo in his position as chief prosecutor of the International Criminal Court (ICC). However, that is not to suggest that I will be either sympathetic or forgiving if he botches the investigations of Kenya's high-profile suspects. This article argues that Kenyans must monitor the approach and performance of the ICC in the country.

When the Rome Statute was enacted in 1998, human rights advocates everywhere enthusiastically gloated over the prospect of a World Court that would finally confront the demon of impunity. We began to believe that leading perpetrators might run but they could no longer hide. Indeed, we thought that prosecuting 'those bearing the greatest responsibility' for war crimes, genocide and crimes against humanity, meant that never again would the world witness atrocities on the scale of the twentieth century.

However, seven years after the ICC's establishment, there is much more scepticism than delight over its capabilities and performance. For most of that time, the Court has lacked staff, resources and international support. Paper pledges and political indifference have characterised most of its tenure.

Beginnings are always difficult and admittedly, much time and effort have gone into establishing the Court and enlisting member states. Currently, 110 states have ratified the Rome Statute. Missing in that list, however, are such superpowers as India, China, Russia and the United States. No wonder then that US Ambassador to Kenya, Michael Ranneberger, could issue only puerile threats about the reform agenda, and have nothing of substance to say about impunity and support for the ICC. Regrettably, this point was missed by most commentators in their debate on the letters sent by the US to blacklisted Kenyan politicians.

Lacking support from the major powers, Moreno-Ocampo has spent most of his time acting more like a diplomat than a criminal prosecutor. His strategy has focused on persuasion and co-operation rather than enforcement of the Rome Statute. In fairness, he has had little option as the ICC mandate may well be clear and precise but it lacks enforcement powers. In other words without its own police force, the Court is totally dependent on international co-operation to apprehend suspects.

As a result, he has been reduced to going about his work by trial and error. However, we have witnessed more errors of judgment than court trials in the last seven years. Indeed the only trial currently proceeding in The Hague is that of little known Thomas Lubanga of the Democratic Republic of Congo (DRC), and that case is moving at a snail's pace.

Moreno-Ocampo hardly got off to a dream start in 2004 with his handling of the conflict in neighbouring Uganda. Instead of using his prerogative powers, he sought an invitation from the Uganda government to investigate atrocities in northern Uganda. President Museveni gladly accepted the opportunity to co-operate, since he believed the ICC would focus only on atrocities committed by Joseph Kony's Lord's Resistance Army (LRA) with no investigations of atrocities committed by the Ugandan army. To date, the ICC's prosecutorial strategy has mirrored Museveni's expectations. The ICC got its first state referral case and Museveni got another weapon to attack the LRA. Moreno-Ocampo was thereafter widely accused of reluctance to prosecute government officials.

However, in fairness, the indictments against Kony and four of his rebel leaders did have an impact on the war in the region. The LRA became increasingly isolated as Sudan could no longer grant it a safe haven, and with the signing of the Comprehensive Peace Agreement in 2005, Khartoum was obliged to disarm all militias and maintain peace. Consequently, Kony and company were forced to the negotiating table. Their arrests have remained elusive but the atrocities have considerably reduced.

The ICC has also been accused of targeting African states. However, the cases of Uganda, DRC and Central African Republic have all been state referral cases. The case of Sudan, however, represents a serious change in approach. The Sudanese indictments came as a result of a 2005 UN Security Council Resolution, as Sudan has not ratified the Rome Statute. A UN resolution ostensibly has world backing and Moreno-Ocampo used that leverage to remove his kid gloves and openly indict current state officials for the first time in the ICC's history.

The first warrants of arrest for Sudan were issued for Minister Ahmed Haroun and Janjaweed leader Ali Kushayb in 2007. On 4 March 2009, the Pre-Trial Chamber granted Moreno-Ocampo's request to issue a warrant of arrest for President Bashir. That marked the most significant achievement of the ICC to date as a sitting head of state was indicted for the first time. It sent shock waves across the continent and brought world attention to the ICC and Moreno-Ocampo, who had accused Bashir of 'exterminating his own people'.

At the African Union (AU) summit in Libya in July, continental leaders said they would not cooperate in the arrest of Bashir. In reality the political leaders wanted to protect their allies and worried they could be the next ones arrested.

So the Kenyan case comes at a very significant moment in the ICC's development. The Chief Prosecutor appears to have grown in confidence and is anxious to have a high profile case to garner international support for the Court. The question is whether he can perform and deliver. The Kenyan case has the potential to make or break the ICC and Moreno-Ocampo knows that.

To date, the ICC has at best operated as a deterrent. The stigmatisation of naming and shaming sitting government officials has spread trepidation everywhere. Arrest warrants have considerably reduced the likelihoods of atrocities and that is a considerable achievement. Yet, the Court was established to prosecute and punish and in that respect it has failed to do justice to victims. Moreno-Ocampo himself has stated that 'arrests are essential for the ultimate efficiency and credibility of the court'.

The ICC cannot be allowed to fail in Kenya. More investigators and professional staff need to be employed while a regional office must be established as a matter of urgency. The International Criminal Tribunal for Rwanda (ICTR) is scheduled to wind up its hearings in Arusha at the end of this year. Would the Tanzanian city not be an excellent venue for ICC regional offices and local tribunal chambers? Elaborate plans for witness protection are also essential if we recall that after a commission of inquiry into the assassination of Dr Robert Ouko, 42 witnesses 'died' in a few years.

Kenyans have great faith in the ICC's ability to prosecute the principal perpetrators of the post-election violence. Those who suffered and survived, the internally displaced persons (IDPs) and the families who lost lives and livelihoods deserve the best justice the world can offer. However, when the ICC begins its work, we must not let the virtual court of the world's political powers allow political expediency to take over at a critical stage in the proceedings. That is why we must treat with suspicion European, American and UN pledges to end impunity. This case is about Kenya, and Kenyans must not sit back passively and wait for the ICC to set the pace for investigations and prosecutions. They must be pro-active on every front to ensure that we have a satisfactory outcome. Kenyan civil society must monitor Moreno-Ocampo's performance from the outset and remind him and the ICC that they are also on trial in this country.

Gabriel Dolan has worked in Kenya since 1982, mostly with Catholic Justice and Peace Commission on issues of human rights. Currently, he works on the rights of slumdweller's rights in Mombasa. gdolan54@gmail.com