

National prosecutions vs international prosecutions

Prof. Michail Wladimiroff

Introduction

The enforcement of criminal law within the jurisdiction of a State has always been an expression of national sovereignty. This still is a leading principle in most parts of the world, but with the emergence of Treaties on mutual assistance in criminal matters and extradition, an international focus was added to the enforcement of criminal law within a national setting. Such Treaties and national law dealing with its implementation in national law and practise are usually referred to as international criminal law. Indeed, this law functioning inter States is bridging national jurisdictions, rather than creating a new one.

With the operation of the Yugoslavia Tribunal (ICTY) and the Rwanda Tribunal (ICTR), after Nuremberg and Tokyo, and recently the International Criminal Court (ICC), a new dimension to criminal jurisdiction has been introduced. These courts deal with the enforcement of criminal law on a supranational level and are therefore separated from the jurisdiction of States. So far this supranational criminal law is limited to the prosecution of violations of humanitarian law only. This area of international law encompasses genocide, war crimes and crimes against humanity.

In this contribution I will deal with a few topics of the prosecution of these horrendous crimes on a national and on a supranational level.

National or supranational trials

The first topic is the relationship between supranational prosecutions and national prosecutions. The classic way to prosecute perpetrators is by trial before a national court. This may be in the accused's country and if carried out vigorously and in good faith, such prosecution has the advantage that the defendant can be taken into custody without extradition or intrusions on foreign territory to make arrests. An alternative might be a trial in the victim's country, as it will save the victim having to travel to the country of his torturer- perhaps I should say: alleged torturer - for the trial process. Another alternative is a trial in the country where the offence occurred, simply because witnesses and real evidence will be locally available. Yet venue in an uninvolved neutral country can offer a balance of all these alternatives, especially when wartime antagonisms linger between the former belligerents.

The ICTY and ICTR

In establishing both ad hoc tribunals, the ICTY and the ICTR, it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect of violations

of humanitarian law. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures. The council settled for a system of concurrent jurisdiction of the tribunal and national courts, being this concurrent jurisdiction, however, subject to the primacy of the tribunal. This means that the tribunal may formally request the national courts to defer a particular case to the competence of the tribunal. This system effectively created a supranational jurisdiction in a neutral country but not being a part of the judicial system of that country.

The primacy of the tribunal in prosecutions of violations of humanitarian law includes the power of prosecutor of the tribunal to start investigations into new cases and to have ongoing national investigations and actual prosecutions handed over to the tribunal. The primacy also encompasses a binding obligation on States to take whatever steps are required to assist the tribunal in all stages of the proceedings to ensure compliance with requests for assistance and consequently to give full effect to orders issued by the judges of the tribunal. This obligation is comparable to the present obligations of States in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of such persons or their surrender or transfer and the service of documents on the basis of a treaty of mutual assistance in criminal matters.

An interesting feature of the supremacy over national jurisdictions is the possibility to override the principle of non-bis-in-idem when a person, who has been tried by a national court for an act characterized as an ordinary crime, when that act in reality constitutes a crime under the competence of the ICTY or the ICTR or when the national proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Until recently, the ICTY initiated cases that were not of major interest and should normally have been dealt with by a national court of one of the new States of the former Yugoslavia according the existing alternatives described above. The majority of deferrals were cases originating from jurisdictions outside of the former Yugoslavia, simply because there were hardly any local prosecutions. The remarkable conclusion therefore is that the jurisdiction of the ICTY has hardly been concurrent to any national jurisdiction within the former Yugoslavia. Most issues of primacy dealt with a failure of the new States of the former Yugoslavia to comply properly with their obligation to assist the ICTY in prosecutions – that is to transfer accused persons to the tribunal and to hand over specific documents. As years went by, local prosecutions emanated in Croatia, Bosnia and Serbia and the recent policy of the tribunal is to encourage these developments and to assist the national authorities to improve the quality of the investigations and proceedings.

With the ICTR the situation is still the same as it was when the tribunal was established. It is not to be expected that Rwanda will be able to have the few national courts to deal with these kinds of trials in

the near future, if ever. Many members of the judiciary were killed during the massacres and the number of those allegedly involved in the atrocities is too large to be dealt with by classic criminal administration. The latest development is the introduction of *Gachacha* a grass-roots justice system, by elderly men of a community. So far all serious cases are tried before the ICTR and - as far as I know - no case was ever deferred to the ICTY because of lack of national prosecutions.

The criminal justice system once available in the territories now under the jurisdiction of both ad hoc tribunals are no longer in place or not duly functioning, either because of the absence of courts due to the destruction of national structures or because of the absence of the willingness of the local authorities to prosecute their own people. Because of this situation the new States of the former Yugoslavia and the State of Rwanda were compelled by the Security Council to accept the concurrent jurisdiction of the ICTY *casu quo* the ICTR with primacy over their national courts.

The ICC

The establishment of the ICC has a totally different background. Without a pertinent armed conflict on their territory that horrified the world, States negotiated voluntarily an equally a treaty that would deal with the prosecution of violations of humanitarian law on a global level. Yet the negotiations were dominated by old principles of sovereignty. Some States were reluctant to create a body that could impinge on national sovereignty and in their view national prosecutions of the core crimes of humanitarian law are paramount and should not be pre-empted or challenged by a supranational court. Rather such court should only assume jurisdiction where the national judicial system was unable to investigate or prosecute perpetrators. Fearing the possibility of sham investigations or trials aimed at protecting perpetrators, other States held that the court should intervene where the proceedings under a national jurisdiction were ineffective and where a national judicial system was unavailable. All these views were resolved in the principle of complementarity.

Complementarity means that the ICC lacks the ad hoc tribunal's plenary power to seize jurisdiction of cases pending on national dockets. Contrary to the ad hoc tribunals, the competence of the ICC is secondary to those of national courts, because the State-parties are – according to the preamble to the Statute - duty bound to exercise their jurisdiction over those responsible for international crimes. When competent State-parties should prosecute perpetrators of humanitarian law before their domestic courts. I will deal later with how States discharge themselves of this duty. When no State-party is competent or when no domestic competence is otherwise available or functioning (properly), the ICC is competent. The exercise of the jurisdiction of the ICC is based on referrals to the Prosecutor by a State-party or by the Security Council or on an investigation on the initiative of the Prosecutor if there would be a reasonable basis to believe an international crime has been committed in a State-party. The ICC, when competent, can override the principle of non-bis-in-idem on comparable grounds as the ad

hoc tribunals can override domestic prosecutions. Yet the competence of the ICC is a delicate mechanism with checks and balances. I will demonstrate the principle of complementarity of the ICC with a few imaginary examples.

An internal conflict in Kenya

When angry young army officers stage a coup in Kenya, the authorities respond in a bloody way by shooting the rebels summarily, killing the militant representatives of their ethnic group and by severely beating up protesting supporters and confining members of the same ethnic group in designed areas. Amnesty International request an investigation by the Prosecutor of the ICC. The government of Kenya, being aware of the ratification of the ICC Treaty by Kenya, argues that these were mere domestic disturbances and the competent authorities reacted lawfully with isolated and sporadic force and that there is no reasonable basis to believe any crime against humanity under the statute has been committed. Kenya asserts that this is a matter for the competent domestic court, rather than for the ICC. The Pre-Trial Chamber, competent under the Statute to deal with such challenge, rules in favour of the competence of the ICC and the investigations continue.

An armed conflict between India and Pakistan

Nuclear weapons are not used in the battle between India and Pakistan over Kashmir, but both parties commit war crimes. Pakistani forces execute hundreds of Indian soldiers after their surrender and the Indian air force wipes villages in Kashmir, where pro-Pakistani warriors are hiding, from the map. Thousands of civilians are killed. Neighbour Bangladesh calls on the ICC to punish the perpetrators, but in vain. Neither India nor Pakistan is a State-party to the ICC Treaty and none of them is prepared to accept the competence of the court on an ad hoc basis. The ICC has no jurisdiction when the crimes are committed on the territory of non State-party and none of the suspected perpetrators are supposed to be subjects of a State-party. Only the domestic courts of Pakistan and India are competent, but neither Pakistan nor the Indian authorities start any prosecution.

The Middle East conflict

The ICC has no competence in the Israeli – Palestinian conflict, as none of the parties have ratified the ICC treaty. This may very well change, however, if skirmishes happen on a larger scale and are extended to the territory of Lebanon after ratifying the ICC treaty. Perpetrators of crimes under jurisdiction of the ICC can be prosecuted before this court when committed on the territory of a State-party. When an Israeli general responsible for the torture of villagers in Lebanon is arrested in transit on Cyprus, a State-party, and flown to The Hague, the Israeli calls for vengeance. Being aware of the delicate balance of power in the area, the United States calls for an emergency meeting of the Security Council resulting in a resolution by which the ICC is directed to freeze the prosecution of the general

for one year. A second attempt of the USA to freeze the situation is vetoed by Russia and the prosecution of the general resumes. Subsequently defence counsel of the accused challenges the competence of the ICC arguing that his client was in Jerusalem when the torture happened. This challenge was dismissed as the court considered itself competent because the place of the crime under the Statute is on the territory of a State-party, regardless whether an order to commit the crime was possibly given elsewhere in a non State-party.

Civil war in Indonesia

Violence has broken out in Indonesia: ethnic and religious groups, islands, rebels, death squads and military formations are involved. No one knows who is fighting whom. The number of victims is unknown but estimated to be over 100,000 people. All kinds of international crimes are committed in the archipelago. As Indonesia has not ratified the ICC Treaty, the Prosecutor can't do anything. The Security Council concerned with the peace in the region decides to intervene and refers the matter to the ICC. By this action the Prosecutor is competent to start investigations and even neighbouring States, not being a party to the ICC Treaty, are now bound to cooperate with the ICC. The position of the court is in this case comparable to the ICTY or ICTR.

National prosecutions

Under existing international law, States may have obligations to prosecute the violations of humanitarian law. Such obligation generally derive from customary international law, like the obligation of States to prohibit genocide or other violations of humanitarian law, which are characterised obligations erga omnes by the International court of Justice in the Barcelona Traction case in 1970. Specific obligation may derive from the ICC Treaty or other treaties like the Genocide Convention or, last but not least, from national legislation. The inherent consequence of these obligations is that domestic courts have universal jurisdiction in abstracto for international crimes like violations of humanitarian law.

The key factor, however, is the competence in concreto. Most countries accept universal jurisdiction of their domestic courts only either if the international crime is committed on their territory, or if the perpetrator is their national, or if there is another link, like the victims being their national or when the perpetrator is found on their territory. The last one – the presence of the perpetrator in the country of prosecution – is an issue that raised some debate. Until recently it was uncertain whether Belgium courts for example would assume competence for the trial of non-nationals, living abroad, who are accused of having committed an international crime in another country. Such competence would encompass the prosecution of everyone who is suspected to have violated humanitarian law wherever, without any link with Belgium what so ever. And, indeed, complaints by interested parties were lodged against a lot of heads of states and other authorities from the African continent, like the late

president Kabila of Congo, the former president of Tsjaad Hissein Habrè, cabinet ministers of Congo and Ivory Coast, and other parts of the world, like Punochet, leaders of the Kmer Rouge, Yasser Arafat and Ariel Sharon.

The consequence of this broad interpretation of universal jurisdiction would be that the Belgium authorities would have to ask States to extradite accused person from their territory to Belgium. If effective the Belgium courts would make the ICC obsolete. Of course this did not work. The first correction came from the national courts when appeals judges rejected the competence of a Belgium court when the accused, in the circumstances I just described, is not present in Belgium. The second correction came from the International Court of Justice in a case between Congo and Belgium. Having in mind the Vienna Convention on immunities, the judges held that heads of states or cabinet ministers in office couldn't be prosecuted before a foreign domestic court as long as they are in function. This is an important difference to prosecutions before the ad hoc tribunals or the ICC, as their personal jurisdiction includes the criminal responsibility of these persons for violations of humanitarian law.

Competent national courts may face many difficulties in conducting trials against perpetrators of international crimes. Assuming your familiarity with such difficulties in your own jurisdiction I will confine myself to the main findings of a recent piece of research in the Netherlands on such prosecutions. The most important factor was factual circumstances, which frustrated a successful investigation, as most crimes were committed many years ago in a country far away. Witnesses were hard to find, in most cases traumatised and due to cultural differences and difficulties of translations statements are in many cases not reliable to an acceptable standard. The technical problematic factors concerned the expertise of investigators, the difficulty to obtain legal assistance from countries devastated by war, access to crime scenes and last but not least the financial burden of these kind of investigations and trials on the budget.

The situation elsewhere on the continent is not very much different. I already indicated the remarkable situation in Belgium, which is now adjusted to a more realistic approach where the test is: Belgium nationality of perpetrator or victim or presence of the accused in Belgium and a formal complaint by a direct interested party. In Denmark the requirement is the inability to prosecute of the State on whose territory the international crime was committed and presence of the accused in Denmark. The exercise of the competence of the courts is based on the direct applicability of the relevant international conventions. So far only two cases were accepted in Denmark: the prosecution of Saric, a Serb from the former Yugoslavia and the conduct of criminal investigation against a General from Iraq because of shelling Kurdish village with chemical projectiles. The situation in Austria is comparable; only one case was prosecuted concerning Cvetkovic, again a Serb from the former Yugoslavia. In Switzerland

there were three cases: two against people from the former Yugoslavia, Grabež and Niyonteze, and a case against a person from Rwanda, Alfred Musema, whose case was deferred to the ICTR. In Italy courts have an unlimited universal competence but this jurisdiction has never been tested. So far prosecutions are limited to one case where the presence of the accused in Italy was enforced by extradition of the accused, Kessler a former nazi, and one where Argentinean military were sentenced in absentia. In Germany the situation is different. International conventions on humanitarian law are directly applicable and only genocide is implemented in the penal code. Courts are in theory competent even in extraterritorial cases but case law has limited this broad interpretation of competence to the requirement of a German linkage. So far four persons have been tried, Djajic, Jorgic, Solokovic and Kuslic, all nationals from the former Yugoslavia.

The lesson of to be learned from all these trials is that national prosecutions can not be considered to be an effective instrument to combat violations of humanitarian law. The sad but realistic conclusion is that the international courts can do no better.