



DON'T JUDGE

—The Hague

Preface

Having issued an arrest warrant for Colonel Gaddafi, will the International Criminal Court ever bring the Libyan leader to justice? Here, prosecutor Luis Moreno-Ocampo responds to critics who say the ICC is ineffectual.

WRITER

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His people have risen up against him, his capital Tripoli is under Nato bombardment, but a piece of paper could decide the fate of Colonel Muammar Gaddafi. In June the International Criminal Court issued an arrest warrant for the Libyan leader, his son Saif al-Islam and Abdullah al-Sanussi, his intelligence chief. The three are accused of crimes against humanity, which, in theory, will see them in the dock at the ICC. But will they ever get there?

A warrant is no guarantee of a trial, as the case of Omar al-Bashir shows. In July 2010 the ICC issued a second warrant for the Sudanese president, this time on genocide charges. Yet he travels fairly freely in Africa. The African Union says its members will not cooperate with the warrant.

The ICC's home in a tranquil suburb of The Hague is an incongruous setting for the world's first permanent international tribunal charged with investigating and prosecuting perpetrators of war crimes and genocide. But these orderly streets are also a battleground: over the legitimacy of the court and the record of the prosecutor, Luis Moreno-Ocampo.

The ICC was established in 2002 by an international treaty known as the Rome Statute. Sixty countries signed and ratified the statute, making them state parties and so accepting the court's jurisdiction, including the UK, Germany, France, South Africa and Nigeria. The US signed the

statute but President Bush reversed the decision. India, China, and Russia are not signatories either, but Tunisia joined in July, the 116th country to do so. The court has an annual budget of €103.6m, and employs 864 people from 102 countries.

But there are increasingly open criticisms of the way the court is run. Several senior ICC officials have left, sometimes unexpectedly. Moreno-Ocampo's management style and decision making "has alienated subordinates and court officials alike [and] he has been dealt numerous judicial setbacks, which have overshadowed his office's modest gains", wrote David Kaye, an expert in human rights law. Others argue that Nato's military intervention in Libya means that the ICC will be seen by some as an instrument of western policy and that if the ICC wants to be viewed as impartial it should prosecute some in the West, as well as Africa.

Moreno-Ocampo, 59, is a veteran Argentinean prosecutor who won his spurs in the Junta Trials prosecuting former army commanders who carried out atrocities during Argentina's "Dirty War" in the 1970s and 1980s. He nods at the list of criticism, picks up a glass from his desk and pours water into it. "Is it empty, or full? It's half full, exactly. We have defeated expectations. We are building an institution. What matters is an agreement between states, that genocide and atrocities cannot be used to stay in power or to increase political power. This is a new idea, it's growing and we will see how far we can go. Gaddafi was killing people in the streets. That was public and clear. ICC intervention is different. We are not invading a country. We are working with Libyans to arrest Gaddafi; they should do it and that makes a difference."

Critics highlight the court's focus on Africa, including both ongoing trials and its investigations: in Darfur, Uganda, Kenya and Libya, with another requested by Moreno-Ocampo for Côte d'Ivoire. Court officials reject claims of a bias against Africa: the UN Security Council referred Darfur and Libya to the ICC. Uganda and Congo themselves asked the ICC to intervene.

The court has no police force, no way of making arrests or power to subpoena

witnesses. It relies on its state parties to detain suspects. The ICC can only become involved in a country if it is party to the Rome Statute; if the government accepts jurisdiction; the UN Security Council requests intervention, or if citizens of a country that is party to the Rome Statute are accused of crimes. Syria, for example, whose government has slaughtered hundreds of protesters, is not a state party, does not accept jurisdiction and has not been referred by the Security Council.

Building an international legal institution doesn't happen overnight. Moreno-Ocampo compares the ICC to Facebook, another new trans-national institution. "Facebook and the ICC are both a community of people. When you see the map of the ICC countries you see countries around the world that are connected: there are 2.3 billion people in ICC states. They all share the idea of no more genocide. This is the 21st-century model: global governance without global government."

The ICC's roots lie in the Nuremberg Trials of Nazi leaders that took place after the Second World War. During the 1990s the UN set up temporary tribunals for Yugoslavia and Rwanda but it soon became clear that a permanent body was needed. Critics often unfavourably compare the ICC with the International Criminal Tribunal for the former Yugoslavia. Serbian president Slobodan Milosevic, Bosnian Serb leader Radovan Karadzic and military commander General Ratko Mladic have all been brought to trial.

Yet the comparison is not entirely fair. The ICTY works in a region where conflicts ended more than a decade ago. It has a powerful ally in the principle of "conditionality" – that future membership of the EU is conditional on cooperation with the tribunal. The ICC operates in ongoing conflicts and often hostile environments. It is not a UN tribunal and is completely independent of any international organisation. Yet it has something arguably much powerful on its side: the growing realisation, especially after the shame of Bosnia and Rwanda, that the international community can and must act to stop genocide and to punish the perpetrators. If it has the political will, which is not always the case.

PHOTOGRAPHER: JUDITH QUAX, IMAGE: REUTERS



- 01 The ICC's prosecutor, Luis Moreno-Ocampo, in legal robes
- 02 International Criminal Court building, The Hague



For example, the decision to pursue Sudanese president Omar al-Bashir was criticised by aid organisations. Others argued that the warrant should have been sealed, as in the case of Jean-Pierre Bemba, former vice-president of Congo, who was arrested in Brussels. But the two cases are not the same, says Moreno-Ocampo. Arresting a head of state is more than a police matter. "You cannot say al-Bashir is in London, arrest him. You need a political agreement and a broad set of actors."

Even so, the indictment of President al-Bashir was a landmark, says Fadi El-Abdallah, an official in the ICC's legal outreach team, as it was the first ICC arrest warrant against a sitting head of state. The precedent was set by the trials of Slobodan Milosevic at the ICTY, and Charles Taylor, the former Liberian leader, at the separate

Special Court for Sierra Leone. "There is now a kind of system in place that is starting to function. Implementation might be complicated and take a little time but it will happen." Crucially, as a legal tribunal, the ICC cannot be swayed by political arguments, says el-Abdallah. Just as a domestic court case would not be stopped because of political difficulties, nor can international criminal justice. "The ICC has a very clear mandate: to investigate and prosecute the perpetrators of these crimes. The political agenda is not the ICC agenda. It is for the states to discuss how to manage the humanitarian or political situation in a specific country."

Trial proceedings are broadcast online (with a 30-minute delay for security reasons) and officials know they are watched in the bases of Africa's warlords. Anyone

Tribunals in brief

International Criminal Court

The first permanent international criminal court to try perpetrators of crimes against humanity and genocide.

International Criminal Tribunal for the former Yugoslavia

A UN tribunal, the ICTY has indicted 161 former political and military leaders for war crimes and crimes against humanity.

International Criminal Tribunal for Rwanda

UN tribunal located in Arusha, Tanzania, to try perpetrators of the Rwandan genocide.

Special Court for Sierra Leone

Tribunal in Freetown, to try crimes committed in Sierra Leone. Trial of Liberian leader Charles Taylor transferred to ICC for security reasons.

International Court of Justice

Established in The Hague in 1945, the ICJ settles disputes between states.

cooperating with the court can be in danger. Moreno-Ocampo claims lessons have been learnt after the trial of Congolese warlord Thomas Lubaga, when attempts to hide the identity of former child soldiers testifying against him failed miserably. Witnesses for some investigations, such as Libya, Darfur and Kenya, are seen outside the country. Nato too is very aware of the potential threat of criminal prosecutions for war crimes. The ICTY investigation into the Nato bombings in Kosovo and Serbia in 1999 sent tremors through the military alliance.

The court has an extensive outreach operation, sending officials into areas where the crimes were committed, helping those who wish to testify. Victims have their own legal representation inside the courtroom. Every stage of their journey to The Hague is carefully planned, right down to the meals.

Witnesses and victims are often profoundly traumatised. Child soldiers may have been forced to kill their own parents to prove their loyalty to their warlord. Many child soldiers who testify are often bemused by the courtroom. They know how to strip and clean an assault rifle but may have never seen a flushing toilet, let alone a computer, or rows of lawyers and judges in their robes. When the microphone is turned on, many flinch at the sound, fearing that it spells danger. A trained psychologist sits nearby.

The ICC's establishment marks the beginning of the end of impunity, says Moreno-Ocampo. "Genocide and atrocities cannot be used to stay in power or increase political power. That's the condition of living in the world today." —(M)