

News

International Court of Justice- elections

By Dr. Olivier Ribbelink, The Hague

New perspectives at ICJ

Two women are expected to bring a breath of fresh air to the International Court of Justice. Mrs Xue Hanqin from China and Mrs Joan Donoghue from the US replace Judge Shi Jiuyong and Judge Thomas Buergenthal, who both resigned before their terms expired. The women come to an ICJ that has been predominantly the bastion of men. Their wealth of international experience qualifies them for one of the most challenging positions on the world stage.

What is remarkable about the two new judges is not just that they will bring down the average age of the members of the ICJ, or that one is very well known in the world of international law and the other less so, but also, strangely enough, that they are women. In the history of the ICJ virtually all judges have been male. There have only been two female ad-hoc judges, that is, judges representing a State in a specific dispute when that State did not have a national on the Bench, namely Suzanne Bastid (France, 1980s), and Christine van den Wyngaert (Belgium, 2000).

The only regular female judge was Dame Rosalyn Higgins (1995-2009, of which 2006-2009 as President). Although it may be too early to say, perhaps their nomination forebodes a new attitude towards the ICJ and international law.

The ICJ has 15 members who are elected by the General Assembly (GA) and the Security Council (SC). Candidates must obtain an absolute majority in both: 97 votes in the GA and eight votes in the SC. Every three years five judges are elected to serve a nine-year term. When a position becomes available due to premature resignation, or the death of a judge while in office an election is called to fill the vacancy.

In regular elections both the GA and SC must continue in session until

all five judges have obtained absolute majorities in both organs. Sometimes a series of voting sessions have been necessary. Judge Buergenthal and Judge Shi represented Permanent Members of the SC, and so will their successors.

Ever since the first elections of Judges of the ICJ in 1946 the Permanent Members of the SC have had a national on the Bench. It has been suggested that this is because the SC and the ICJ have the same number of members. Thus, a candidate nominated by a Permanent Member is for all practical purposes assured of election.

According to the ICJ Statute, Judges must be 'of high moral character' and 'possess the qualifications required in their respective countries for appointment to the highest judicial offices' or 'jurisconsults of recognized competence in international law. And the Court as a whole must represent 'the main forms of civilization' and 'the principal legal systems of the world'.

Membership of the ICJ is similar to that of the SC. There are three judges for Africa, two for Latin America, three for Asia (including China), five for Western Europe and Other States (including the United States, United Kingdom, and France), and two for Eastern Europe (including Russia).

The election of Mrs Xue Hanqin took place on 29 June 2010. She is an experienced diplomat and eminent international lawyer and a member of the International Law Commission of the UN. She also served as China's ambassador to the Netherlands from 2003-2008.

The election of Mrs Joan Donoghue will formally take place on 9 September. She is currently Principal Deputy Legal Adviser in the US State Department. Both new judges have experience with the ICJ.

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ICTY prosecution tactics questioned

The trial of former Croatian general Gotovina at the International Criminal Tribunal for the former Yugoslavia (ICTY) has concluded amid allegations of underhand tactics by the prosecution. Against the rules of a criminal trial, the prosecution brought new arguments in the closing statement.

Gotovina (54) has been on trial at the ICTY since March 2008. He is charged with organising a campaign of murder and plundering which had driven up to 200,000 ethnic Serbs from the Krajina region of Croatia in 1995. The prosecution called for Gotovina to be sentenced to 27 years. The defense argued he took all necessary measures to prevent crimes.

Luka Misetic, Gotovina's lawyer, says that the defense has been deprived of the right to refute the arguments brought by the prosecution in their final statement. He told IJT: "It's improper for the prosecutor to raise new arguments at the end of a trial". Misetic thinks the reason for these last-minute allegations is that the arguments of the prosecution were discredited by the defense during the trial. "The prosecution wanted to come up with new theories to advance its case, but the accused has the right to hear the allegations against him during the trial so he can address them. That didn't happen here", he said. The former general, who spends his time painting portraits in jail, is optimistic about the result of the judgement, which Misetic expects within ten months.

The Piracy Conundrum

On 25 August 2010, the UN Secretary-General published a report at the behest of the UN Security Council (UNSC), on the available options 'to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia.' This report can be seen as a summary of a debate that was started in 2009 within the confines of the Contact Group on Piracy off the Coast of Somalia.

When it comes to piracy, states whose sophisticated navies patrol the Indian Ocean seem stuck between not wanting to deal with Somalia itself and not wanting to prosecute pirates domestically. The international legal regime on piracy offers a definition, the exceptional authority to stop and seize vessels on the high seas, and provides for universal jurisdiction, i.e. the authority for any state to prosecute acts of piracy. Yet, states are not obligated to prosecute and states mostly decline to do so for various reasons.

In 2009, as the number of piracy incidents continued to rise, international efforts focused first on domestic prosecutions by all states and secondly on prosecution by states in the region resulting in controversial transfer agreements between most prominently the EU and Kenya (and later the Seychelles).

In time, the capacity of Kenya to absorb and prosecute transferred pirates came under severe strain, however. The Netherlands, Russia and Germany therefore argued in favour of an international mechanism to prosecute pirates, based on the existing legal regime.

The options for prosecuting pirates discussed in the report, can be put into two categories, namely prosecution by regional states and international prosecution. With regard to the latter, the options are based on the existing models for international criminal trials, namely the ICC, ICTY and Sierra Leone tribunal. An international tribunal would provide uniformity in terms of procedure, punishment and interpretation of the legal regime as well as the proper treatment of those suspected of piracy. Yet, it will

consume a lot of time to bridge the many political and legal disagreements that do exist over piracy and how any tribunal should operate, whether the tribunal is established by treaty or by UNSC resolution. Arguably that time is not available, and many states do not want to see another Chapter VII UNSC resolution establishing an international body.

More fundamentally, States argue that international prosecution should be reserved for the most serious crimes (genocide etc.), which piracy is arguably not. With only Russia arguing in favour, an international tribunal does not seem likely.

The domestic prosecution by regional states, with international assistance, is first of all an expression of the view that piracy is a regional problem, and that for political, legal and cultural reasons, Somali pirates should be tried and held in the region. The options discussed in the report focus on practical issues, making domestic prosecutions possible and effective.

Option 1 in the report reflects already ongoing international efforts to build the capacity of the regional states to prosecute, in particular Kenya. Through international funding and technical assistance, piracy prosecutions can be placed outside the domestic legal system and within new and separate facilities.

As in Kenya, option 2 contemplates a Somali court that sits in the territory of another regional State, which is sympathetic, but not feasible in the ultimate failed State and because of regional animosities.

The third and fourth options follow the example of the Bosnian War Crimes Chamber, in which a special Chamber within the national system is created and specifically geared towards prosecuting specific crimes, thereby lessening the burden on the regular system. The Bosnian example is not well known, but is highly (cost) effective.

The issue of piracy will not be solved in any court of law, but rather in Somalia itself. The assistance of the international community for regional States should nevertheless be welcomed as the only feasible option that has benefits for all involved.

The European Union has called into question the legality of France's expulsion of Roma migrants.

In August France expelled 1,000 Roma from illegal camps around the country. It brings the total this year to nearly 9,000. President Nicolas Sarkozy blames the Roma for a rise in crime. But critics accuse him of using the issue to boost his flagging popularity before elections in 2012.

The EU has asked France to show that its crackdown on crime is not limited to the Roma alone. The legality of the expulsions centres on the conditions under which the Roma are being sent back rather than the fact that they are being returned.

French Interior Minister Brice Hortefeux said the measures were "not meant to stigmatise any community, regardless of who they are, but to punish illegal behaviour."

As EU citizens, the Roma are free to live in any EU state for up to three months but can only stay longer if they have a job and contribute to the social security programme.

EU Commissioner for Justice Viviane Reding said:

"It is clear that those who break the law need to face the consequences. It is equally clear that nobody should face expulsion just for being Roma."

France claims that the returns are voluntary and has offered 300 euros to Roma who agree to leave.

But the EU says such payments do not waive the bloc's rules on the free movement of citizens, non-discrimination and the rights of those belonging to minorities.

The Executive Director of the European Roma Rights Centre, Robert Kushen says Roma are being coerced to accept the French offer. In an interview with IJT he asks:

"Is this French action that singles out a group of people on the basis of ethnicity consistent with European ideals or European law? I don't think so."

The United Nations Committee on the Elimination of Racial Discrimination has told France to avoid "collective repatriations" and work towards "lasting solutions."

Amnesty International has asked Rwanda to review its laws on 'genocide ideology'. The human rights watchdog claims the laws are being used as an excuse to suppress political opposition and freedom of speech. As a result, some critics of the government are living in fear and are choosing to stay silent.

Only recently, in the run-up to presidential elections on August 9, two opposition candidates and a newspaper editor were arrested and charged with 'genocide ideology'. In its report *Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on 'Genocide Ideology' and 'Sectarianism'*, Amnesty International warns that the wording of the laws is so vague that they could be abused to criminalise dissent by opposition politicians, journalists and rights activists.

The director of Amnesty International's Africa Programme, Erwin van der Borgh, told IJT: "The problem with the approach of the Rwandan authorities is that they went far beyond what they should have done. The result is they have criminalised what should be the right to freedom of expression." The 'genocide ideology' and 'sectarianism' laws were originally introduced to restrict speech that could promote hatred in the decade following the 1994 genocide in which 800,000 ethnic Tutsis and moderate Hutus were killed. Rwandan Media High Council executive secretary Patrice Mulama says the laws were necessary given Rwanda's history. "You must remember that this is a society that is recovering from a genocide, in which hate speech and racist speech had a very strong role in orchestrating."

Amnesty says that while it agrees that prohibiting hate speech is a legitimate aim, it believes the Rwandan government is guilty of violating international law.

Al-Bashir rains on Kenya's party

Many Kenyans were disgusted when Omar al Bashir turned up for a party in Kenya last month to celebrate the country's new constitution. They were dismayed when authorities failed to arrest the Sudanese president even though the International Criminal Court issued a warrant for his detention. His controversial visit raises the question of whether the Kenyan government, despite signing up to the ICC, is genuine about wanting to cooperate.

Kenya, of course, has its own problems when it comes to the ICC. Several leading political figures have also been indicted as perpetrators of violence in Kenya's election in 2007/8. Could it be that Kenya's failure to detain al Bashir has anything to do with its own politicians' fear of being hauled before the court?

Former UN Secretary-general Kofi Annan said "the Kenyan government should clarify its position on the ICC". The Kenya National Human Rights and Equality Commission (KNHREC) said by hosting the Sudanese president Kenya has sent the wrong signals to the post-election violence victims and to the ICC.

KNHREC chairman Florence Sambiri-Jaoko believes that the government's lack of action is a statement of impunity and sends a worrying message on the implementation of the new constitution.

"We want an assurance from the government that it would co-operate with the ICC and hand over people implicated in the skirmishes, because the country is under investigation by the court.

The controversial visit put the fragile coalition of Prime Minister Raila Odinga and President Mwai Kibaki under strain. The invitation for Bashir came from Foreign Minister Moses Wetang'ula, a member of Kibaki's PNU party. Members of Odinga's ODM party claim not to have been in the know about the visit and they deplored Bashir's presence.

The Foreign minister said Bashir's visit had helped to unlock outstanding peace and security issues in Sudan. ODM members, however, accused the minister of appeasing a "blood-thirsty tyrant with blood on his hands" in the pursuit of economic interests and in the name of African solidarity.

The Kenyan foreign minister based

his opinion on the African Union, which at a summit last year in Libya decided not to collaborate with the UN in arresting Bashir. The AU made its decision after having asked the UN Security Council to postpone the case against Bashir for a year. The pan African organisation fears peace efforts for Southern Sudan and Darfur will be in danger if too much outside pressure is put on the Sudanese president.

The International Center for Policy and Conflict considers this argument about African Union resolutions "just another cover-up or an African leaders' peer protectionism strategy".

Bashir was received at the airport by Tourism minister Najib Balala, the most prominent member in the government of Arab descent. "I felt proud to receive him", he said, thereby going against his party boss Raila Odinga who denounced the visit.

Referring to the Rome Statute establishing the ICC, Odinga said:

"We have no problem with Sudan as a neighbour, but we are a signatory to the Rome Statute. We are going to look very bad in the eyes of the international community if we invited somebody indicted to spoil the party for us".

Kenya has played a major role in war and peace efforts in Southern Sudan over the last thirty years and the final stage of that process is coming up in January with a referendum on independence. With that historic event in sight it is understandable that Kenya does not want to offend Sudan.

But there is more at stake than the important relationship with Sudan. With the implementation of a new and liberal constitution, Kenya is keen to be seen as Africa's fastest democratising country, a country where "western" ideas about tolerance, pluralism, religious and press freedom are being established.

But by openly welcoming Bashir, Kenya has done neither itself nor the African continent any favours. Its action has undermined other countries such as South Africa and Uganda who pointedly refuse to receive him. Al Bashir can feel relaxed again about traveling within Africa.

HRW opens new office in Amsterdam

Human Rights Watch will open a new office in Amsterdam on 14 September, from which it hopes to strengthen ties with and closely monitor the new Dutch government.

Amsterdam bureau director Timmerman says an important reason for opening the new office is that "it has a very highly developed human rights culture and we want to be part of it". She added that the Netherlands is the third-largest source of HRW funding, after the US and UK.

The new office will focus mainly on foreign policy issues, but will also have a specific Dutch agenda. HRW international justice advocate Geraldine Mattioli told IJT the national agenda will focus largely on "asylum seeking and immigration issues". HRW recently criticised the Dutch initiative to send back Somali refugees to Somalia.

After controversial elections in June, in which the rightist Freedom Party (PVV) won a sizeable share of the vote, the Netherlands could be heading in a direction that might be less favourable to rights organisations such as HRW.

Mattioli said: "We will be watching closely what the new government does. But we have strong hopes and expectations. The Netherlands has been a key partner as one of the very human rights friendly governments within the EU."

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When facts are thin

Fact-finding at the international tribunals is not as precise as we think. Nancy Combs, Professor of Law at William and Mary Law School, explores this in her new book 'Fact-finding without facts: the uncertain evidentiary foundations of international criminal convictions'.

What are the basic conclusions of your book?

My basic conclusions are that, for a variety of reasons, witnesses at the ICTR, the SCSL, and the Special Panels for East Timor have a very difficult time providing the kind of testimony that fact-finders need to receive to determine with any kind of certainty who did what to whom. Testimony at these tribunals is frequently lacking in necessary detail and inconsistent with the witnesses' previous written statements. Some of these deficiencies stem from innocent causes, such as the witnesses' lack of education, investigator errors, the need for language interpretation and cultural divergences between the witnesses and courtroom personnel, but some of them stem from witnesses' efforts to evade or outright lie. And it's almost impossible to tell one from the other. Despite these difficulties, the tribunals I studied convict most of the defendants who come before them, so I looked at why that is. I concluded that because the Trial Chambers frequently receive evidence that leaves them uncertain, they are forced to supplement that evidence with inferences that they draw from the institutional affiliations of the defendant during the conflict. Although these inferences often tell us little about the specific acts charged in the indictment, they can create a picture of the defendant's overall guilt.

Can justice be delivered in these courts?

I think so. One of my conclusions is that the fact-finding at the international tribunals is not the fact-finding that appears to take place, but that doesn't necessarily make the convictions wrongful or the process unjust.

What are the chances that somebody might be convicted and found guilty when actually they maybe are not?

Wrongful convictions are possible in any criminal justice system, but I

don't think it's likely that the tribunals I studied are convicting innocent people. What is more likely is that the facts that are supporting those convictions are inaccurate. In other words, I believe that – based on the totality of the evidence – the Trial Chambers can reach a high level of certainty that a particular defendant played some role in the commission of genocide. But because the eyewitness testimony the Trial Chambers receive is problematic in so many regards, they can have far less certainty that that same defendant was at a particular roadblock on a particular date distributing weapons.

As to fact-finding, is this a case of 'practise makes perfect'?

Not entirely. Many of the fact-finding impediments that the Trial Chambers confront are not amenable to significant change because they stem from educational, cultural and linguistic factors. But improvements can be made. The tribunals need to devote resources to language interpretation and their investigations practices to eliminate the problems that can be eliminated. The tribunals should conduct more on-site visits not only because they provide information and enable the judges to press witnesses in a more informed and rigorous way, but also because they are apt to deter some witness lying. Witnesses are less likely to lie if they know that their stories would be carefully scrutinized. Finally, I suggest some minor and some major alterations to the tribunals' procedural systems that are likely to enhance accuracy in fact-finding.

Do you think there is a danger that people fit the case to the facts that are available rather than the facts that are needed?

Yes, but that's been the case throughout time and history. In domestic criminal justice systems, rape convictions are now far more certain than they used to be thanks to DNA evidence, but we still prosecuted rape 30 years ago even though the evidence supporting the convictions was less certain. The tribunals have to do the best they can with the evidence that is available and the improvements I suggested are designed to ensure this.