

Editorial

Criminal Justice & Human Rights

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Keywords

Criminal Justice, Human Rights, ICC, Al Bashir, Victim Participation.

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Merkourios 2010 – Volume 27/Issue 72, Editorial, pp. 01-03.

URN: NBN:NL:UI:10-1-100922

ISSN: 0927-460X

URL: www.merkourios.org

Publisher: Igitur, Utrecht Publishing & Archiving Services

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When Jan Jippe Arends, the Executive Editor of *Merkourios*, invited me to write this editorial, I immediately accepted. While in the United States law journals are usually run by law students, this is not the case in Western Continental Europe. As a result, *Merkourios*, a law journal fully run by students from Utrecht University, is quite an innovative enterprise, which, if rigorously managed, can prove to be successful despite of departing from the traditional approaches to the running of law journals in Western Continental Europe.

In addition to the innovative approach of *Merkourios*, I was pleasantly surprised by the editor's decision to devote the present volume to international criminal justice and human rights. This choice is fully in line with the path chosen here at Utrecht University years ago. Some universities have decided to address those issues relating to international criminal law from the broader perspective of public international law. Other universities prefer to analyse such issues from a national and comparative criminal law perspective. Nevertheless, here at Utrecht University, we have always stressed the importance of a close relationship between international criminal law and international human rights. It is for this reason that the Willem Pompe Institute and the Netherlands Institute for Human Rights jointly offer a LLM Programme on the 'International Law of Human Rights and Criminal Justice', which includes a Clinical and an Externship Programme on Conflict, Human Rights and International Justice.¹

Several decisions of the international criminal tribunals for the former Yugoslavia and Rwanda have highlighted the need to consider international human rights law in order to adequately address international justice issues. Nevertheless, article 21 (3) of the Rome Statute of the International Criminal Court (ICC), which has a preeminent role among the sources of law applicable before the ICC has gone a step further, by requiring the ICC to ensure that:

The application and interpretation of law [...] be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

From the beginning of the ICC's judicial activities, the single judge of the *Lubanga* case (the first case before the Court) stressed already on 15 May 2006 the relevance of the 'general principle of interpretation set out in article 21 (3) of the Statute'.² Soon afterwards, the Appeals Chamber confirmed this relevance by underscoring on 14 December 2006 that:

[...] Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights [...]³

Subsequently, the relevance of international human rights law in the ICC's practice has been notable in several areas. As the ICC Appeals Chamber has affirmed, this has taken place 'first and foremost' in the context of the interpretation of the right to a fair trial.⁴ It has also taken place in relation to other issues, such as the determination of the specific procedural rights to which victims are entitled in the ICC proceedings. In relation to this last issue the Court has relied, to an important extent, on the abundant case law of the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights,⁵ as well as on the 1985 UN Declaration⁶ of Basic Principles of Justice for Victims and Abuse of Power and the 2005 Basic Principles⁷ and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁸

1 See <http://www.uu.nl/university/international-students/EN/intlaw/Pages/default.aspx>. See also <www.uu.nl/legalclinic>.

2 *The Prosecutor v Thomas Lubanga Dyilo* (hereinafter, *Lubanga*), Decision on the final system of disclosure and the establishment of a timetable, Pre-Trial Chamber I, ICC-01/04-01/06-102 (15 May 2006) Annex I para 2.

3 *Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Appeals Chamber, ICC-01/04-01/06-772 (14 December 2006) para 37.

4 *ibid.*

5 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Pre-Trial Chamber I, ICC-01/04-01/07-474 (13 May 2008) paras. 30-44. See also Situation in the Democratic Republic of the Congo, Public Redacted Version of the Decision on the Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6, Pre-Trial Chamber I, ICC-01/04-101-t-EN-Corr (17 January 2006).

6 United Nations General Assembly, UN Declaration of Basic Principles of Justice for Victims and Abuse of Power, A/Res/40/34 (29 November 1985) para 88.

7 United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/Res/60/147 (16 December 2005).

8 *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Pre-Trial Chamber II, ICC-02/04-01/05-368 (13 February 2009).

Without doubt, the articles included in this volume address pressing subjects. Numerous human rights violations in Latin-America relate to the exploitation of mineral resources located in land that belongs to indigenous and afro-American communities. In the coming years, there is the risk that this problem will become even more serious as a result of governmental development plans which strongly rely on the investment of foreign mining companies in areas owned by the said communities. As a result, the role of the IACtHR in the design of appropriate measures for collective reparation, the establishment of adequate enforcement mechanisms, and, above all, the deterrence of States from implementing development plans that violate the rights of indigenous and afro-American communities is now more important than ever.

Also highly topical is analysis of the scope of application, if any, of the immunity of current heads of states when they are accused of committing genocide, crimes against humanity, or war crimes, that is to say, 'the most serious crimes of concern to the international community as a whole'.⁹ This is a complex matter that has substantive and procedural implications, and is at the very roots of the ongoing case before the ICC against current President of Sudan, Omar al Bashir, for his alleged criminal responsibility as a principal to genocide, crimes against humanity and war crimes that allegedly occurred in Darfur from 2003 to 2008.

An analysis on the legal nature of 'asset freezing' and the extent to which drug-related violence may constitute a basis for refugee status protection under international refugee law and U.S. asylum law completes this excellent first - and I hope not last - monographic volume on international criminal justice and human rights of Merkourios. ■

9 *Rome Statute of the International Criminal Court*, (opened for signature 17 July 1998), 2187 UNTS 90 (entered into force 1 July 2002) preamble.