

## **Interview with Judge O-Gon Kwon**

Judge O-Gon Kwon was a permanent judge at the International Criminal Tribunal for the former Yugoslavia from November 2001 to March 2016. He was also Vice President of the tribunal from 2008 to 2011. At the ICTY, he presided over the trial of former Bosnian Serb leader, Radovan Karadžić. He also sat on the trials of Slobodan Milošević, former President of the Republic of Serbia and the Federal Republic of Yugoslavia, and of Popovic and others, which dealt with the events of Srebrenica. Following his tenure at the ICTY, Judge Kwon was elected President of the Assembly of States Parties of the International Criminal Court in December 2017. He served in that capacity until February 2021. Prior to his international career, Judge Kwon served as a judge in the Republic of Korea for 22 years. He also served in various senior positions in the government of the Republic of Korea. He holds an LL.B degree from Seoul National University College of Law and of two LL.M degrees, from the Graduate School of Seoul National University and from Harvard Law School.

**What led you to specialize in international humanitarian law and to serve as a judge for the International Criminal Tribunal for the Former Yugoslavia (ICTY)? How did your experiences as a member of the judiciary in your home country of the Republic of Korea shape your approach to the work of the ICTY?**

To be frank I didn't intend to specialize in IHL as such. However, having served as a judge in South Korea for 22 years, I became curious about the idea of becoming a judge at an international tribunal. I thought that it would be intriguing, albeit challenging, to adjudicate on behalf of the international community as a whole. I had sufficient expertise in criminal law and criminal procedure, so it was not a big problem for me to catch up and familiarize myself with IHL and the criminal procedure at the ICTY. Further, when I joined the ICTY, its procedural rules had already converted to a hybrid system, combining both the common law and the civil law features. This made it easier for me, coming from the Republic of Korea which has also adopted such a hybrid system, to quickly adapt to the new system and to contribute to its development to a certain extent. For example, if you follow the jurisprudence, I offered some momentum to import some civil law features such as the admission of written statements within or under certain conditions.

**Turning to specific cases during your time on the ICTY, such as the trial of former Bosnian Serb leader Radovan Karadžić, of the former President of the Republic of Serbia and the Federal Republic of Yugoslavia Slobodan Milošević, and the trial of Popovic and others, what were some of the key things that stood out to you?**

I worked at the ICTY from 2001 to 2016. During that period, I was involved in many cases: trials, appeals, pre-trials, sentencing, contempt, referrals and so on. At one point in time, I think I had the highest caseload of any of the judges in the tribunal. However, the main high-profile cases that I was involved in were the three trials that you mentioned: Milošević, the Popovic, et. al., and finally the Karadžić case, and each of these took five years, totaling fifteen years.

My first matter, the Milošević case, drew extraordinary worldwide attention in that he was the first head of State to be indicted for acts that had allegedly been committed during his term in office. Unfortunately, as you know, Milošević died in prison due to his health problem when the trial was in its final stages, so of course the proceedings were terminated. It was a great disappointment, but I believe that the case itself still sent an important message that the international community would not tolerate criminal impunity for heads of State.

What is of note is that all the three cases I was involved in included the Srebrenica component, and therefore I may be one of the judges who looked at the Srebrenica massacre in the most comprehensive way. In particular, my second case, the Popovic et al. case was exclusively related to Srebrenica event and included seven accused from various echelons of the military and the police. And so what had happened in Srebrenica was analyzed in the most comprehensive way. Further, Karadžić was the individual at the highest echelon, as the President of the Serbian Republic for Bosnians Serbs.

I would say that the case has stood out the most for me is the Karadžić case, as I was the presiding judge. It was a challenging and yet rewarding experience. Karadžić was charged for two counts of genocide – one for Srebrenica component and the other for the municipalities component, or in other words “ethnic cleansing”. As you know, the Chamber concluded that what happened in Srebrenica in the summer of 1995 amounted to a genocide and found Karadžić to be individually responsible for this. In terms of jurisprudence of international criminal law, the Srebrenica case was the first case in which the “intent” to destroy a “part of a group” was held to amount to *dolus specialis* or special intent for genocide. To put it simply, the intent was not to destroy the whole Muslim group but the groups who were in the part of Eastern Bosnia; the Muslims who stayed in

the Srebrenica area. So that's the first case in which the part of the group was targeted.

However, as regards the municipalities component, the Chamber held that what happened there did not amount to genocide. There, the Chamber was not satisfied beyond reasonable doubt that there had been such "special intent" to destroy a part of the whole of a group, as part of ethnic cleansing. So in the one case, there were two different charges of genocide and the Chamber had to distinguish one from the other. That was a very difficult task for us.

**Turning to current issues, how do you think the COVID 19 pandemic has affected work in international criminal law?**

As I left the ICTY before the outbreak of the COVID 19 pandemic, I am not in a position to comment on how work in that kind of tribunal has been affected by the pandemic. But I can certainly imagine that there are various difficulties in terms of investigation, and logistical problems related to the trial such as bringing witnesses to The Hague.

However, while I served as the President of the ASP<sup>1</sup> of the ICC<sup>2</sup> from December 2017 to February 2021, the last part of my mandate was severely affected by the pandemic so much so that I could not travel at all and all the meetings had to be held virtually including the interviews of candidates for judges and the prosecutor. At the same time, however, I think there was also merit in having these kinds of virtual meetings. One of the problems with the ASP of the ICC has been the issue of the working method between the New York delegates and The Hague delegates. However, when we had virtual meetings, the delegates in The Hague and in New York were able to participate in meetings at the same time, which would be impossible if you have to hold all meetings in person.

**Do you see the Asia Pacific region as having contributed to the development of international humanitarian law?**

Yes and no.

Asia is said to be the place where the idea of international humanitarian law originated. Sun Tzu's Art of War, a Chinese classic on military strategy written around 500 BC and the Indian Code of Manu developed between 200 BC and 400 AD are good examples. And it is also true that the Asia Pacific region

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<sup>1</sup> Assembly of States Parties to the Rome Statute.

<sup>2</sup> International Criminal Court.

provided a lot of competent judges, including Judge Pangalangan from the Philippines, to various international tribunals and courts, thereby contributing to the development of ICL and IHL.

However, whilst the Asia-Pacific is the most populous and economically dynamic region in the world, Asian States are the least likely of any regional grouping to be party to most international organisations. There is no regional framework here comparable to the African Union, or the Organization of American States or the European Union. And Asian States have by the far the lowest rate of acceptance of compulsory jurisdiction of the International Court of Justice. The membership of the International Criminal Court is a very good example. Almost two-thirds of the countries of the world have ratified the Rome Statute. But only one-third of Asia Pacific States have done so, or 19 out of 53 countries.

It is noteworthy that we did see the establishment of the Association of Asian Constitutional Courts in 2012. In the same vein, I sincerely hope that our shared efforts for implementing justice and rule of law in the region will bring about the realization of our dream of having a common regional judicial body, such as an Asian Pacific Court of Human Rights, in the near future.

Further, I mention that there have been a number of judges that came from the Asia Pacific Region. Now, I would like to see many staff members from the Asia Pacific Region at the ICC and other institutional organs. In this regard, while I served as the President of the ASP, I used every opportunity to emphasize the importance of geographical representation in staffing issues and I look forward to seeing some positive results.

### **Looking at academic journals, such as the Asia Pacific Journal of IHL, how impactful have these journals been in the development of international humanitarian law and related fields?**

The role of academic journals and blogs is of critical importance for the development of jurisprudence of criminal law and criminal procedure law. Practitioners are so busy dealing with their everyday routine and workload, so they need to receive some kind of input and guidance on a regular basis, to look back at their practice and allow them to think about a way forward. This also applies to the administration of the ASP, where I think the role of journals is somewhat similar to that of civil society. I am a strong advocate for this, serving myself as a member of the Board of Editors of one such academic journal.

To be successful, these journals must of course be able to publish good articles. It is also important that they are able to motivate scholars, in particular

young scholars, to contribute to the development of IHL and ICL. Organizing interesting seminars and symposiums on important topics or giving some opportunities like scholarships or awards to young scholars may be some ways to do that.

**What do you see as some of the challenges facing international criminal law and what might be some of the ways the international community can address these?**

The message that I'm always trying to send is that the international justice system is in its infancy stage, so we can only expect it to progress slowly. I see international criminal justice as a living or growing organism – very much a project in progress. We have to admit it is far from being perfect. We have to develop it bit by bit. And it is a great and intriguing experience to be able to contribute to it.

In terms of challenges, first of all there are so many parts of the world that are out of reach of the rules-based international order. So much so that these States as well as non-State actors push the boundaries of humanity with acts of violence conducted with disregard for human rights and internationally accepted norms.

Currently there are 123 States Parties to the ICC. This means one-third of countries of the world are not under the umbrella of the Rome Statute, not to mention some big powers such as the United States, China and Russia. When I was elected as President of the Assembly of States Parties to the ICC, I made a pledge to do my best to increase the number of countries that ratified the Rome Statute, in particular in my region Asia-Pacific. I have to admit, I only had limited success. During that time, the Philippines withdrew from the ICC and Malaysia, which had reached the final stage of ratification, withdrew its intention at the last minute. However, we were so pleased to be able to welcome one country from the Pacific at the last minute: the Republic of Kiribati. This meant we at least maintained the total number of States Parties from the Asia Pacific region.

As for other challenges for the ICC, I think the lack of cooperation from States Parties and the international community, including the United Nations Security Council, also raises serious problems. The case of Omar al-Bashir may be a good example. Although the UNSC referred the case to the ICC almost 20 years ago and the arrest warrant was issued more than a decade ago, he is still at large. So without cooperation from the international community, the ICC, or any other international court or tribunal, is just a giant without limbs. And here I would also point out the critical role of the principle of complementarity, in that the primary responsibility to prosecute the heinous crimes lies with the States or the domestic jurisdiction. In other words, the ICC steps in only when domestic jurisdictions are

unable or unwilling to carry out effective investigations and prosecutions. In other words, the ICC is intended to complement, not to replace the domestic jurisdiction. However, I'm afraid that this principle of complementarity does not seem to be widely or properly understood by many States and there still exists a lot of misunderstanding.

**Talking about the ICC, what are your views on the prospect of involving the crime of ecocide as an international crime?**

For me, it was not until I attended the Pacific Islands Roundtable on the Ratification and Implementation of the Rome Statute of the ICC held in Port Vila, Vanuatu<sup>3</sup>, one of the Pacific Island countries, that I was able to feel in my bones the seriousness of the issue of ecocide. At that conference, I heard the serious arguments from delegates from the Pacific Island countries for the inclusion of ecocide as an international crime. I responded to them that such argument might be another reason for them to ratify the Rome Statute to become a part of the family of the Rome Statute, because by doing so they can have a stronger voice for criminalizing ecocide at the international level as well.

However, practically, I think it will be difficult to get consensus from the international community to include the crime of ecocide as an international crime at this juncture. Also, there is an argument that it may be best for the ICC to focus right now on enhancing the effectiveness of the performance of its traditional mandate. Therefore, I would propose that the process of criminalizing ecocide at the international level should start with domestic restriction and should proceed to the regional movement by way of alliances, and finally aiming at becoming a global movement.

**What is your forecast for the ICC in the coming years especially given the new Prosecutor?**

Well, the new Prosecutor is incredibly competent and experienced, and will no doubt provide very good momentum for a renewed way forward for the court. At the same time, the Independent Expert Review or IER also offers a golden opportunity to enhance the performance of the ICC and strengthen the Rome Statute system.

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<sup>3</sup> Pacific Islands Roundtable on the ratification and implementation of the Rome Statute of the International Criminal Court, held on 31 May 2019. See <https://www.icc-cpi.int/news/Pages/event.aspx?event=20190531-seminar-port-vila>.

As you know, during my mandate as the ASP President, the ASP commissioned eminent well qualified experts for this exercise. And the group of independent experts, under the leadership of its chair Mr Richard Goldstone, issued its final report last year. Now, the ASP is working hard to assess and to implement the recommendations of the experts contained in that report. I believe this IER report and its implementation will be remembered as a legacy for the international criminal justice system in the future. I have no doubt States Parties and all the other stakeholders will spare no effort in their support for the ICC. As a young institution, a “project in progress”, the ICC and the Rome Statute system will continue to progress and be perfected bit by bit with such support.

**What qualities do you think are important in a position such as the prosecutor or a judge of an international court?**

For any judge, any criminal judge, it is imperative to be equipped with a sense of justice and the ability to empathize with the victims. That said, the judges at the international tribunal are supposed to work with individuals from various parts of the world with diverse legal and cultural backgrounds. Therefore, you need to have an open mind and you should avoid the habit of sticking to familiar practices or theory in the country where you come from. An open mind is very important. Finally, of course, you should work hard. The case load is just enormous because the size and scope of the cases are truly immense and not comparable to the ones in the domestic jurisdiction, so if you don't work hard, the case could be prolonged forever.

**Do you have any specific advice for aspiring legal practitioners especially those who are thinking of specializing in IHL or ICL?**

For certain contexts in Asia, like Philippines, English will not be an issue. But even for others, for example Korean students, I say don't be too concerned about language. What matters is the content and what you like to do so focus on what you like to do. If you are interested in ICL or IHL, continue and keep on going and keep studying and developing yourself. I recommend doing some internships at international tribunals or international organizations. Having real experience gives you something else.