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## **MEET THE LAWYER TAKING THE EU MIGRATION POLICY TO THE ICC**

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17.06.2019

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EU Observer (14 June 2019)

Juan Branco is one of Europe's most in-demand lawyers. He used to work for the International Criminal Court (ICC) in the Hague, in addition to the French foreign ministry, and he is currently on Julian Assange's defence team.

Now he wants to see European Union officials and member states prosecuted for "crimes against humanity" for the bloc's migration policies. Branco sat down with the EUobserver for an interview.

### **Q. Can you please explain the legal document submitted to the ICC this month?**

Me and my good friend and colleague Omer Shatz, whom I met at Yale University some five years ago, have worked on this dossier thoroughly for more than two years.

It all started with one particular video from the investigative organisation Forensic Architecture in which we could follow the events of a migrant shipwreck in the Mediterranean, and what we consider to be a crime scene.

Several stakeholders from the EU, the military and the Libyan Coastguard appear in the images, supposedly there to save people in distress but ultimately □ and deliberately □ not saving those individuals from drowning.

We did a legal analysis of the material, based on my own experience of working at the Office of the Prosecutor at the ICC □ with these particular types of complications □ and discovered criminal liability. This led us to investigate the EU migratory politics between 2014 and 2019 during the so-called refugee crises.

What happened was no tragedy, it was a series of voluntary acts, conscientiously and willingly executed when applying the European politics of deterring migrant flows at any cost □ even when that meant the death of tens, hundreds or even thousands of individuals, and torture and rape in Libyan detention centres.

### **What are your expectations of the outcome?**

Enormous. We have respected all the internal canons of the ICC and we are certain that, in terms of quality, this is an ultra-solid legal document.

It is for that reason it took us two years to finish it. We wanted to make sure the ICC would not have any excuse nor alternative but to commence a proceeding. We are talking about a case of a crisis with a death toll of more than 14,000 in which one of the stakeholders – the EU Commission, admits its implication – even if only by calling it "an error". Consequently, the minimum consequence must be to start a proceeding, at least.

We are talking about institutions [EU institutions, member state governments] with their headquarters only tens of kilometres from the ICC's own headquarters. It would not be complicated for their investigators to just go there, knock on their doors and say: 'give us access to your archives'.

There are established agreements of cooperation between these institutions so they could do that without any sort of difficulty nor any risk for their safety. If they would not investigate this, it would demonstrate a severe insufficiency and complicity.

### **When will we know if the proceeding will be opened?**

According to our estimations, it will take only a few months for the court [ICC] to analyse this case. Since the court is obliged to at least respond to our submission, we would consider it serious if, by the end of this year, there is no type of action whatsoever from their part,

You have worked at the ICC yourself, and have expressed criticisms regarding the institution.

Yes, and I hope to be wrong. I have questioned its independence from the same stakeholders appearing in this dossier.

### **Why are you doing this?**

We are not a lobby, as they say, we were lawyers, academics and students that have been working on this dossier.

What we are demonstrating with this investigation is that this goes beyond politics. There can be agreements or disagreements regarding migration politics, integration policies, border control etcetera. However, there are clear limits established by international criminal law .

That means that it is illegal to cross those limits. Now those limits are crossed happily and continuously which means something very simple: that there are criminal liability and that some people should have to go to prison.

We are not demanding political consequences but legal ones, even if that means that an open proceeding would be closed.

We want the responsible people to pay the consequences of their crimes. These are criminal politics; to knowingly and willingly let people drown, and to fund and train the Libyan Coastguard

in their criminal activities.

During a crisis it is very difficult to defend minorities because it is not politically profitable.

In our liberal democracies, politics must be profitable to persist. But there are two pillars of a liberal democracy: one is the freedom to vote in free elections, and the other is the rule of law. If one does not work we have to recur to the other, which is the case here.

Is it possible for you to say which people could end up in prison, if your submission leads to prosecution?

We do not want to play that game [...] I mean, this is not a game.

In order to know for sure we would need access to those classified archives only accessible if the ICC begins the proceeding. The decision-making at the European level is very complex. There are internal power games between the European Council and the European Commission, power games between their own officials and administrators and so on. We are talking about complex interactions so if we accuse one specific person it is possible that his or her responsibility cannot be established.

Take the former commissioner of internal affairs [Cecilia] Malmstrom, for example. It is possible that she fought fiercely against these criminal politics behind the scenes. We don't know that □ even if I doubt it.

When Malmstrom announced the passing from the Italian search and rescue mission Operation Mare Nostrum, to EU-coordinated Operation Triton, when she evidently knew that would lead to more deaths at sea her responsibility was established.

What we do not know is what level of responsibility we are talking about. Maybe she had to obey orders from Jean-Claude Juncker Juncker or from someone else. When journalists question her and others they answer ambiguously. They say 'no Operation Triton was not a substitute for Mare Nostrum', but it was ...

They have difficulties assuming their responsibility.

EUobserver asked commissioner Malmstrom to comment. She said: "The coordination of the search and rescue missions is regulated in international law, and is the responsibility of the national authorities. The commission can support national operations, with the approval of the member countries, but not substitute them. Mare Nostrum was in Italian initiative. All decisions regarding its persistence and size was up to the Italian government of the time. At the time I was clear: Frontex could assist Italy's rescue missions, but Frontex did not have neither the means nor the competence to substitute Mare Nostrum. On various occasions I begged the member countries to show solidarity and help out with the rescue missions on the Mediterranean Sea. On as many occasions, I brought up the need for secure and legal ways into the EU. All this stands clear if you follow the references linked to my name in the submitted dossier."