



Meeting Summary: International Law Programme

Milestones in International Criminal Justice

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International Criminal Tribunal for the former Yugoslavia

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INTRODUCTION

The event was hosted jointly between Chatham House and Doughty Street Chambers to discuss milestones in international criminal justice and was the first in a series of joint seminars to be held this topic.

The event was not held under the Chatham House Rule and a video recording of the event is available on the Chatham House website.

INTRODUCTORY REMARKS

Geoffrey Robertson QC:

Seventy five years ago the world was looking in amazement at the purge trials being conducted by Stalin in Moscow. There was no CNN, no Wikileaks, and no international justice organisations observing, and ‘human right’ was not yet a recognised term. The first of the modern human rights conventions based human rights not on the law of nature or on religion but on the idea that man is entitled in justice to rights which are enforceable against all, even leaders. President Roosevelt’s ‘four freedoms’ speech which set out four freedoms: freedom of speech, freedom of worship, freedom from want and freedom from fear.

After the Second World War there was a debate over whether the Nuremberg trials should be held. The Nuremberg trials ended the possibility of holocaust denial and succeeded partly because the Nazi defendants cooperated with the process once they realised that they would get a reasonably fair trial and partly because the Nazi regime had written everything down and the court had access to all the records. The Nuremberg trials did not face the difficulty of working with no documentation that the Special Court for Sierra Leone had or the problem of a government refusing to hand over documentation, faced in relation to the Serbian government by the International Criminal Tribunal for the former Yugoslavia.

Nuremberg was the great milestone in creating international criminal justice. After Nuremberg came the Universal Declaration of Human Rights, the Geneva Conventions, the Genocide Convention and many other treaties over the next fifty years, including those against torture and racism and covering the treatment of women and children. These are all good conventions, but their effectiveness is hindered by a lack of enforcement mechanisms.

The Pinochet case at the end of the last millennium was a hugely important precedent and was the first suggestion in international criminal justice that heads of state might indeed be brought to trial. While criticisms remain, in a very short time of ten years the world has moved from outright hostility to a general acceptance that international criminal justice is a good thing, as evidenced by the trials of Radovan Karadzic and Charles Taylor and the arrest of Ratko Mladić.

A recent great milestone in international criminal justice is Security Council resolution 1970. Unlike earlier resolutions on the situation in Darfur, this was a unanimous referral by the Security Council of the situation in Libya to the

international criminal court. This is just seventeen years after a time when US hostility was so strong that it passed the American Service Members' Protection Act which allowed the US President to attack the Hague if any American serviceman was arrested by the international criminal court. The international community has come a long way and as a result has created expectations, as evidenced by the people on the streets of Syria demanding that President Assad be tried at the Hague. The world now has a duty to deliver on those expectations. International criminal justice has come a long way to delivering on the Nuremberg legacy in a very short period of time; many milestones have passed but there is still a long way to go.

THE STATE OF INTERNATIONAL CRIMINAL JUSTICE TODAY

Judge Howard Morrison QC:

International law has come a long way and has now crossed the line in public perception between obscurity and acceptance, as evidenced by the fact that people now understand the difference between the international criminal court (the **ICC**) and the international court of justice. However, there is still some way to go. For example, when Ratko Mladić was arrested some media reported that he was to be tried at the ICC and not the International Criminal Tribunal for the former Yugoslavia (the **ICTY**); this difference is small but important. It is difficult to expect the general public to understand the mechanics of international criminal justice if they are not reported correctly.

One of the main problems facing international criminal law today, particularly when looking at the ICC, is that there are not enough people behind it. In the preparatory commissions for the Rome Statute of the International Criminal Court (the **Rome Statute**), the United States took a leading role and it was a sad development when it became apparent that it was not going to join the court. Russia, China, India and countries in the Middle East are not on board. The reason for the reluctance of these states is partly that they do not want their sovereignty diminished and partly fear that their citizens may end up being indicted by the ICC. While these are understandable concerns they are not good reasons. There is a need for more people to get on board if there is to be true international criminal law in a truly international criminal court.

There is still a debate as to how international criminal law should be formed and whether there should be a formalistic or pluralistic approach. Those from civil systems support a fully codified set of laws but others feel that the law should evolve on a case by case basis through developed precedent. One advantage of the former, which should not be underestimated, is that it ensures that everyone knows exactly what they have to do.

In the Hague people initially wanted proceedings to run in the way that they were used to in their own country. It is better now that there is a greater body of jurisprudence and more academic literature but the process has taken several years to homogenise. The civil versus common law debate, however, is still ongoing and it would be better to take the best parts of both systems and combine them rather than spend time arguing over one or the other. One thing that has made a difference has been the full incorporation of the defence into the organic structure of the court system. People are beginning to understand that the points that they were focussed on in the past were not

always the right ones and that approaches to cases may have been too selective and not broad brush enough.

There has been criticism from some African countries that the ICC has concentrated too much on African cases, but another way to look at this is that the aim is the protection of people in Africa against whom egregious crimes are alleged and that the jurisdiction of the court should therefore be applauded not denigrated.

There is an increased understanding through developing jurisprudence of the appalling nature of rape as a war crime, and that women and children often suffer the most in genocides, crimes against humanity and some aspects of war crimes. It is for those people that international criminal law must strengthen and go forward. While we are on the road to ending impunity and immunity we are not there yet. In order to make this happen it is important not only that statutes are passed but that the international community works together to ensure that they are applied and followed; otherwise they are of little value.

The role of victims and witness participation in international criminal justice is now being looked at for the first time at the ICC. This needs to be approached with realistic expectations since allowing thousands of people to participate in trials would be too expensive and would take too long. The court needs to find a way to fit witness participation into the reality of what it can actually do. The ad hoc tribunals, the ICTY and the International Criminal Trial for Rwanda, are coming to the end of their mandates and the ICC is the successor court to these. This is a senior criminal court and it must be seen as such and be staffed by appropriately experienced criminal practitioners and judges. It deals with human rights but it is important to realise that it is not a human rights institution. When it is seen to be a senior criminal court which is doing an efficient and cost effective job then this will hopefully encourage more governments to join. It is also important that people work to influence those governments which are not yet a part of the ICC to try to universalise acceptance of the court.

ICC PROSECUTOR V GADDAFI

Rod Rastan:

The ICC is now ten years old and is building on the milestones put down by the ad hoc tribunals. The statute constituting the court was negotiated in 1998 and the court came into being in 2002; it is a milestone in itself that the sixty ratifications required for its creation were achieved in such a short time. At the time of the Darfur referral, despite a lot of ambivalence and many alternative suggestions, including extending the mandate of the ICTR or creating a new ad hoc tribunal, the Security Council turned to the ICC to investigate the situation in Darfur. Despite the abstentions on the final resolution, this referral was a significant milestone. This year there has been the unanimous resolution referring the situation in Libya to the ICC with countries such as the United States, China and Russia voting in favour of an ICC investigation. Justice is now seen as the norm not the exception and the court is firmly established as part of the arsenal of tools to deal with international crises.

Now that it is normalised, people are querying why the ICC is *not* involved in certain situations such as Syria and Sri Lanka rather than objecting to its work. The major challenge for the ICC is that while it is an international criminal court, it is not yet truly universal. While 118 State Parties is a large number and is rising¹ there are still significant gaps in the Middle East, Asia and the major powers. The Arab Spring has brought renewed interest in the ICC with Tunisia joining the court and Egypt expressing interest in membership. Views are changing and countries which used to be afraid that the ICC would be used as a tool against them are increasingly seeing it as a positive protection for their citizens. There is also renewed interest from the Middle East, and Palestine has lodged a declaration asking the court to investigate events there, although there is a question over whether it has the capacity to do this. Countries in Asia are also turning to ICC membership with countries such as Malaysia and Indonesia considering the passing of enabling statutes and the Philippines recently signing up. There are however still many cases where the ICC does not have jurisdiction because the alleged crimes are neither in the territory of nor perpetrated by a national of a State Party. These cases fall to the Security Council, who can refer any case

¹ The 117th state party, the Philippines, will take effect on 1 November 2011 and the 118th, the Maldives, on 1 December 2011.

to the court under its powers under Chapter VII of the UN Charter (**Chapter VII**)², and its role within the court apparatus is also very important.

Achievements of the ICC

The ICC has opened six investigations, all in Africa: in Uganda, the Democratic Republic of Congo, Central African Republic, the Darfur region of the Sudan, Kenya and Libya. Cote D'Ivoire is opening up and there are other situations around the world which some argue the ICC should investigate: others say that it is better to work with the authorities of the state in question under the complementarity principle. These situations include Colombia, Afghanistan and Georgia. In relation to Georgia, both Russia, a non-party to the Rome Statute, and Georgia have called for accountability; this active engagement from the Russian authorities is an interesting development.

The ICC is different from the ad hoc tribunals in that it is a permanent court and therefore the cases that emerge from its investigations are necessarily limited in number. The ad hoc tribunals were engaged with one situation for a number of years and had the capacity to bring numerous indictments, around 160 at the ICTY and about a hundred at the International Criminal Tribunal for Rwanda. This number of indictments per situation is simply not possible for the ICC. The Special Court for Sierra Leone brought about twelve indictments representing four of the main factions involved and this perhaps may be a more realistic model for the ICC. Any investigation will result in intense debate around selection and prioritisation of suspects and the difficulty of narrowing down the thousands of people involved to just a few indictments. In the Kenya investigation there are currently six indictments, three for persons associated with each of the two ruling parties in the coalition government, in the Democratic Republic of Congo cases are being brought against warlords from three of the main factions and in Darfur against three people on each side to date; although this very much reflects a work in progress. In Libya there are currently three indictments, but it is likely that more will follow as the investigation continues against persons associated with both the pro-Gaddafi and former rebel sides. The Office of the Prosecutor is not focussing its efforts on foot soldiers and in some cases not even commanders. It is focussing on the people who bear the most responsibility for the most serious crimes, and this may be people who are several steps removed and have no direct blood on their hands. It is, of course, hard to prove cases at this level

² Charter of the United Nations, Chapter VII

as there are rarely direct orders tying them to crimes, which adds to the complexity of such cases. Usually a case is formed by building links from the crime base to the person at the top, although in Libya the opposite was true. The leaders declared their intention to go 'door to door' on national television but initially there was less clear information about what had actually occurred on the ground.

Challenge for the ICC

The ICC has a two-stage confirmation and trial procedure as well as victim participation which means that the proceedings can be even more complex at times than at the ad hoc tribunals. The cases the court investigates are also complex due to the nature of the charges and because of the persons implicated at the highest levels. Four additional themes stand out in relation to the work of the ICC as a whole in terms of bringing into being a system of criminal justice in a true sense, comprising the interaction of national and international courts.

Firstly, the ICC faces the perennial challenge of obtaining effective cooperation from national authorities both for the execution of arrest warrants and the gathering of evidence. Secondly, there remains a need to operationalise a complementary model of criminal justice involving the combined activities of national and international actors. The few cases brought by the ICC must be complemented by the bulk of cases at the national level. An example of this can be seen in the former Yugoslavia where, despite the ICTY bringing over a hundred indictments, thousands of cases today are being brought before the war crimes chamber of the State Court in Sarajevo, and in Zagreb and Belgrade. The bulk of the cases related to any investigation will always fall to the national level and it is therefore critical to consider how to achieve this, especially in situations where the states in question may have been found unwilling or unable at the initial stage to investigate or prosecute. Thirdly, how to advance the peace versus justice debate and implement in practice the now widely held view that both justice and peace are required. Finally, the ICC must work to improve the victims' roles in proceedings and its outreach work to make sure that the process is meaningful to them.

Elham Saudi:

Perception of the ICC in Libya

Resolution 1970 was passed just 11 days after the first peaceful protest and was a quick, forceful and unanimous resolution. It was a big boost for the people on the ground to know that the international community was behind them. People see the ICC as a symbol of hope and they were excited that Gadaffi would be arrested and that both he and the victims would get the justice that they deserved - of a fair and proper trial. This view was enhanced by the comments of the ICC prosecutor, the quick issuing of the indictments and a real sense that there was going to be an end to impunity and immunity. However, following the initial activity there was little communication between the court and those on the ground. The press and NGOs were in Libya and were gathering evidence but there was no visible presence of the ICC. People were not clear as to what should happen after the indictments and did not understand why, for example, the BBC was in Libya but the ICC was not. That the words of the ICC and the international community were not backed up by the actions in the country and the lack of communication was a real problem.

Six shortcomings of the ICC

The experience of the Libyan people highlighted six practical shortcomings in the running of the ICC.

The ICC needs to better manage expectations. A massive initial reaction to a crisis followed by a sudden perceived halt is difficult for the victims to understand. This has not only been seen in Libya but also in Kenya where the ICC investigations had the support of 78 percent of the population a year ago but have just 51 percent support now. This is due to a combination of fatigue, a lack of knowledge of what is happening in the process and a lack of additional perpetrators coming to trial.

The ICC is not accessible enough. There is too much focus on the need to limit numbers due to time and funding constraints, but this isn't communicated in a tangible way to those on the ground. The court needs to find a way to explain the situation to people and to give a real voice to the victims. This wouldn't need to be a voice actually at The Hague but there could, for example, be a number that they can call to explain their situation.

The ICC needs to improve its responsiveness to changes in events. It can be too unwieldy at times and this can lead to an unacceptable delay in action. One month after Tripoli was liberated the ICC was not visible in the city. Each day's delay means more evidence goes missing and the cases get harder to establish.

The ICC needs to work better with its partners on the ground. For security reasons, the court does not reveal who it is working with but this can undermine the work of the people trying to gather evidence who cannot comment on situations or say what they are doing. It may be better for the ICC to make some of its efforts more public.

People look to the ICC as a symbol of hope and solidarity and the court needs to improve the way in which it shows how justice is being done. There needs to be active communication as to what is going on so that people don't see the investigation as a political statement at the time of an event which is not then followed through. The court often uses security as a reason for why it does not call more witnesses. The court needs to look at whether witnesses are endangered because they are speaking to the ICC or whether they are just *endangered*. There are many people who are in danger every day and many of these people would gladly take the risk in order to have their voice heard at the ICC.

These problems could largely be solved through an increase in transparency and education as to what the court process is and how it works. The court should also use the media properly to keep people informed, not just through prosecutor comments but with general updates through its website and social media such as a Twitter feed. Finally, the ICC could make better use of technology - for example, to involve more witnesses through a witness database.

FIRST INDICTMENT IN THE HARIRI CASE AT THE SPECIAL TRIBUNAL FOR LEBANON

Herman von Hebel:

The Special Tribunal for Lebanon (the **STL**) is very different from the other ad hoc tribunals. It has an extremely limited mandate and only has jurisdiction over the 2005 assassination of former Prime Minister Rafiq Hariri and a number of connected cases. Despite its limited jurisdiction, it could have a tremendous impact in Lebanon and on the cycle of violence that has led to so many political assassinations in the country for decades.

The STL

The statute of the STL is more civil than common law based and gives the pre-trial judge, who is looking at the pre-trial process and indictment very closely, a strong role in the tribunal. There is a separate defence office which provides support to defence teams appointed for the accused.

The STL has victim participation in common with the ICC and is learning from that court's lessons. Despite the fact that the number of victims is limited compared with other tribunals and cases, there were still more than twenty killed and more than 100 injured in the assassination and it is important that the survivors and their families have a voice in the courtroom. There is a process for victims to declare themselves for participation and there are people in the field in Lebanon and at the STL trying to contact victims, speaking to them and helping them make an informed decision as to whether to participate in the trial.

The STL does allow trials *in absentia*, an element which is different from all other international criminal justice tribunals. There is likely to be increased discussion on this in the coming months as there may be a need to hold such a trial in the foreseeable future.

The legal basis of the tribunal is unusual. It was initially supposed to be created on request from Lebanon and after negotiations with the UN, but the agreement never came to full fruition. The provisions of the agreement were ultimately brought into force by the Security Council under Chapter VII but they are only binding on Lebanon, and to a certain extent the Netherlands as the host state of the tribunal. The Lebanese government must provide 49 percent of the funding for the tribunal but the remaining 51 percent comes

from voluntary contributions from international donors which is particularly challenging in the current international financial crisis.

The First Indictment

There is currently one indictment which was initially submitted by the prosecutor in January 2011 and was finalised following some amendments in May. It received confirmation from the pre-trial judge in June. The indictment has been sent to the Lebanese government which under Chapter VII is legally bound to cooperate with the tribunal and to search for and arrest, detain and transfer the accused. Following an initial 30 day period the prosecutor general of the Supreme Court of Lebanon had to report to the tribunal on all the efforts that have been taken to find the accused. A lot of efforts have been made but so far these have not achieved the desired results and none of the four people named in the indictment have yet been arrested. A second report has now been submitted by the prosecutor general and it is clear that Lebanon continues to be under an obligation to search and arrest for the accused. This has been seen numerous times before in international criminal justice cases, including with Charles Taylor and Ratko Mladić, and there are many arrest warrants relating to international criminal justice that remain outstanding. While the Lebanese authorities are continuing to look for the accused, it must be accepted that it may not be realistically possible to arrest them in the foreseeable future and a decision on whether to hold a trial *in absentia* will probably be made towards the end of October. Even if such a trial does commence, Lebanon are under a continuing obligation to search for and execute any outstanding warrants.

It is for the trial chamber to decide if Lebanon has taken all reasonable measures to find the accused and this will primarily be based on the reports of the prosecutor general. If a trial *in absentia* is decided upon, then pre-trial preparation would begin and the prosecution would have to disclose to the defence teams appointed in the absence of the accused to serve their interests. The defence teams will need to properly prepare for a trial and they may take a minimum of four months to do this, but more time may be required. Realistically, it is not likely that any trial would start before late 2012 but while any calculations about judicial activities are difficult it is important for the trial to happen as quickly as possible, especially given the unique financial situation of the STL and the expense involved in international criminal justice.

The Hariri case is not the only one under consideration at the STL. The pre-trial judge recently asked Lebanon to refer three other cases to the tribunal

and following recent receipt of the referrals the prosecutor will continue to investigate the cases and decide whether to issue indictments.

Managing the expectations of any tribunal is very difficult and extremely important and the political situation in Lebanon remains very challenging. The STL has lots of support but it also attracts a lot of criticism and for this reason it has worked hard to be transparent, run outreach programmes for Lebanese society and have an accessible website to ensure that the people whose work the tribunal is for, the victims and population of Lebanon, are fully informed as to what is happening.

DISCUSSION

Question 1:

Is there any shift of support for the role of the ICC in Libya?

Elham Saudi:

Since the National Transitional Council took over as the interim government of Libya there has been a lot of discussion about domestic justice, and in an ideal world all crimes would be tried in Libya. People are generally asking two questions. Firstly, what happens about crimes committed prior to 15 February 2011? Resolution 1970 only covers acts committed on or after 15 February 2011 so trials in Libya are possible for pre-15 February acts; but there is a concern that it will be difficult to secure the return of those accused from the Hague to stand trial, especially if they are likely to face the death penalty in Libya. Secondly, people want to see the death penalty as a possible sentence and this is not a sentencing option under the Rome Statute. This is often a problem in international criminal justice and is not a point that should be relevant at this time. The important thing is to have the trial and the sentence is a result of that.

Question 2:

Is the STL thinking of referring Lebanon to the Security Council under Chapter VII since people know where the accused are and nothing is being done to arrest them?

Herman von Hebel:

The statute of the STL was adopted under Chapter VII and Lebanon is therefore under an obligation to cooperate with the tribunal. It seems that the authorities in Lebanon are already doing a lot but there are limits as to what they can achieve and it is very difficult to make them do any more. If there was a perceived lack of cooperation then the STL could call on the Security Council but this wouldn't necessarily achieve very much. This path has been taken by the ICTY but it didn't do much good. There is already international pressure on the Lebanese government to comply and to bring resources to the tribunal but there are areas of the country where it is very difficult for the government to operate and the Security Council can't do much to go beyond that.

Question 3:

It has been said that judges shouldn't make political comments. Is the work of judges inherently political having regard to the choice of indictments and statements by e.g. the AU telling countries not to honour their international obligations to comply with indictments?

Judge Howard Morrison QC:

Judges must concentrate on making trials as unequivocally and transparently fair as possible and should try to separate law from politics. This is extremely difficult to do in international criminal justice. The negotiations for the Rome Statute, for example, were intensely political. An example from the ICTY involves the special courts established in Sarajevo, Zagreb and Belgrade. Judges at the ICTY have to determine what evidence should be passed from ICTY records to those courts when they are trying cases, and must particularly make sure that protected witnesses aren't compromised. The work of these courts is done against political pressure and under security threats and the judges there do an excellent job. It is unrealistic to say that there is no political aspect to the work of an international criminal justice judge, but judges separate law and politics as best they can. This is especially true when dealing with an institution that is created through voluntary signature by states since if it is a democracy there will always be a proportion of people in each state who are not in favour of membership. Kenya, for example, was a strong supporter of the ICC when it was formed but its reaction to the ICC indictments in relation to the 2007 violence in the country didn't indicate this.

Geoffrey Robertson QC:

It is impossible for judges to go into the political ring but very difficult for them not to, especially as they believe in international justice. Diplomats are to a degree the enemy of judges since they prefer expedient diplomacy to international criminal justice. Political statements can lead to questions over a judge's impartiality but prosecutors can speak out and politicians and diplomats need to work to live up to the expectations that are created.