
Sir Richard May Memorial Lecture

The International Criminal Court: Progress Made, Progress Needed

Lord Justice Fulford

International Criminal Court (2002–13)

Judge Morrison

International Criminal Court, International Criminal Tribunal for the former Yugoslavia

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Introduction

This is a summary of an event held by the International Law Programme at Chatham House.¹ The lecture was convened in memory of Sir Richard May, the first British judge elected to the International Criminal Tribunal for the former Yugoslavia (ICTY). The legacy of Sir Richard May includes acting as the presiding judge in the first indictment of a sitting head of state, President Slobodan Milošević. Sir Richard May was also heavily involved in drafting the Rules of Procedure and Evidence of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR), where he acquired expertise on which he drew to advise on the establishment of the International Criminal Court (ICC).

The meeting examined the progress made and the progress needed at the ICC. The first speaker, Lord Justice Fulford, spoke on the difficulties facing the court in terms of victim participation and the proposed restructuring of the Office of the Public Counsel for the Defence (OPCD). The second speaker, Judge Morrison, focused on comparisons made between the ICC and the ad hoc tribunals, claims that the court is racially biased, the structure of the Pre-Trial Chamber, and broader issues such as political cooperation and funding at the court.

The meeting was not held under the Chatham House rule. However, the comments and opinions presented by each speaker were made in their own personal capacity and in no way reflect the views of their respective institutions or employers.

Victim participation at the ICC

*‘One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence is the series of rights granted to victims. For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the court. The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard.’*² It was noted that it is in its inclusive approach to victims that the court is most distinguishable from its forebears, particularly the ad hoc tribunals. Although there is much by way of aspiration in the framework of the Rome Statute with regard to victim participation, there is perhaps less by way of understanding in respect of the practical difficulties facing the court. Indeed it was noted that facilitating the opportunity for victims to express their views in a meaningful way with real involvement in the process was one of the most difficult aspects of the court’s work. Lord Justice Fulford pointed out that the ICC is at a crossroads as to how it will provide representation to these groups; and in this regard, he described the aspects of the Registrar’s ReVision Project that will affect these offices as critical.³

Challenges facing victim participation

The recognition of victims

Article 68 of the Rome Statute expressly provides for the right of victims to participate in ICC proceedings. However, the way in which victims come to participate has been described as both arbitrary and highly selective, with difficulties in filling out the relevant paperwork identified as a particular impediment to the recognition process.

¹ This summary was prepared by Niamh Diskin.

² Quotation from the ICC website: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx.

³ The Registrar is the head of the Registry, the organ of the ICC responsible for the non-judicial aspects of the administration and servicing of the court. The Registrar has recently undertaken a major ReVision Project of the functioning of the court, whereby its structure, processes and regulatory framework, among others, are subject to review.

Although there are many obstacles to providing direct access for victims appearing before the court, it was noted that some alternatives could lead to the valuable concept of victim participation being turned into something less worthwhile. Lord Justice Fulford cited the decision made in the *Kenya* case, whereby it was recognized that all that was required of the participating victims was a simple process of registration.⁴ He expressed doubt over whether an application process without any consideration of the merits of each individual application could lead to any form of meaningful involvement in the proceedings. He reasoned that by following the *Kenya* formula, anyone who chooses to register is treated as a victim, although in reality he or she may be a perpetrator seeking to influence the proceedings or alternatively may have no link whatsoever with the events in question.

By way of comparison, Lord Justice Fulford cited the *Lubanga* case, where 100 or so victims were given permission to participate in the proceedings on an individual basis.⁵ The critical element of this application process was that individual consideration was given to the particular circumstances of each applicant, with some applicants turned down as they lacked a sufficient link to the subject matter of the trial. Although this system is put under undoubted strain in a situation in which there are potentially thousands of victims, Lord Justice Fulford emphasized that at least the sifting procedure followed in *Lubanga* ensures on a *prima facie* basis that the judges have selected those who fall properly into the category of potential victims of the crimes alleged against the accused. In the Trial Chamber Decision on victim participation and representation, he noted that any form of discretion in the recognition of victims is left in the hands of the common legal representative alone, save for those individuals who wish to present their views and concerns individually by appearing before the chamber.⁶ In conclusion, he asserted that the process of granting victims the right to participate, and thereafter providing this opportunity, must remain a process that is not merely tokenistic. For instance, if recognition is done on a collective basis, it must be because the individual in question falls properly within a particular defined group.

The representation of victims at the ICC

There are a large number of different branches within the ICC that deal with victims, namely: the Office of the Public Counsel for Victims (OPCV);⁷ Outreach;⁸ the Victim Participation and Reparation Scheme (VPRS);⁹ the Counsel Support Section (CSS);¹⁰ the Trust Fund for Victims;¹¹ and external counsel. The Registrar's ReVision Project recommended that their functions could be dealt with by one office. The project further included as a core recommendation that every victim shall in future be represented by in-house counsel, save that any external counsel who are instructed will represent victims on an ad hoc basis and will be retained as staff members or consultants. It was emphasized that, if implemented, the new OPCV would decide whether there is to be outside representation, and therefore it is likely that most victims will *de facto* have to accept the in-house representation offered by the court. This arrangement, in Lord Justice Fulford's view, would critically undermine a key element of choice and arguably the right of victims to express their views through an advocate of their election, perhaps someone from within their community who has a real understanding of the context in which the crimes occurred.

⁴ *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11-498, International Criminal Court, 3 October 2012, Decision on Victims' Representation paras 48 and 49.

⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, International Criminal Court, 14 March 2012.

⁶ *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11-498, International Criminal Court, 3 October 2012, Decision on Victims' Representation para.s 24 and 28.

⁷ The OPCV seeks to ensure the effective participation of victims by providing legal support and assistance to the legal representatives of victims.

⁸ Outreach is one of the court's external communications functions; its duties include the dissemination of information to the public.

⁹ The VPRS is responsible for giving all appropriate publicity to reparation proceedings in order to enable victims to make their applications.

¹⁰ The CSS is responsible for the management of legal assistance and for providing defence teams with necessary expertise and administrative support.

¹¹ The Trust Fund for Victims advocates for victims by funding or setting up projects to meet victims' physical, material, or psychological needs.

The decision of the Trial Chamber, in the previously discussed *Kenya* case, where it was presumed that the interests of victims would be better represented by a common legal representative based in Kenya, was also raised. This arrangement meant that in reality the views and concerns of the victims are first filtered through the common legal representative *in situ*, and then through an OPCV advocate in court. Thus, the advocate will not represent the victims direct, but will, in the language of the Trial Chamber, be appearing on the common legal representative's behalf.¹² Furthermore, Lord Justice Fulford underlined that this would create a real element of distance and would mean that victims will simply have their positions represented, in the main if not exclusively, by court-based lawyers who frequently will have no connection with or personal knowledge of the events in question.

Lord Justice Fulford expressed doubt whether this restructuring of victim participation represents the intentions of those who drafted this part of the Rome Statute. He emphasized that the victims are, in a sense, the third arm of the court, and that their participation should have heralded a new way of conducting criminal justice. He affirmed that in the *Lubanga* case the judges strove to give real meaning to this new form of trial without undermining the fact that it is at root a criminal trial of an accused. He stated that the judges sought to allow participation and simultaneously tried to ensure that this did not unbalance the proceedings. He did not deny the difficulties inherent in dealing with mass applications to participate, but emphasized the proportionate answer is not to emasculate the process to the point where it becomes little more than a symbolic gesture. Although he recognized the managerial and financial problems that accompany significant victim participation in individual trials, this should not be an excuse for partially or substantively abandoning the whole project. Furthermore, he emphasized that the Registrar's proposals should not be implemented, as they would dilute the meaningful role for victims in ICC proceedings provided by the drafters of the Rome Statute.

Challenges facing the Office of Public Counsel for the Defence

Lord Justice Fulford set out his vision of defence services at the ICC as a body with the independence and experience equal to the Office of the Prosecutor (OTP), even if it did not equal its funds and resources. The intention was to establish a wing of the court that would always provide, at the very least, real support services for counsel appearing in cases and in appropriate circumstances taking on the conduct of trials. This body would, in appropriate circumstances, include bringing in lawyers from the relevant area to assist in the presentation of the case.

The Registrar's ReVision Project identified the fact that defence services are provided by more than one internal body, i.e. the Counsel Support Section and the Office of Public Counsel for the Defence, as a potential area for duplication and waste. The Registrar's proposals, if implemented, would mean that the OPCD and the CSS would be abolished and replaced by a new defence office within the Registry, to exercise what is described as the duty to promote the rights of the defence. Lord Justice Fulford highlighted that the present opportunity for the OPCD to represent individual accused, at any stage in the proceedings, would disappear. Moreover this new defence office, although still able to provide legal and IT assistance to external defence teams, would exist as a body within the Registry, meaning that a defence office essentially independent of the Registry would no longer exist.

These challenges facing the defence services are heightened when compared with the undoubtedly powerful OTP, with its high degree of institutional independence, relatively substantial budget and large number of permanent, experienced counsel. In this regard, the OTP has a permanent advantage over the accused, particularly given that counsel for the latter is retained on a case-by-case basis. Moreover, it was

¹² *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11-498, International Criminal Court, 3 October 2012, Decision on Victims Representation, para. 70.

noted that while some defence counsel have experience of litigating before international criminal tribunals some are entirely new to the field.

It was acknowledged that the OPCD has made mistakes, and in this regard the OPCD intervention in Libya, which ended with the detention of one of its members, was raised. However, it was noted that these errors have not been limited to the OPCD; and to use a single instance, at least in part, to justify disbanding the entire office is to forget the strong support that the office has provided to many of the defence teams, and its potential for a far wider role if provided with the necessary resources to do so.

An independent association of defence counsel

One of the Registrar's recommendations stipulates that defence counsel appearing before the court should be part of a self-governing association of defence counsel. The proposal maintained that this body could play a key role in assessing the competence of applicants for admission to the list of counsel acting for the defence. However, it was noted that this independent association of defence counsel could risk becoming an exclusive body, with a tendency to resist newcomers in order to restrict the pool of advocates who are entitled to take on the limited defence work available. In this regard, it was asserted that professional bodies of this kind, unless managed to the very highest of standards, can become self-serving clubs which become too difficult for most people to join.

Although it was admitted that the Registrar's proposals may have some utility if all goes well, it was noted that in an age of budgetary constraints, a new and reduced defence office within the Registry with the somewhat imprecise role of solely providing generalized support for defence teams could become a prime candidate for financial cutbacks. Indeed, it was suggested that the proposition that defence teams should be able to do their own legal research and have the necessary IT skills to navigate the e-court environment could be used to justify the scaling down of this new defence office.

The OPCD and the OPCV were created by the judges in the Regulations, and therefore the Registrar needs their express consent to abolish them; Judge Morrison noted that the debate is ongoing at the court.¹³ The considerable budgetary responsibilities of the Assembly of States Parties were acknowledged, but the pursuit of financial discipline should not result in undermining two key participating bodies – i.e. the defendants accused of crimes, and their alleged victims. The speakers drew attention to the dangers apparent in an institutionally lopsided court, with very considerable power remaining with the Prosecutor on the one hand, and a somewhat insubstantial gesture extended towards victim representation and defence support on the other. In conclusion, it was held that by safeguarding the ability of the accused and victims to engage with the court, to be represented to a high standard and to be afforded a real measure of equal footing with the prosecution, the health and well-being of the institution could be ensured.

The ICC: broader questions and contentious issues

The ICC and the Ad Hoc Tribunals

A number of comparisons have been made between the ICC and the ad hoc tribunals. One such comparison is that the ICC has a lower caseload than did its predecessors. Judge Morrison emphasized that, unlike the ad hoc tribunals, the ICC is not limited to a particular region or time period and does not have a readily available list of accused individuals; nor does it receive UN assistance. Additionally, the ICC is faced with considerable difficulties in dealing with the various linguistic, legal and factual backgrounds of each case. Given these points of divergence, it was suggested that the ICC should be viewed not as a supranational domestic court dealing in international law, but as a series of ad hoc tribunals – each with its own legal, factual and cultural particularities to be accommodated. It was noted that these challenges make the problems for the defence and for victim participation previously discussed appear particularly

¹³ The Regulations of the court are the list of rules adopted by the judges that govern the operation of the court in terms of its composition, administration, proceedings etc.

acute. It was reiterated that an efficient structural framework and proper funding at the court could resolve these particular problems.

Accusations of racial bias at the ICC

There have been 21 cases and nine situations brought before the ICC since its establishment, all of which have involved African countries.¹⁴ Critics have claimed that this focus on Africa is inappropriate and indicative of racial bias. In response to this claim, it was emphasized that this contention should be dealt with in practical terms by reference to the facts. Specifically, it was observed that of the nine situations before the court, five were self-referrals made to the court by the state itself,¹⁵ and a further two situations were referred to the court by way of a UN Security Council resolution.¹⁶ If the court had not followed up on these referrals, it would be likely to have been criticized for failing to act in the best interests of the ordinary African citizen.

The targeting of non-state actors

Participants raised the issue that many situations referred to the ICC have culminated in the prosecution of non-state actor adversaries to the government, rather than of government actors. It was noted that this is an issue not only for the court but for the international community to resolve. On the problem of proceeding against government actors, Lord Justice Fulford referred to the possibility of deploying rapid reaction teams that would investigate alleged crimes from the outset, gathering evidence from all actors involved in the conflict, although he accepted that may be politically unrealistic. Judge Morrison added that referrals do not necessarily lead to proceedings; and therefore this issue can be mediated by the Office of the Prosecutor, who has the onus to conduct a balanced inquiry and make a determination on whether to open an investigation based on the quality and nature of the evidence gleaned. It was also pointed out that there are in fact some cases involving government actors; the case against Muammar Gaddafi was brought when he was still in power.¹⁷ Furthermore, the *Kenya* cases include persons now in government – namely Uhuru Kenyatta, the President of Kenya,¹⁸ and William Ruto, the Deputy President of Kenya.¹⁹

UN Security Council referrals

There are three instances whereby an investigation can be initiated by the ICC: situations may be referred by a state party, by the OTP acting under *proprio motu* powers,²⁰ or by a referral from the UN Security Council. With regard to Security Council referrals, the argument has been made that having taken the decision, the Security Council should provide additional funding and support for the court in its subsequent investigation. Although the logic was acknowledged that the Security Council should incur the cost of its referrals, it was observed that this was unlikely to happen having regard to the membership of the Council. Furthermore, a Security Council referral should not be viewed as a solution to a conflict or other international problem, and political cooperation following a referral is essential for the court to fulfil its functions effectively.

¹⁴ http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

¹⁵ The Situation in Uganda, the Situation in the Democratic Republic of the Congo, the Situation in the Central African Republic I and II, and the Situation in Mali.

¹⁶ UN Doc. S/RES/1593 (2005) and UN Doc. S/RES/1970 (2011).

¹⁷ *Situation in the Libyan Arab Jamahiriya*, ICC-01/11-13, International Criminal Court, 27 June 2011.

¹⁸ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11-382, International Criminal Court, 23 January 2012.

¹⁹ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11-373, International Criminal Court, 23 January 2012.

²⁰ The Prosecutor intends to initiate an investigation on his or her own motion.

The structure of the Pre-Trial Chamber

The Pre-Trial Chamber of the ICC plays an important role in the first phase of judicial proceedings until the confirmation of charges stage, whereupon the Prosecutor intends to seek trial against the person charged. It was pointed out that the Pre-Trial Chamber in effect conducts a lengthy and expensive initial trial. Pre-Trial Chamber decisions that require a majority of judges ought to be managed by a single judge who would *prima facie* decide if there are grounds to confirm the charges; this is commonplace in many domestic systems.

The future of the ICC

Looking to the future, it was observed that at present it is unlikely that Russia or India will ratify the statute. Although relations between the US under the Obama administration and the ICC have seen a marked improvement, it was admitted that the likelihood of the US becoming a state party is remote. Similarly, despite the growing interest in international law and the recognizable engagement with human rights law within China, the possibility of China becoming a state party remains distant. The redistribution of power towards the BRICS²¹ nations and its implications for the ICC was also discussed. However, it was remarked that although only two of the five permanent five members of the UN Security Council are state parties to the Rome Statute, there was still enough confidence in the court to refer the situations in Sudan and Libya to the ICC.²²

Claims have been made that the development of international criminal law and international humanitarian law has reached a plateau. It was pointed out in response that given the continuous growth of the global population, combined with limitations in available resources, it follows that there will be more conflict, not less. Egregious crimes will need to be dealt with, and this means – and should mean – the referral of situations to the ICC. Both speakers mentioned their concern for the court's budgetary constraints and noted that certain states involved in the budget negotiations advocated for zero growth, which effectively means that the court can neither take on new situations nor address its existing shortcomings. It was concluded that the court needs to be properly funded, and given the appropriate resources, if it is to be used as a mechanism to deal with the most serious crimes of concern to the international community.

The proper functioning of the ICC depends on mature state cooperation; it was suggested that this support had on occasion fallen short. States, having ratified the Rome Statute and accepted its core message of ending impunity, need to commit to this responsibility and support the work of the court. Judge Morrison emphasized that preliminary examinations currently under way into various situations, including that in Iraq (in relation to UK actions), demonstrate that the court has a widespread portfolio and that it needs active support and not partisan criticism in order to discharge its responsibilities. Furthermore, it was noted that the ICTY had required time to become a homogenous court, and in this regard the ICC is no different. The purposes behind setting up the court were only partly achieved with its establishment; consistent political cooperation is essential to ensure the court's future development.

²¹ Brazil, Russia, India, China and South Africa.

²² UN Doc. S/RES/1593 (2005) and UN Doc. S/RES/1970 (2011).