

2ND BIENNIAL WAR CRIMES CONFERENCE:

‘Justice? – Whose Justice? Punishment, Mediation or Reconciliation?’

3 to 5 March 2011, Institute of Advanced Legal Studies

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The eagerly awaited 2nd Biennial War Crimes Conference, organised by SOLON, was held 3 to 5 March 2011 at the Institute of Advanced Legal Studies (IALS), Russell Square, London.

This year SOLON was supported in hosting this event by the following partners:

- Centre for Contemporary British History at King’s College London;
- Institute of Commonwealth Studies, Institute for the Study of the Americas and the Human Rights Consortium, all at the School of Advanced Study (University of London), and
- The Raoul Wallenberg Institute of Human Rights and Humanitarian Law (Sweden).

I am aware that I cannot possibly do justice to all the papers presented over the three-day conference so what follows are just some of the highlights of the 2nd Biennial War Crimes Conference.

DAY 1

Opening the Conference:

Dr Judith Rowbotham, a founder member of SOLON, opened the conference together with Professor Avrom Sherr, Director of IALS. It was announced that Jose Pablo Baraybar (EPAF Peru), the charismatic forensic anthropologist who held all the delegates enthralled at the first conference two years ago, was sadly unable to open this year’s event as originally planned due to problems with flights out of Lima. Additionally, influenza deprived the conference of the presence and challenging input of Lesley Abdela.

***‘Chains Can’t Control Thought*²**

Dr Gopal Siwakoti, a leading human rights defender and President of INHURED International, launched the conference by introducing the issues and inherent problems surrounding Transitional Justice, through the medium of film. Using the Nepalese conflict as

¹ Currently based in the Lebanon where she is conducting research for her phd on Women Activists in Twentieth Century Lebanon at SOAS, University of London.

² INHURED International production, *Journey to Justice*, (a docudrama on Transitional Justice in Nepal).

a backdrop, the docudrama *Journey To Justice*, attempted to give a balanced view of the conflict, depicted abuses suffered by both sides and put forward the arguments of all parties involved. However, it also challenged the basic premise of Transitional Justice, namely that alleged perpetrators should not get away with impunity. In the case of Nepal's 10 year conflict, there had been negligible accountability for atrocities committed by either Maoist or Nepalese troops. A former political prisoner and torture survivor, Dr Siwakoti argued that the unwillingness to prosecute the architects of human rights abuses reinforced the spectre of a repetitive culture of impunity.

ROUND TABLE ONE: PRACTICAL ISSUES IN ASSESSING JUSTICE

Chaired by Rory Stewart MP, this dynamic round table session presented and discussed the practical grounds on which lawyers and other practitioners can begin to initiate war crimes related measures. The two case studies presented focused on the myriad of challenges facing post-Saddam Iraq and the Sri Lankan government's outlook following their victory over the Tamil Tigers.

'Education, culture and lack of political willingness to tackle problems!'

Mark Hull, US military advisor to the Iraqi Security Forces, painted a very bleak picture of the current situation in Iraq. He suggested that there was rampant corruption within the present Iraqi administration and he was adamant that in his experience he has not seen, and feared that he might never see, an attempt to put in place any type of mechanism for democratic change. His practical experience of the present Iraqi military infrastructure had not given him a sense that the post-Saddam Hussein regime would be any different than its predecessor.

However, there seems to be a lack of consensus with Mark's views within the US military. In a televised conference the Chairman of the Joint Chief of Staff, Admiral Michael Mullen, had this to say,

I had the chance to spend time with Iraqi security forces...there is absolutely no denying (their) incredible progress in the last year. There is also no denying that this vastly improved security has permitted Iraq and Iraqi citizens to develop burgeoning democratic institutions. The Iraqi security forces have made extraordinary gains in their own professionalism and I remain convinced that they are defending their country and their people very well indeed.³

A conference delegate who had recently been posted to Afghanistan with Amnesty International responded constructively to Hull's paper. She suggested to the panel that perhaps a better approach to the Iraqi situation would be a short term shifting of perspective

³ www.jcs.mil/speech.aspx?id=1590 – 22 April 2011.

through example and education, as opposed to concentrating on long-term success. Her practical experience, gained during her posting, enabled her to report positive feedback in terms of small shifts in attitude within the community under her remit.

***'We had to fight our way through a carpet of bodies'*⁴**

In an attempt to assess practical justice in Sri Lanka, Yolanda Foster (Sri Lanka expert at the International Secretariat of Amnesty International) had been left frustrated in her dealings with the Sri Lankan authorities. Representatives of Amnesty International had consistently been refused permission to enter the country, even though almost two years had elapsed since the Government victory over the Tamil Tigers, which had ended three decades of violence. Throughout the conflict the UN had been reluctant to interfere on the grounds that since the civil war had been effectively contained within Sri Lankan borders there was no reason for UN involvement. Moreover, President Rajapaksa in an address to the UN Security Council in June 2010, stated that a domestic 'Commission on "Lessons Learnt and Reconciliation" ... has already taken steps to commence initial work...the process of initiating a domestic mechanism for fact finding and reconciliation.'⁵ The panel together with the audience debated the heavy handedness of the Sri Lankan government treatment of its own citizens and the unwavering neutrality of the UN response.

With the 'Arab Awakening' then currently unfolding in the Middle East and North Africa, it was not long before the delegates compared the restraint shown by the UN and international community towards the Sri Lankan leadership with recent authorisation of military action to curb Libyan leader Muammar Gaddafi, hours after he threatened to storm the rebel bastion of Benghazi. Defending this course of action, British Foreign Secretary William Hague had stressed the UN resolution is necessary 'to avoid greater bloodshed and to try to stop what is happening in terms of attacks on civilians'.⁶ This raised the question for some in the audience of whether justice was only served when international political agendas (for instance: protection of petroleum) coincided with national sentiment.

A lively discussion ensued between the Round Table panel and the delegates as they discuss the merits of a 'Lesson Learnt Initiative' as a process of easing the inevitable tension between reconciliation and justice. A consensus was finally reached: accountability was the only viable and visible method to break the cycle of violence in order to allow the possibility for reconciliation.

⁴ Yolanda Foster reporting a conversation with a mother who lived in the No Fire Zone.

⁵ http://www.defence.lk/new.asp?fname=20100605_05.

⁶ <http://www.reuters.com/reaction> to U.N Council vote on Libya.

After a delicious lunch on Day 1, Dr Michael Kandiah chaired three very different but equally compelling papers:

'Lost in Translation!'

The International Community recognised the principle that punishment played a fundamental role in the reconciliation process. Dr Nigel Eltringham's presentation, 'Doing Justice to the Mundane: The Social Worlds of International Tribunals, Present and Past', tackled the problems associated with translations of witness, survivor and perpetrator statements within the ICTY⁷ and ICTR⁸. When judging credibility in a national courtroom, judges and legal practitioners often rely on facial expressions, the witnesses' tone of voice, even silence as an answer to a question. In international tribunals, these nuances can be lost through simultaneous interpretations. The evidence produced was slow, arid and, according to one judge, a 'boring, boring exercise.' A brave delegate ventured to ask the obvious: surely such boredom must prejudice the impartiality of a trial? Eltringham responded that judges interviewed wanted translators to aim for clarity and simplicity enabling the judiciary to sustain a state of heightened attentiveness. Eltringham also argued, to my mind convincingly, that even though tension existed between the use of language and appreciation of cultural references, nevertheless, new techniques can be developed to ensure that international justice was best represented by practitioners who can effectively navigate diverse social and cultural practices.

'I should like to amend the Royal Warrant, to death by breaking on the wheel'⁹

Dr Lorie Charlesworth ('Deconstructing the personal in British war crimes trials in Occupied Germany, 1945'), examined the reasons as to why thousands of 'minor' war crime trials held by the Allies have largely been ignored by both academics and practitioners. She questioned whether these trials should be dismissed simply as 'victor's justice' or whether they might have actually 'revealed something more human, ethical and decent' in the psyche of those on the front line of war crimes investigations and prosecutions. Using the liberation of the Belsen concentration camp by the British army as a case study, Dr Charlesworth pointed out the unique opportunity presented to the investigators and prosecutors of war crimes. It was the first time that the perpetrators, witnesses and victims could be found together. Having seen firsthand the brutality of the concentration camps the British military officers in charge

⁷ International Criminal Tribunal for the Former Yugoslavia.

⁸ International Criminal Tribunal for Rwanda.

⁹ Lorie Charlesworth, Deconstructing the personal in British war crimes trials in Occupied Germany, 1945.

of the war crimes office took to calling witnesses 'survivors' as opposed to 'victims'. Dr Charlesworth's paper reminded us of the 'humane' dimension in upholding human rights.

'Whose Justice?'

In SOLON's War Crimes Conference 2009, there was a great deal of excitement regarding the Extraordinary Chambers of Cambodia (ECCC) and their implementation of victim participation as civil parties in legal proceedings against the Khmer Rouge regime. It was debated at the time whether the ECCC's model would influence the International Criminal Court (ICC) and if so to what degree.

This year Johanna Herman's presentation, 'Problems and Promise: Civil Society, Victim Participation and the Extraordinary Chambers of the Courts of Cambodia', set out in detail the organisational and logistical challenges facing the ECCC throughout the first trial and during the preparation for the second. According to Herman the underlying weakness of the victim participation process seemed to be the absence of legal aid and assistance. However, she put forward an argument for the viability of this model through the contribution of civil society. The evidence seemed to suggest that Civil Society engagement on a local level was the way ahead in order to obtain the appropriate reparations for victims of war crimes. A lively debate ensued between the panel and the delegates regarding justice for victims. It was pointed out that the ICC was now treating the idea of reparation for victims in a more holistic way whilst trauma suffered by witnesses was viewed as an ongoing event as opposed to a one-off occurrence. However, before these points could be further clarified and expanded upon an argument broke out between the academics and practitioners over the dangers of using the word 'victim' as it seemed to suggest that alleged perpetrators have already been convicted of war crimes before the tribunal had even begun. Professor David Fraser of the University of Nottingham observed: 'One can't be a victim unless and until the court establishes a crime against them...it's called "burden of proof".' This set off another round of criminal legal discourse.

DAY 2

'The King's most loyal enemy aliens'

Dr Simona Tobia's paper, 'Nazi and British war crimes trials 1945-48: investigators and translators', explored the inextricable link that exists between identity, linguistics and cultural knowledge. She reminded the conference of the thousands of Austrian and German Jewish refugees during the Second World War enlisted in the British Army and subsequently played a significant role in the denazification effort following the end of the war. They specialised in

investigating war crimes, translating documents and were often put in charge of Nazi prisoners. Dr Tobia clearly set out the manner in which ‘identity and language were crucial in the purpose of constructing war crimes investigations’. The process behind any international war crime trial or tribunal, past, present or future, involves, to a certain degree, local investigators, interrogators and interpreters. The use of ‘victims’ or ‘survivors’ of war crimes as reliable interrogators and translators on behalf of the alleged perpetrators was first raised and discussed at length at the Belsen trial. At the time the court dismissed the issue of reliability confident that there were sufficient safeguards to ensure impartiality within the system. This issue would be raised again in relation to the challenges faced by the ICTR in regards to Rwandan culture. The reaction to this presentation was fairly emotive as delegates were clearly in two camps: those who felt that the ‘survivors’ thirst for vengeance would cloud their judgment and those who believed that the impartiality of an International Court would not be affected.

‘We have to be prepared to understand that the Nuremberg principles might have to be updated.’

In an intriguing paper, ‘How the “War on Terror” changed perceptions of the Legacy of Nuremberg’, Sascha-Dominik Bachmann, argued that the concept of force and aggression had changed since the end of World War II. The US military response to the attack on the Twin Towers in New York on 11 September 2001 had fundamentally altered the people of the world’s collective perception of a fair and impartial international community. The invasions of Iraq and Afghanistan by an American-led coalition would continue to be controversial for years to come as neither were acts of self defence nor authorised by the UN Security Council. However, there have been no moves by any international tribunal to bring those in question to account. Moreover, the type of warfare has altered substantially since the mid-1940s. The nature of aggression and force are changeable depending on different scenarios. For example ‘hybrid threats’ now exist in the form of cyber wars conducted by one nation against another: The case of Russia v Latvia (2009), whereby the former totally shut down the latter’s internet infrastructure for over 24 hours. In the twenty-first century, where technology infiltrates every aspect of people’s lives, this show of strength can bring a country to its knees.

After a much-needed coffee break, my head reeling with thoughts of ‘hybrid threats’ and crimes against peace, it was time to debate whether truth commissions can contribute towards criminal justice or whether they were an effective deterrent to prosecutions.

‘Ten Principles for Reconciling Truth Commissions and Criminal Prosecutions’

Lyal Sunga, a specialist in international human rights law, discussed the ways of optimising the relationship between truth commissions and criminal prosecutions. He also questioned how amnesty from prosecution can play into this dynamic. Sunga highlighted certain prime objectives as goals to maximise the benefits of both strategies in the fight for justice, peace and human rights: 1) To ensure individual criminal responsibility. 2) To respect Human Rights and the Rule of Law. 3) To end impunity. 4) To promote a minimum level of reconciliation so as to provide society as a whole as well as the victims and survivors the full story, redress and access to justice. 5) Rights of victims to an effective remedy. 6) Principle of restorative justice. 7) Governments should not be allowed to grant blanket or unconditional amnesty. 8) If blanket amnesty WAS granted then no international or foreign court should respect it, nor should they refrain from investigating because of a blanket amnesty. 9) If an indictment was going to put civilian in danger than prosecution should wait. 10) Full amnesty for lesser crimes if it meant we get a complete picture of what happened.

Sunga’s principles, segued quite nicely into the next presentation: ‘Why do Truth and Reconciliation Commissions Fail? The case of the Democratic Republic of Congo’, by Patryk Labuda.

‘Attempting TRC without peace simply doesn’t work!’

Stated Labuda, a civilian justice advisor to the European Police Mission in the DRC. Although appreciative of the benefits of TRC Labuda maintained that it was equally important to be aware that, as a tool of transitional justice, a TRC was not always a practical solution, which seemed to be the case in the DRC. Atrocities over a 45-year period, unclear mandates and a TRC ‘shrouded in mystery’ had doomed the 2003 operation. Initially backed by the United Nations, support and funding dried up in 2006 and has never been renewed. Labuda was adamant that ‘TRCs can rarely operate in a war zone.’ The First Congo war was not widely reported by the western press and it was shocking to hear that the estimates of fatalities during the conflict ranged from 250,000 to 5 million. Yet how significant was it that the neither the West nor the broader international community intervened as was currently happening with the case of Libya?

‘The dark side of the media!’

‘Media, Journalism and Reporting War Crimes Processes’ was a thought provoking presentation by Milica Pesic from the Media Diversity Institute. As an ex-Serbian TV anchor and reporter, she put the following questions to her fellow panellists and the delegates:

1. Can a war report be considered a war crime?

2. What role does the media play in inciting war crimes? She cited the former Yugoslavia and specifically the rivalry between the two main TV stations: Serbian TV v Croatian TV.
3. How does one establish a link between a news report and the subsequent action of a viewer who decides to join the war effort on the strength of news bulletins? (In fact there currently is a case of a Rwandan journalist being prosecuted for inciting war crimes.)

‘How do you choose your victim?’

Theresa De Langis, a specialist in the field of women’s human rights in conflict settings, presented, ‘The Perils of Peace: High Stakes for Afghan Women in War Crime Justice’. She discussed and highlighted the very disturbing plight of Afghan women and ‘the danger of their rights being traded for an expedient deal with the Taliban’. Negotiations between the Taliban and President Karzai’s High Peace Council have sought to sideline such controversial issues as the mass rapes and sexual violence against women - commonly used tactics in the long conflict gripping Afghanistan. Will International forces looking for an exit strategy turn a blind eye in the name of peace? De Langis left us with an intriguing question: Could there be such a thing as a non-ideological Taliban?

DAY 3

‘My country is lead by warlords and I am ashamed of them’

Said Dr Cissa Wa Numbe, a human rights activist from the Democratic Republic of Congo. Those who attended the first War Crimes Conference will remember Wa Numbe’s heartbreaking stories of life in the Congo and impassioned speech for International help for the injustices being committed on the Congolese people.

In ‘Congolese Perspectives’, Dr Wa Numbe stated that the perception by people in his country was that the ICC is politically and diplomatically motivated with hidden agendas. He added that, ‘I want the ICC to be there but it needs to be fair. On paper everything looks great but on the ground it is a different story.’ In theory, all war crimes should have been addressed; however, in practice, it was often the case that politics played a pivotal role in the prosecution of a particular warlord or individual perpetrator. The reasons generally seemed to be determined by the International Communities’ interests at the time. (Surely, several insisted, the failure of the International Community to indict Gaddafi has always been motivated by the West’s need for access to petroleum – something certainly at least suggested in the previous session by the Chair, Courtenay Griffiths in relation to the Charles Taylor case).

'Justice through the ICC smells'

Not a man to mince his words, Dr Cissa Wa Numbe was painfully blunt when he chaired the closing Round Table discussion. How should the ICC choose its victims? What fairer mechanism could be put in its place? The consensus was that even though the ICC was flawed in its practices, for now it was the only viable instrument of justice that we have: it certainly possessed the willingness and political capacity to do the job properly. The majority of the delegates felt that it was better to have something such as the ICC in place than nothing at all. Its basic framework could be used to develop a better alternative in the future.