

INTERNATIONAL JUSTICE DAY EVENT

FCO LOCARNO SUITE, 17 JULY 2017

INTERNATIONAL CRIMINAL JUSTICE ACHIEVEMENTS AND CHALLENGES, IN SYRIA AND BEYOND

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On 17 July, the Foreign and Commonwealth Office and the British Institute for International and Comparative Law, in association with Temple Garden Chambers and Debevoise & Plimpton LLP, held a conference on the occasion of the 15th anniversary of the International Criminal Court on the theme of '**International Criminal Justice - Achievements and Challenges, in Syria and Beyond**'. This one day event gathered a large audience of private practitioners, senior government legal and policy officials, academics, parliamentarians, think tanks and non-governmental organisations, as well as media professionals.¹

Following Alice Lacourt's (Foreign and Commonwealth Office) welcome address, the event started with a screening of '**Syria's Disappeared: The Case Against Assad**', a Channel 4 documentary, which presents a haunting account of the torture suffered by thousands of detainees under the Syrian regime, allegedly for having taken part in the revolution movement, with the fate of many of detainees remaining unknown, despite ongoing attempts by their relatives to obtain information.



¹ The speeches by the Attorney General and the President of the International Court were given on the record. The panel discussions were held off the record to encourage interactive and frank discussion; therefore this report, which reflects the authors' impressions, does not represent the formal position of BIICL, FCO, speakers, or the institutions they represent.

The Making of the Documentary and the Situation on the Ground in Syria

Andrew Cayley CMG QC, Temple Garden Chambers and Director of Service Prosecutions moderating with **Stephen Rapp**, non-resident Fellow, The Hague Institute for Global Justice; Director and Producer of *Syria's Disappeared*, **Sara Afshar** and Co-producer **Nicola Cutcher**; **Sareta Ashraph**, Former Legal Analyst, UN Independent International Commission of Inquiry on Syria and **Alex El Jundi**, Legal Adviser, UN High Commissioner for Human Rights Syria Country Team.

The discussion opened with reactions to the shocking and compelling documentary, 'Syria's Disappeared: The Case Against Assad' which exposed the systematic infliction of torture, and which drew parallels to Srebrenica. President Assad denied the allegations of torture in the documentary and there had not been any further response from the Syrian Government since then, not even to NGOs such as Amnesty International or Human Rights Watch. One panel-member asked why more was not being done to lobby the Russian or Iranian governments to put pressure on the Syrian government following the release in 2014 of the so called 'Caesar photographs', which showed dead bodies of Syrian detainees who had been subjected to torture; those in power had not yet asserted any pressure on the regime despite such evidence. The fate of the bodies depicted in the 'Caesar' photographs remained unclear, despite a recent claim by the US State Department of the existence of a crematorium at one detention facility in Damascus. Mazen, one of the survivors shown in the documentary, still did not know what happened to several of his family members: he was lacking support to find out the truth about them. If nothing was done to change the situation of those disappeared, detained, and tortured by the regime, i.e. if no information was provided to their relatives and if those still in detention were not freed, then the pleas of Syrians would have been woefully neglected.

With regard to the victims, two groups stood out: those who had disappeared, and those in detention, with adult men being those most affected in both groups. One of the youngest recorded victims was a 13-year-old Syrian boy from Daraa, whose mutilated body was returned to his family. However, in general, families had simply received death certificates citing cardiac arrest as the cause of death. The targeting of men had created a 'ripple effect', where the inability to prove a person (father, brother, husband, etc.) had died adversely affected the rights of women and children, such as their right to inherit property and the right of women to re-marry. It had also increased child labour, children dropping out of education, and child and early marriage, as families struggled to get by.

The documentary director and co-producer had been contacted by more Syrians wanting to give evidence since its recent broadcast on Al-Jazeera. The determination of the victims was key and was highlighted in the documentary. Mariam fought relentlessly to find out the truth about her son Ayham, who died in detention six days after having disappeared. She had now joined the proceedings filed in Germany against the Syrian Arab Republic by an NGO, the European Center for Constitutional and Human Rights. These proceedings were brought on the basis of universal jurisdiction and concern torture in Syrian detention centres. Similar investigations were also underway in both France and Spain.

Proceedings were brought in Spain in February 2017 by a dual Spanish national whose brother died in detention, and who claimed to be a direct victim of his disappearance, torture and killing. The jurisdiction was thus based on the passive personality principle. At the end of March, the relevant court decided it had jurisdiction to hear the case. According to Spain's 2015 Immunity Act, it retained jurisdiction in relation to certain crimes, including enforced disappearances and crimes against humanity for former heads of States, for example, as well as state-sponsored terrorism, alleged in this case to include the use of security forces to 'disappear' individuals, suppress democracy, and cause fear and intimidation to citizens. Although jurisdiction was likely to be appealed,² the investigation was ongoing and arrest warrants may be issued. Whilst warrants issued at the domestic level could not include Bashar Al-Assad as a sitting head of state who enjoys immunity before

² Since the event, the High Court ruled against the claimant, upholding an appeal by Spain's state prosecutors. The claimant is appealing this decision to the Spanish Supreme Court.

national courts (see *the Belgium Arrest Warrant Case*), they could be issued in Spain against other officials, such as the Vice-President or the Head of Security Services.

The conflict itself was described as highly politicised and complex, with many parties involved. There was evidence that its conduct had included breaches of international humanitarian law and international human rights law through indiscriminate attacks, the use of child soldiers, the taking of hostages, the denial of access to water and aid supplies, torture and murder, the denial of the right to family life, the right to a fair trial, and others. Multiple parties on all sides of the conflict were suspected to have committed such violations and abuses. When considering incidents reports, such as those provided by the OHCHR, one had to remember that each incident meant the loss of life, but also that it ruined an entire family, with many left mourning and/or wondering what happened to their loved ones.

In order to coordinate evidence gathering for possible future prosecutions, the United Nations General Assembly resolution of December 2016 established the International, Impartial and Independent Mechanism (IIIM) to assist in the investigation and prosecution of those responsible for the most serious crimes under international law committed in Syria since 2011.³ The IIIM was thus mandated to collect and analyse evidence, as well as to prepare files in order to facilitate possible criminal proceedings in national, regional, or international courts. This mechanism was described as the result of the political stalemate, particularly at the UN Security Council level, with the veto of at least one permanent member on all resolutions that had been made against the Syrian regime, despite calls from the United Nations High Commissioner for Human Rights for the restraining of the veto power where crimes against humanity and war crimes were alleged (as well as calls for a referral to the ICC). With the current impossibility of ICC involvement, the focus had thus so far been on using national courts to prosecute some of these crimes. Despite optimism towards the IIIM, some concerns were voiced, such as the issue of linkage of evidence of a crime to an identified, alleged perpetrator, this having been particularly problematic in past international criminal law cases. Concerns were further raised with the voluntary funding aspect of the mechanism which lent itself to criticisms of western bias with most funding expected to emanate from western states. One panel member stated the IIIM remains underfunded and pointed out that small EU countries including Finland and the Netherlands had given €1 million each, whereas the UK had only contributed £200,000. Later in the discussion, the wider FCO contribution on accountability was noted to include funding NGOs active in this area.

There needed to be an end to the killing and justice for the victims, a process which must be predicated on truth to ensure long-term peace. Any accountability mechanism must be independent and impartial, and examine actions by all parties to the conflict. There was also a need for non-judicial mechanisms to ensure reconciliation, a process which must be Syrian-driven and include the consultation of all parties involved.



³ UNGA Res 71/248 (21 December 2016)

The UN Dynamic and Political Constraints

Shehzad Charania MBE, Head of International and EU Law, Attorney General's Office and International Law Adviser, No. 10 Downing Street moderating with **Christian Turner** CMG, Deputy National Security Adviser, former FCO DG Middle East and Africa and former High Commissioner to Kenya; **Peter Wilson** CMG, Ambassador and Deputy Permanent Representative, UK Mission to the United Nations, New York and Ambassador-designate, The Hague and **Catherine Amirfar**, Partner, Debevoise & Plimpton LLP.

The discussion opened with a consideration of the perspectives of the Obama administration on the situation in Syria. The policy of the US government with respect to the war crimes committed in Syria had been essentially two-fold. Externally, the US was acting as a part of the coalition condemning the crimes of Daesh; internally, it was working to hold the current regime to account for its crimes. Reference was made to the speech of the US Secretary of State John Kerry in 2013, which called for the international community to react strongly to the use of chemical weapons by the Syrian regime, and to the political steps taken by the US to ensure the accountability of the Syrian regime. The current goals of the Trump administration in relation to the Syrian conflict were also considered, namely to fight ISIS and provide the people of Syria with new leadership.

With regard to the UN Security Council and the ICC, at the time the resolution calling for the crisis in Syria to be referred to the ICC was introduced, the UN Security Council was in a deadlock, and the vetoes exercised by Russia and China were foreseeable. However, even if the referral had been successful, the ICC could have been faced with a complex situation, with the risk of damage to its credibility and legitimacy. Therefore, caution was advised with respect to imposing tasks on international judicial systems before ensuring the body in question had the capacity and support required to handle a referral.

Another issue raised was the tension between international justice and the need to promote peace. Ending of the bloodshed was the priority. While there could be no justice without peace, if there was no hope for justice there will also be no long-term peace; Afghanistan provided a good example of the dilemma.

The panel accepted that the issues of accountability and international justice did not exist in a vacuum, but formed part of the broader political context. To illustrate this point, reference was made to the situation in Kenya at the time of the 2013 election, and, specifically, how that played into proceedings before the ICC in relation to the 2007-2008 post-election violence. By 2013, many in Kenya were criticising the ICC's involvement on the basis that the court's intervention was interfering with reconciliation efforts. However, this did not provide a legal justification for the ICC to discontinue the cases underway. In that context, when the request for a deferral of the Kenya cases came before the UN Security Council, the UK's main objective had been to follow the ongoing ICC legal process. Nevertheless, this situation raised profound questions as to the purpose of justice. Separately, the Kenya situation also highlighted the need to create space for truth telling.

With regard to ensuring justice in the Syrian context, accountability was an essential part of the Syrian future. In the short term, however, ending the violence was the priority, with the creation of ceasefire zones and the establishment of pockets of stability, and to begin the process of reconstruction of Syria as a functioning state. Bringing alleged perpetrators to justice also brought into question the kind of justice sought, whether restorative or retributive. With respect to justice in Syria, the key objective at present was to gather and preserve the evidence of crimes to ensure future accountability. In this regard, the speakers welcomed the resolution of the UN General Assembly establishing the IIM to assist in the investigation of serious crimes committed in Syria since 2011.

The Rt Hon Jeremy Wright QC

The Attorney General



The Rt Hon Jeremy Wright QC, who was introduced by Professor Robert McCorquodale, the director of BIICL, provided the audience with a practical view of some of the issues likely to arise when prosecuting crimes committed in conflict areas in the UK domestic courts.⁴

The Attorney General started by outlining of the achievements of the Counter Terrorism Division of the Crown Prosecution Service (CPS), which was dealing with allegations of terrorism, war crimes and crimes against humanity brought in the UK. He observed that the CPS had obtained more than 90 convictions from more than 60 cases arising from the conflict in Syria and Daesh activities in that region. The Attorney General noted that despite the significant increase in its caseload, the CPS managed to maintain high conviction rates and earned an excellent reputation both in the UK and abroad.

The Rt Hon Jeremy Wright QC went on to discuss some of the challenges faced by domestic investigators and prosecutors dealing with offences which took place in an area of conflict. According to the Attorney General, if evidence from the country where the offence took place was unavailable, domestic investigators had to build a case on the evidence that was at their disposal. In such a situation, however, there was a real risk that the most serious offending, in particular conduct akin to torture, crimes against humanity or genocide, could go unpunished. To illustrate his point, the Rt Hon Jeremy Wright QC referred the audience to the case of Imran Khawaja, who was arrested by the police on returning to the UK from Syria in 2014. Khawaja had joined Daesh and was ultimately convicted of various offences including preparing acts of terrorism, attending a place used for terrorist training and receiving weapons training. Part of the evidence against him was a video promoting Daesh that had been posted on social media in which he was shown holding up two severed human heads. As observed by the Attorney General, he was not, however, given a life sentence since there was no evidence that Khawaja had actually participated in the combat itself.

The Attorney General especially emphasized the challenges of investigations based largely on digital material. One of such challenges was huge volumes of data recovered during investigations and prosecutions. He noted that identifying relevant and incriminating material from all the data was a mammoth task which was made more complicated where foreign languages, code or encryption were used. According to the Rt Hon Jeremy Wright QC, this issue highlighted the importance of the availability of other sources of evidence.

The Attorney General continued to describe the effectiveness of the evidence in ensuring accountability for the most serious crimes, even if the offence took place several years ago. He recalled a case of Anis Sardar, a British citizen, who was convicted in 2015 after a trial of the murder of the US soldier in Baghdad in 2007 and conspiracy to murder. In that case, the US soldier was tragically killed by the improvised explosive device in the construction and/or deployment of which Anis Sardar was found to be directly involved. As observed by the Attorney General, the crucial evidence in the case was fingerprint marks taken from a number of explosive devices, evidence of similarities between the device that killed the US soldier and three other similar devices used against coalition forces, the unusual nature of their construction, and, the fact they had been deployed in a small area of Iraq over a short time period. Ultimately Anis Sardar received a life sentence with a minimum term of 35 years.

⁴ Full speech available at: <https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-justice-day-event>

In conclusion, the Rt Hon Jeremy Wright QC stressed that the UK prosecutors had the skills and experience to prosecute these challenging cases and were committed to prosecute such crimes vigorously. The fundamental precursor to all this work, as pointed out by the Attorney General, was the availability of the reliable evidence. Thus, the key to ensuring that the perpetrators were held to account and that victims receive justice, was gathering and preserving the evidence. The Attorney General stated that this process required the closest possible cooperation with those on the ground, a huge challenge that we must overcome to achieve all we could in the delivery of international criminal justice.

How to Prosecute Universal Jurisdiction Crimes? International and Domestic Options

Karim Khan QC, Temple Garden Chambers moderating with **Deb Walsh**, Crown Prosecution Service; **Dr Devika Hovell**, Associate Professor in Public International Law, LSE; **Toby Cadman**, Guernica 37 International Justice Chambers and **Scott Gilmore**, Center for Justice & Accountability.

The domestic prosecution for torture in England and Wales through s.134 of the Criminal Justice Act, committed in situations of armed conflict or otherwise, was dealt with by the Counter Terrorism Division of the Crown Prosecution Service (CPS) which works closely with the police. There was a two stage test contained in the Code for Crown Prosecutors to consider with any prospective prosecution: was there sufficient evidence for a realistic prospect of conviction (admissible, reliable, credible evidence and the defence in relation to each charge); and was it required in the public interest. If so the Attorney General had to give consent.

However, there were a number of challenges that domestic courts faced when trying to prosecute these crimes, the first being the fact that they were exercising extraterritorial jurisdiction. Other challenges included: the framing of charges (such as the lack of command responsibility at the domestic level), jurisdictional challenges (particularly immunity issues), legal challenges, contextual element, interpretation, presentation of witness evidence, witness protection, witness credibility, and disclosure of evidence (unused material which could undermine the prosecution's case and support the defendant's). Further, there was the matter of reliance on NGOs for dossiers of evidence and narratives, which generally need to be independently verified, with the police launching a fresh independent investigation with a view to obtaining testimonial evidence.

In the UK, there had been two prosecutions under universal jurisdiction: *R v Faryadi Zardad* and *R v Kumar Lama* and one was currently underway against Agnes Reeves Taylor for crimes committed in the first Liberian war. The *Kumar Lama* case, which concerned a Nepalese Army Colonel charged for torture, was used as an example to discuss the concept of universal jurisdiction, which was based on a public interest to prosecute grave crimes such as torture. Due in part to a reporting ban and the wholesale nature of domestic criminal proceedings, this case did not attract public attention in the UK. The lack of publicity following the conclusion of the case raised the question as to whose 'public interest' the trial was conducted in. The public interest was arguably not that of the UK public, but of a differently-constituted public, in this case the Nepalese public. Other issues with this case regarded translation issues with witness evidence (e.g. allegedly the victims had used the term Sir but the translator opted for Colonel which suggested a different person), the issue of command responsibility, and the question of the appropriateness of the use of jury trial in UK war crimes proceedings (juries not being used in international criminal courts). Questions surrounding the adequacy of a domestic court exercising power over a foreign national, foreign state and foreign community, on the basis of universal jurisdiction opened up the issue as to whether adjustments needed to be made to judicial procedure in these cases. Universal jurisdiction, unlike other bases of jurisdiction, was not connected to state sovereignty. It was commonly explained as a basis of jurisdiction that served the 'conscience of humanity', in which a domestic court acted on behalf of the international community. An alternative (and arguably more concrete approach) was to see universal jurisdiction as a human right in terms of affording justice for victims.

Colvin v Syria, a U.S. case concerning the US journalist killed in 2012 whilst reporting from Syria, was also discussed. U.S. courts had criminal and civil jurisdiction over the commission of crimes in violation of international law. Marie Colvin was smuggled into Syria and hosted by Syrian opposition at their media centre in Homs. Marie was giving a live broadcast for foreign media on the 21st February and, on the 22nd, the centre was shelled, killing her, a French photographer and Syrian activists. In July 2016, a civil complaint was filed against Syria under the Foreign Sovereign Immunity Act, which criminalises terrorist acts, requiring that Syria be designated as a sponsor of terrorism

and that the claimant be offered a reasonable opportunity to arbitrate under international law. On 15th July 2016, the Syrian government responded by saying that Marie Colvin had entered Syria illegally, worked with terrorists and was responsible for anything that befell her.

A criminal case was then brought on the basis of extrajudicial killing in violation of international law and the protection of media workers in armed conflict, with Homs being in a state of hostilities at the time. Amongst the many publicly available documents from the Syrian regime was an intelligence circular from 2011, which called for arrest and detention of those who 'tarnish the image of Syria in the media'; however no documents used the term 'kill', relying on coded terms instead. The success of the case rested on the legality surrounding the conduct of hostilities and the strength of the evidence.

There was a criminal investigation in France, which initially was petitioned on behalf of the French citizen killed in that incident. The case had since evolved into a war crimes investigation, on the basis of passive personality, with added charges for two victims of other nationalities due to the French doctrine of 'indivisibility of crimes'. All of these cases were the fruit of over five years of evidence collection. The value in prosecuting the alleged perpetrators of those crimes was a form of 'lawfare', which afforded legal rather than just political condemnation to violations of international humanitarian law.

One of the victims, who appeared in the documentary as having smuggled fabric pieces on which victims had written their names with their blood, was thankful when hearing about the criminal investigations ensuing in Europe, such as the Spanish case. The hope was expressed that a case would also be filed in the UK for the killing of Dr Abbas Khan, who was unlawfully killed in 2013 whilst imprisoned in Syria

The capability of the ICC or even any international court to deal with the complexity and scale of the international crimes committed in Syria was questioned and a view was expressed that Syrians should deal with this through an *ad hoc* criminal tribunal because they were the community that bear the burden. It was they who would have to deal with trials, truth telling and reconciliation. There should be a mechanism that works with the victim community and the Syrian legal community. In the meantime, the retention and gathering of evidence was important. The evidence against Assad was overwhelming and more than any international tribunal had had in previous cases. It was argued that the international community was wrong to ask that the situation be dealt with by an international court; this had not happened which had led the community to become disillusioned. The lives of the Spanish claimant and the defector 'Caesar', for example, were at risk with perpetrators still active, yet it was through their and other Syrian's evidence that individual perpetrators had been identified in the Spanish case and that of Abbas Khan. As the UK counter terrorist command (SO15) had limited resources, it was important to find a way to build capacity and fund NGOs and mechanisms such as the IIM, so that these investigations could continue.



The Pursuit of Truth, Justice, Reparations and Institutional Reform in Transitional Contexts

Dr Matt Preston, FCO Multilateral Research Group moderating with **Fiona McKay**, Open Society Justice Initiative (and formerly ICC Victims Participation and Reparations Section); **Dr Carla Ferstman**, Director of Redress and **Paul Seils**, Vice President, International Center for Transitional Justice.

The discussion opened with an observation that not only was it complex to reconcile the objectives of both peace and justice in Syria at the present time, but it was also complicated to achieve either individually. The panel was invited to reflect on what should be done about transitional justice in Syria today. Subsequently, panellists were asked whether one should stick to a specific approach or adapt to the changing context of the Syrian conflict with an evolving approach. Finally, the chair wondered how we should approach transitional justice in order to improve the prospects for a political settlement.

The panellists generally agreed that Syria was still not in a transitional situation at present. However, they all agreed to some degree that it was of the utmost importance to discuss the modalities and prepare the ground for a successful future transitional process starting from today. In this respect, they illustrated some successful initiatives that were currently being taken by a number of actors, but they were of the opinion that the attention and the substantial engagement of the international community were still largely insufficient.

In the course of the debate, the panellists proposed several building blocks to which governments, NGOs and international organisations should stick to in order to lay the foundation of future transitional justice in Syria while the conflict was still ongoing.

First, it was unanimously agreed that the efficient collection of evidence before records were destroyed was pivotal to the transitional process. As shown by the documentary screening, the Syrian conflict featured an unprecedented amount of evidence regarding war crimes and crimes against humanity. Accordingly, it was essential to gather and record this evidence in an effective and focused manner in order to promote future accountability and redress for victims of systematic human rights abuses. When the relevant actors undertook this task, they should think about the types of evidence that we would need and establish which different uses of this information we would make - bearing in mind that this might not be limited to criminal accountability procedures - in order to attain these objectives. Indeed, this reflection should directly influence and shape the manner we collect data today. Moreover, it was important not to rely exclusively on documentary evidence, which was the most abundant: witness statements were harder to collect, but were equally important for ensuring future accountability and the pursuit of truth.

Second, the panellists raised the issue of consultation with Syrian civil society organisations and communities. It was observed that even if the State should normally be involved in transitional justice, in the absence of a legitimate authority recognising human rights violations it was still possible to conduct a community-led transitional process. In the case of Syria, it was essential to create the necessary conditions for consultation as soon as possible. Some groups had urgent needs, such as medical care, which should be met immediately. A consultation process entailed some complexities. First of all, consultation was going to be difficult because Syrian people were divided, and because they could make transitional justice choices that external actors may disagree with, such as providing amnesties or the death penalty for the perpetrators of war crimes. Then, the needs of the victims were likely to change over time depending on the level of security and stability in Syria. Indeed, if the basic needs of Syrians were not met, it was unlikely that people would engage in a fruitful discussion about truth or institutional reform. Nonetheless, strengthening the consultation efforts remained an essential condition for a peaceful transition. Therefore, access to information should be extended to Syrians that were not currently in the position to be consulted, so that when the time comes they would know how to engage in the discussion.

With regard to the participation of the Syrian population in the transitional process, how refugees and IDPs engage with transitional justice should be considered. In particular, one should not assume that reparation was connected to repatriation. Indeed, Syrian people may be unable or unwilling to go back to their country of origin at the end of the conflict. At the moment, a striking majority of Syrian refugees affirmed that they had the intention to return; however, this may be due to the dire conditions in temporary refugee camps, which means that this number may decrease in the future. Thus, victims of human rights violations should be able to access reparation even if they were outside the country, so as not to force them to go back to be eligible for reparations. For example, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) considered victims located outside of Cambodia, while the ICC Trust Fund has so far focused on the communities who stayed where the crimes took place. Refugees were also among the groups that would need redress now: even though this objective was hard to achieve, it was at least necessary to ensure that the material and psychological needs of Syrian refugees were met.

The panel observed that the property restitution issue had not received enough attention and should be addressed promptly. Property restitution was likely to be problematic because property registration documents may have been destroyed during the conflict or disseminated around the world during the Syrian diaspora. Therefore, it was necessary to focus on this issue as soon as possible: otherwise, it may be too late to identify these records. Other proposals were suggested, such as that the use of frozen Syrian assets as an instrument to fund victims' redress. It was suggested that the issue of forced disappearances, poignantly described by the documentary screened at the beginning of the event, was currently being neglected in the discourse on Syria and reparations.

Faith in justice was named as an essential building block for a peaceful transitional process that should be developed starting from now. The promotion of faith in justice should include showcasing the (rare) justice success stories, demonstrating political willingness to investigate large scale crimes and reinforcing Syrian voices that explain why justice is essential to Syrian people. With regard to the relationship between judicial accountability and peaceful political settlement, it was also observed that it was important to look beyond criminal justice by complementing it with the measures described above. Indeed, even if the pursuit of justice remained essential in the long term, it could only give a partial (and delayed) response to the Syrian situation.

Finally, it was argued that the approach to transitional justice could not be monolithic with reference to Syria. Before taking any specific measures, it was indeed necessary to understand the peculiar and continuously changing context of the Syrian conflict and to adapt the responses to it. It was stressed that if we did not take this task seriously, the discussion on peace, truth, justice, redress and institutional reform aimed at pursuing rule of law risked being without foundation.

Judge Silvia Fernández de Gurmendi

President of the International Criminal Court



In the final session, **Elizabeth Wilmshurst CMG**, distinguished fellow of the International Law Programme at Chatham House, introduced the closing speech of the President of the International Criminal Court. **Judge Silvia Fernández de Gurmendi** thoroughly reflected on the successes and shortcomings of the ICC in the day of the 19th anniversary of the Rome Statute signature and of the 15 years of operations of the ICC.⁵

The President first concentrated on the achievements of the ICC, which had demonstrated that international criminal justice was possible and that impunity was no longer an option. The development of a global system of justice was also thanks to national judges exercising their universal jurisdiction and to several *ad hoc* chambers and tribunals. However, the ICC played a central role in this system because of its permanent and general mandate and thanks to the large participation of the 124 State Parties to the Rome Statute. It was a court of last resort, not intended to compete for jurisdiction, but rather to work alongside national systems and encourage others to capacity build. In sum, she concluded that although impunity was still occurring, there was now a strong expectation of accountability, which we needed to continue to push towards a reality.

Judge Fernández de Gurmendi then described the actual operations of the ICC as a second great achievement. She observed that the court had succeeded in building a new institution from zero, and had made improvements to promote a more cohesive culture within its institutional structure. Moreover, she noted that the court was currently conducting ten investigations in nine countries; had four trials ongoing; had handed down nine convictions and one acquittal to date; and had addressed a large variety of crimes. Finally, the ICC had a strong focus on victims. Almost 14.000 victims had participated in proceedings; the ICC had awarded reparations to victims; and the Trust Fund for Victims had conducted assistance projects in a number of countries. In brief, the ICC had demonstrated that it was working concretely to address crimes; it had proved that it could deliver high quality justice, while also learning lessons for the future.

However, the President did not shy away from the fact that the ICC had often been criticised as being slow, weak, and selective. In this second part of her speech, Judge Fernández de Gurmendi underlined that the cooperation of States and the support of the international community, including in multilateral fora, were of paramount importance.

As far as the length of proceedings was concerned, the President recognised that ICC needs to enhance its efficiency in order to maintain credibility and promote continued cooperation from States. She explained that the reasons behind delays were multi-faceted, and not always down to the ICC, for example problems with State cooperation. However, the ICC was trying to improve what it can. The President said that her top priority had been enhancing the efficiency and effectiveness of proceedings, through improving internal governance, identifying best practices and harmonising processes; and developing key performance indicators.

With reference to allegations that the ICC was weak, the President emphasised that this very much depended on how much external support the ICC received through concrete cooperation, which was not always forthcoming. She pointed to the many people under warrant and still at large. The same could be said of the obstacles to referrals by the Security Council. Referring to Syria, Judge Fernández de Gurmendi clearly stated that the court was ready and had the capacity to receive a referral. But the real question was whether the international community was ready to refer, since this formal action must be supported by substantial cooperation.

⁵ Video of full speech available at: <https://www.biicl.org/int-justice-day>

Finally, Judge Fernández de Gurmendi addressed the problem of selective justice, noting that the questions of where and who to prosecute were difficult. The court had often been accused of focusing excessively on the African region. In this regard, she observed that several African States had self-referred their cases to the court and by the Security Council had referred Libya and Sudan. She thought that the issue was compounded by the ICC not having universal jurisdiction. She advocated a renewed concerted effort to attract new members. In relation the withdrawal of members, she observed that any treaty body has to live with the reality of withdrawals, as politics change.

The President concluded that there had been huge achievements, together with improvements in the operations of the court and in the effectiveness of international criminal justice, but that the long-term sustainability of the ICC would require concerted efforts by the international community.