



**British Institute of
International and
Comparative Law**

Report on the seminar

Current Trends in International Criminal Justice:
Courts, Cases and the Rule of Law

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On 22 May 2014, the British Institute of International and Comparative Law hosted an event on the current trends in international criminal justice. Rodney Dixon QC chaired the panel composed of Amal Alamuddin (Doughty Street Chambers), Professor Olympia Bekou (University of Nottingham) and Dr Federica Gioia (International Criminal Court).

At the beginning of the seminar Rodney Dixon QC highlighted several topical issues concerning the International Criminal Court (ICC), including individual criminal responsibility regarding aiding and abetting, and the relationship between the ICC and the UN Security Council (the Council), stimulated by the cases of Libya and Kenya. An area of current tension is the case of *Katanga*, whereby the judges decided to reclassify charges at the end of the case. He pointed out that established jurisprudence, emanating from The Hague, might also be affected by the Court's prospective preliminary investigation into the conduct of UK forces in Iraq. This decision sparked an intense public debate, due to the high threshold that ought to be applied in relation to the ICC's principle of complementarity. Mr Dixon suggested that the current situation in Ukraine might precipitate landmark developments in international criminal law. So too, may the Special Tribunal for Lebanon insofar as corporate entities – a television station and a newspaper – have been charged with contempt for publishing confidential information given by witnesses.

Amal Alamuddin addressed the relationship between the Council and the ICC and emphasised that the credibility of international criminal justice stands in the balance of the relationship between these two institutions. She pointed to two challenges in terms of: 1) political selectivity and 2) lack of enforcement by the Council. Political selectivity was identified in the manner in which the Council pursues accountability for international crimes. She was concerned at political division within the Council that has constrained the effectiveness of the referral system in triggering the jurisdiction of ICC, specifically in the context of prosecuting nationals of States that are not parties to the Rome Statute. This provides a stark contrast to the unanimous Council resolution establishing the Special Tribunal for Lebanon in 2007. The recent failure of the Council to refer the Syrian situation to the ICC – due to vetoes by Moscow and Beijing – has demonstrated the lack of a consistent approach in addressing international crimes. Serious crimes have been committed, and the Council has taken robust action, in Libya and Sudan. But in Sri Lanka, Gaza and North Korea, the Council has failed to take similar action – despite the fact that *the UN itself* determined the existence of international crimes in those places. Further challenges facing international criminal law include instances in which the Council has reacted to a situation, but has then failed to give a mandate that is sufficiently comprehensive to enable an appropriate Court to dispense justice for all crimes that have been committed (eg Lebanon). However, the most egregious manifestation of selectivity exists where the Council refers a situation to the ICC, but then carves out unjustifiable

exceptions for nationals of certain states (noteworthy examples are Sudan and Libya). Regrettably, this is now an established trend in referral resolutions, contravening the principle of accountability for all those responsible for international core crimes. This problem of political selectivity certainly has the potential to severely impact upon the credibility of the Council and the Court.

Ms Alamuddin suggested that if more States became members of the Court the accountability gap would be reduced, and the Court would not have to rely on the Council so much. Moreover, the Council should refrain from carving out exceptions for certain nationals when referring a situation to the Court. It would be in the interests of international criminal law, and so to the wider interests of justice, for the Council to act more consistently and on an objective legal basis in the face of international crimes. Those members of the Council with a permanent seat (and so the power of veto) should flesh out and adopt objective guidelines (rather than the current status quo of subjective, unfettered discretion) when considering referral to the Court. She concluded by noting that there are solid grounds to be confident that the institution of international criminal accountability at The Hague is here to stay.

In her presentation Professor Olympia Bekou pointed to the tense relationship of the Court with African states, which prompted some critics to label the ICC as the 'European Court for Africa'. She rejected this simplification by considering that most African cases are self-referred – the prosecutor has initiated just two cases using the power of *proprio motu*.

A paradoxical situation currently exists regarding the prosecution of Heads of States, for example in the cases of Sudan and Kenya. It is unrealistic to demand an indicted Head of State to attend proceedings in The Hague whilst, at the same time, attempting to maintain the presumption of innocence and allow that person to continue running the executive branch of the country. In recent years, the African Union has been particularly vocal in urging the Council to halt proceedings before the Court related to situations in Kenya and in Sudan. One key problem is the issue of immunity. Under article 27 of the ICC Statute, there is no immunity for Heads of State. The drafters saw this article as a great step forward for core international crimes, although, they did not envision having Deputy President Ruto and President Kenyatta facing proceedings in The Hague.

At the end Professor Bekou mentioned the situation in Ukraine. She clarified that Ukraine officially referred the situation to the ICC by a declaration pursuant to article 12, paragraph 3 of the ICC Statute, thus accepting the Court's jurisdiction. One problem, however, is that this is declaration stipulates a very narrow temporal frame (mainly covering events during the 'February Revolution'), and thus a narrow mandate of the Court is accounted for in this case.

Dr Frederica Gioia evaluated the ICC's substantive and procedural elements in light of the 'rule of law' requirement. Since not many references to the rule of law can be found in the Rome Statute, it could be questionable whether the rule of law qualifies as one of principles of international law that the Court is supposed to apply pursuant to article 21. Nevertheless, she insisted that it remains extremely important for the legitimacy of the ICC.

At the international level, elements of the rule of law are more elusive than in the domestic context. However, following a definition by Tom Bingham and increasing awareness about this principle in international affairs, it could be understood that international rule of law includes the following components: impartiality, publicity, institutional governance, transparency, accountability, fairness, separation of powers, and equality under the law.

The substantive nature of the rule of law concerns the role of victims and their standing in proceedings before the ICC. The Court is an institution of international criminal law, and therefore it is bound by the principle of legality. The law does empower victims but it also sets forth strict parameters for designation of the victim status. Equality before the law does not mean that all victims must come before the Court. Criminal justice is selective as a matter of necessity. Nor can all cases that come before the Court result in conviction of the accused individual, due to a (necessarily) high evidentiary burden that applies in criminal justice. The ICC does not score well in terms of legal certainty which is, however, a fundamental aspect of the rule of law. Judicial discretion in determining the parameters of victim participation – despite the existence of a specific rule – has resulted in a number of different approaches. In fact, the range of a victim's right is dependent upon which particular chamber the victim applies to. This is to the great detriment of legal certainty.

Regarding procedure, there are many areas where discretion is unduly wide and, so, the lack of legal certainty is unjustifiable. For instance, there is lack of a temporal limitation on the power of the prosecutor to investigate a given case. This is a stark contrast to the position under many municipal criminal legal systems. There are many other instances of the day to day practice at the ICC that are problematic from the standpoint of the rule of law, including, but by no means limited to: 1) the length and complexity of decisions; 2) the decision to grant an appeal; and 3) inconsistent practice on confidentiality (apparently due to the lack of a guiding principle). Some of these problems have been present in the decision on admissibility in the case of Saif Al Islam Gaddafi and Abdullah Al-Senussi. However, Dr Gioia concluded on the positive note that the Court strives to uphold the noble end of universal accountability for international crime, notwithstanding that there have been (and continue to be) significant obstacles along the way.

The seminar concluded with a book launch of the Institute's new book entitled *Contemporary Challenges for the International Criminal Court*, edited by Andraž Zidar and Olympia Bekou. In his presentation Iain Macleod, legal adviser at the Foreign and Commonwealth Office, emphasised that a book strikes a good balance between practical, scholarly and empirical characteristics of the work of the ICC, which makes its contents very accessible to readers. For that reason it will be useful for students, scholars and practitioners alike.

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