



**British Institute of
International and
Comparative Law**

Report on the Seminar Recent Developments in International Criminal Law: Hopes and Fears

Temple Garden Chamber Series in International
Adjudication

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On 15 October 2013, the British Institute of International and Comparative Law hosted the fourth event in the Temple Garden Chambers International Adjudication Seminar Series, 'Recent Developments in International Criminal Law: Hopes and Fears.' The panel was chaired by Rodney Dixon (Temple Garden Chambers) and composed of keynote speaker Howard Morrison (Judge, International Criminal Court) and discussants Dr Mohamed Elewa Badar (Northumbria School of Law) and Gaëlle Carayon (REDRESS).

Mr Dixon began by touching upon a host of recent and dramatic developments that illustrate the quantity and immensity of the challenges facing contemporary international criminal law (ICL) including: complementarity with regard to Libya and the trials of Saif Gaddafi and Abdullah Al Senussi; the African Union (AU) recommendation of deferral of the case against Kenyan President Uhuru Kenyatta; and calls for judicial intervention in Syria.

Judge Morrison suggested that in the globalisation of international criminal and humanitarian law we are approaching the end of the 'honeymoon' phase. A trend is emerging whereby States are withdrawing from the human rights prioritisation of the Rome Statute and take a more, paradoxically inwards-looking, community-based approach. For this Judge Morrison identified two contributing factors: first, international law has seen the recent emergence of corporate participants, the offensive capacity of which international criminal and humanitarian law does not currently accommodate; and, secondly, as a direct result of exponential global population growth, natural resources are dissipating. The significance of both corporate offending and resource wars will only increase in years to come and are therefore areas upon which international criminal and humanitarian law should carefully focus.

In linking such trends to the role of the International Criminal Court (ICC), Judge Morrison noted that in times of increased turmoil the populism of inwards-looking security-orientated national policies is undeniable. Simultaneously, States will look to international institutions such as the ICC for value for money and deal rapidly and responsibly with difficult situations. Given the budget-strapped reality of international institutions, Judge Morrison stated that if the international community wants something from the ICC then it needs to examine what it is prepared to pay for. With the requisite financial and political backing, Judge Morrison remains resolute that international law has the capacity to rise to the occasion, and that we can face recent developments and challenges if we abide by principles of fairness which, given the complexity of ICL, is often more easily said than done.

During the 'honeymoon' period of 2000-2003, Judge Morrison admitted that he was as naïve as any in hoping that the US would be part of the project, and was struck by the enthusiasm of African States to ratify the Rome Statute despite US hostility, and apparently viewing sovereignty not as an obstacle but as something to be incorporated. However, recently it seems that such positions are reversing, particularly in the case of AU Member States. As cause for concern, Judge Morrison highlighted Sudanese President Bashir's presence on the territory of various States Parties to the Rome Statute without being arrested. Compounding such concerns, Libya continues to pose a challenge given that, irrespective of the fairness of trials, any system that imposes the death penalty is not one the UN can embrace.

To those who sympathise with the contention that the ICC is targeting Africa, Judge Morrison highlighted that the ICC has a limited budget, most of which is spent trying to protect ordinary Africans from the excess of African governments. Moreover, the majority of cases before the ICC are self-referrals or UN Security Council referrals. On this note it is Judge Morrison's hope that the ICC will continue to demonstrate that it is not simply an arm of the Security Council (SC), unencumbered by its machinations, not least the veto.

Judge Morrison considered that all SC permanent members are likely to wield a veto in the process of protecting national security. Judge Morrison reads great significance into the fact that, as a direct result of Russia's invocation of international law, focus has shifted from the perceived inevitability of NATO strikes to talk of an ad hoc tribunal in response to events in Syria. The prospect of such a tribunal is extremely positive irrespective of the associated practical issues.

In closing, Judge Morrison invited a shift in perspective emphasising that, in 1980, nobody would have believed that ad hoc tribunals could have been established for the Balkans or Rwanda. It appears that hopes and fears for ICL depend on the viewpoint from which the ICC matrix is considered. Given it is only ten years old it ought to be viewed not as an end product but as part of an on-going process. Accordingly, Judge Morrison's long-term hopes rest in persuading the big players, such as the US, Russia, China, India and Israel to join the project. In the short-term, however, it is imperative that we deal developments of the kind seen with respect to the AU and Libya in a sensible and constructive way. Hilary Clinton's recent statement that the "US is no longer hostile" to the ICC is a great cause for hope. However, Judge Morrison's fears linger, based on the loose interpretation by the US of terms such as "hostile."

Gaëlle Carayon addressed victim participation in ICC proceedings, whereby victims act not merely as witnesses but as participants; when their personal interests are affected they may present their views and concerns at appropriate stages of proceedings, as long as not prejudicial to defence rights. The Rome Statute elaborated a definition of victim which has been refined by jurisprudence. However, the definition of broad notions of views and concerns, the appropriate stage of proceedings, and when the personal interests of a victim are concerned was a task left to the judge.

Victim participation has been recognised at all stages of proceedings and at the trial stage, victims are accorded extensive rights. Their involvement in proceedings also gives victims the opportunity to request reparations, and may facilitate rehabilitation and restoration of dignity. It was also noted that victim participation bridges the gap between the Court and affected communities, helps Chambers to understand the context of the commission of crimes and contributes to the establishment of the truth.

In considering the success of the system, Ms Carayon suggested that the record was mixed. Chambers have highlighted the constructive role of victim participation but limitation of extensive rights of participation to a narrow category of victims impedes fulfillment of the goals of victim participation. One future challenge is the administration of the system and the large volume of applications for victim participation, prompting the questions as to whether States will continue to fund this element of the Court's mandate, if the current system is not functional, is it worth it and, if so, what is to be done?

In closing, Ms Carayon highlighted the shift towards community-based approaches and considered collective reparation and participation a pragmatic solution, though not without its challenges. She suggested that hopes of the ICC delivering a novel kind of justice to victims have not been quashed and that the current context is one of developing a strategy for future problems. The taking account of all interested parties is essential given increasing pressure on the Court, and Ms Carayon concluded by qualifying the support of victims and civil society as vital to the continuation of the Court's work.

Dr Badar addressed the challenges of legal pluralism by considering the interplay between Islamic law of rebellion, international criminal law (ICL) and international humanitarian law (IHL). IHL does not address the issue of rebels, instead subject to domestic law, under which they are regarded as criminals. The Islamic legal system, or Sharia, however, treats rebels as combatants, not criminals, to whom the domestic criminal law is not applicable.

Dr Badar considered Nigeria, in which the application of Sharia in 12 northern states of the country is informally tolerated. Since its establishment in 1999, the terrorist organisation Boko Haram has committed mass murder. The Office of the Prosecutor (OTP) is investigating suspected crimes against humanity but has concluded that an armed conflict does not exist on Nigerian territory, excluding any investigation of alleged war crimes. Should the Prosecutor find that armed conflict does exist, the question may arise as to the applicable law. Dr Badar asserted that IHL would be applicable. However, it might be argued that two legal systems – IHL and the Islamic law of rebellion – would be applicable, each according to Boko Haram different rights and obligations. The question is then posed as to whether the ICC should take account of both regimes in assessing the conduct of Boko Haram in light of ICL.

The Islamic law doctrine of rebellion with respect to rebels, *bughah*, accords them prisoner of war status at the conclusion of hostilities rather than criminal prosecution for murder and property destruction; their conduct is justified by virtue of the fact it was for the purposes of ousting a corrupted regime and establishing an Islamic State. The three criteria for *bughah* status are that the group evince a degree of power and organisation, be under the command of a leader and have a legal justification for its acts. In the case of Boko Haram, reference to the OTP Report of 5 August 2013 suggests that all three criteria are satisfied. Accordingly, Dr Badar concluded that there is a case to answer that the ICC consider the Islamic law of rebellion if faced with defendants belonging to Boko Haram or other rebel groups to whom the Islamic law of rebellion is applicable.

In the ensuing discussion it was asked to what extent judges' individual opinions play a role in accommodating legal pluralism. Judge Morrison responded that we ignore Sharia at our peril; though most western lawyers do not understand it, we must learn to accommodate it, and individual judicial opinions can point the way in this regard but it will require much study and education nonetheless. Dr Badar added that it is for legal scholars to write on topics that are not widely understood, to raise awareness thereof.

The question was posed as to the prospect of the Court adopting reconciliation as part of its process. Judge Morrison considered that reconciliation works. However, the judges are bound by the inflexibility of the Rome Statute, and though some aspects merit revision, Judge Morrison was not certain that would be achieved. Ms Carayon highlighted that the reconciliation is a strategy goal of the TFCV, which it implements under the auspices of its general assistance mandate.

The question was raised as to perception of the ICC as meting out partial, victor's justice, to which Judge Morrison responded that there is always a danger of a view of partiality and that it depends on one's point of view and we must be sensitive to this. However, at the end of the day it comes back to the budget – there is a limited amount the ICC can do with a fixed, zero-growth budget.

The issue of the financial implications of SC referrals was also raised. Judge Morrison expressed the view that if the SC wishes for the Court to deal with a case, it should make a financial contribution. However, he also recalled that many States Parties to the Rome Statute do not have strong economies and that the Court is largely supported by four main contributors – Japan, Germany, France and the UK. In response to the suggestion that SC funding might affect the appearance of the Court as independent, Judge Morrison agreed but considered that the ICC is not a charity and that funds must come from somewhere – the ASP alone cannot support the cost of the Court – and though there is a special relationship between the ICC and the UN, the fact of funding the Court does not amount to funding a judgment.

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