

CONFERENCE REPORT

War Crimes Conference, 19-21 February 2009 SOLON in association with the Institute of Advanced Legal Studies and the Institute of Historical Research

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The intention of this conference was to bring together, in a small forum, a group of individuals with real expertise and insights in a range of areas. Originally a one-day colloquium had been envisaged, but when the Call for Papers resulted in a plethora of important and also wide-ranging options, the Conference Committee (Judith Rowbotham, Lorie Charlesworth, Michael Kandiah and Belinda Crothers) agreed that we had to expand our vision in order to accommodate as many as possible. We took the gamble that such a diverse mix of experience and expertise, bringing together academics (lawyers, historians, anthropologists, political scientists) with practitioners and professionals (judges, barristers, NGO workers, researchers etc) would work: that brought together in a conference format but without packing the conference with large numbers of delegates, real debate would ensue and that commonalities, examples of good (and bad!) practice, and even – ambitiously – strategies for moving forward would emerge. It did work! The result was a lively, stimulating, engaging set of debates emerging from these encounters between fine minds and the common passionate determination to make a difference.

1 Conference Themes and Challenges

The conference opened with a challenging plenary from Lesley Abdela, talking for only half an hour but engaging in a debate with the audience for the remainder of the session in a way which helped to identify many of the themes of the conference, in terms of practical agendas and ways of understanding war crimes and war tribunals. Drawing on her experience in the immediate aftermath of conflict in Kosovo, Bosnia, Sierra Leone,

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Iraq, Afghanistan, Aceh and most recently, Nepal, Lesley talked of the importance of making the identification and definition of war crimes, and their subsequent prosecution, more than an admirable concept; and into something which can actually help in post-conflict reconstruction in such societies. Her particular emphasis was on gender as a key factor in reconstructing citizenship, and she talked of the issue of rape, and its wider implications for the legal process. That was a theme which regularly re-emerged during the conference, as part of the debate over whether it was possible to identify some international code, and even more importantly, *language*, of rights which could unite all the participants in war crimes trials. Defining the nature of a war crime, in the cultural spaces of the local/national and the international was a key problematic: Lesley pointed out it was only recently that rape had been identified formally as a war crime, and this identification was hedged around with problems. She posed the question, why is a man injured in war a hero, while a woman raped in war is an embarrassment: are they not *both* 'wounded' in war? Should there not be memorials to both? Which, in turn, led to another debate much discussed during sessions, breaks and dinners in the conference: is it useful to talk of the 'victims' of war crimes, certainly when we are talking of the living. Are they not offered a better respect when the terminology of victimhood and its implications are avoided? Might 'witnesses' or 'survivors' be a better set of labels, especially in terms of their ability to reconstruct themselves as individuals and communities in the post-conflict world? Debate over this was a sustained trope for the remainder of the conference.

Another challenge was looking beyond the rhetoric to understand the dimensions, and so begin to find answers to, the question of who was undertaking the war crimes trials and on whose behalf? The debate threw up another important point: that the politics of justice are complicated and it is not always easy to apportion 'blame' or the label of being 'in the right'; partly because of the complications of the ways in which treaties are written (war crimes such as rape may continue after a treaty is concluded, but they no longer acquire the label and so are not considered treaty violations). There is also the issue of what should be the role of the International Criminal Court: should it involve itself in post-conflict resolution, or was that aspect of war crimes tribunals for other agencies and agendas? Was it possible, or desirable, to draw a line between the work of war crimes tribunals, especially where the ICC was involved, and other agencies (local, national and international)? And what kind of justice was being sought? How could, and

indeed *should*, international jurisprudence trickle down into domestic courts? Should the ICC have a role in this? It was agreed that in many ways, 'justice', certainly as it was perceived by those who suffered from or were affected by war crimes in some way, was often contained in the interstices of procedure, and that was a real complication.

By the end of the opening session, it was plain that one of the themes that would regularly emerge was the challenge to academics to find ways of providing work which could be used to inform and support war crimes initiatives, especially in the courts. A challenge for practitioners and professionals in the field, was finding the best way of establishing good practice, respecting local differences while supporting the concept of international law (and so characterised by a fundamental agreement on key constituent elements), and an international code of practice that respected – even gave primacy to? – the national dimension. In succeeding parallel sessions and plenaries, these issues, and their relationship to particular themes, regions and agendas, were to reappear in both the presentations and the debates. It was accepted that there were many (too many?) different jurisdictions and court processes when it came to war crimes tribunals. How did this contribute to, or work against, the fight to establish good practice?

This theme was particularly apparent in the Thursday evening Round Table, when Lesley Abdela again challenged the conference to consider the concept that we were talking about lessons identified, and not yet lessons learned. Talking of war crimes tribunals, she suggested that one thing emerging already from the conference was the issue of their timing, because it bore so importantly on the question of what kind of post-conflict justice is acceptable overall? Is it important to have elections first, to establish 'democracy'? Or should there be moves first to deal with war crimes, through international or national (or both) tribunals in that the outcome of tribunals (or Truth and Reconciliation Commissions, alternatively) had the power to affect, profoundly, people's relationship with a post-conflict constitution and its democracy? As the debate revealed, the issue was very strongly that of *where* should prosecutions take place? Were hybrids between the national and the international tribunals the way forward? This was a particularly crucial issue given the time factors (Shireen Fisher estimated that the trials in Bosnia could be sustained for perhaps another ten years before key witnesses died and made such trials practically impossible) and the geographical realities of distance. Was it important at times for there to be such a distance as to justify trials in The Hague; or

was it always going to be preferable to locate trials in the affected region, given that travel was likely always to be an issue for witnesses if only for cost reasons?

The economic dimension came up as a regular theme, but we all felt it to be a deficiency that we had not had specialists in this aspect come forward. It was agreed, for instance, that the current global economic crisis had real and worrying consequences for successful war crimes tribunals: the support available for witnesses (and this dimension was, anyway, another issue raised as a real problem under current arrangements), especially vulnerable ones such as women who had been raped. It was pointed out that historically, and even today, one of the things which was generally carried on during a war was trade: today it was likely to be illegal rather than legal trade, as in the case of the Mafia in Bosnia, but that was a dimension that needed to be explored further.

2 Contextualising the Issues

Some papers stressed the notion that war crimes had to be seen in the context of their historical circumstances and, consequently, how these circumstances played out. This helped explain how war crimes were prosecuted and how nations were subsequently confronted – or perhaps even more importantly – failed to confront the past. For instance, Effie Pedaliu's paper on the war crimes perpetrated by Italy during World War II argued that the advent of the Cold War and a desire for reconciliation within the post-war Italian state led to very few offenders being prosecuted. Pedaliu further argued that this has led to the fundamental political instability of the modern Italian state, providing an interesting illustrative response to Lesley Abdela's query whether it was sensible to move to elections without dealing first with the issue of war crimes through some means. Other papers, such as that given by Peter Rushton and Gwenda Morgan, revealed the historical origins of attitudes which colour a state's practice when dealing with war crimes. They explored the perceived importance of an observance of legal protocols during the American Revolution/War of Independence, which found real echoes with the strategies adopted by defence lawyers as depicted in the powerfully delivered panel featuring Joe McMillan, Michel Paradis and Melissa Epstein Mills, on prosecutions in Guantanamo Bay, and the prosecution of US servicemen for misconduct during the Iraq war.

Equally, the historical dimension demonstrated that it was the label of 'war crime' that was new: many of the crimes now encompassed under that banner were already well-established as atrocities in war, as in the case of rape. This reality was forcefully addressed in the panel featuring Bonita Meyersfeld, Rirhandu Mageza-Barthel and Daniela De Vito. As their presentations and the subsequent discussions emphasised, it had to be accepted that sexual violence, particularly (but not exclusively) against women was integral to the way in which perpetrators committed war crimes, regardless of location. But as the talks delivered by, amongst others, Cissa Wa Numbe and Erasmus Ndemole Migyikra stressed, sexual violence – elevated at times to being a tool in a deliberate genocide – is best understood as part of an overall pattern of war crimes. This means that the case studies of events and tribunals in particular regions have a very significant role to play in furthering strategies for dealing with war crimes, whether judicially or socially, as Timothy Waters, Valerie Arnould and Iryna Marchuk demonstrated. It was very impressive to hear the range of papers on Bosnia also; in particular the panel based around the experiences of the Prosecutor's Office and the UNDP in Bosnia-Herzegovina. Aided by their Chair, Shireen Fisher (who, until 2008, was an International Judge there) Toby Cadman, Iva Vukusic and Alma Dedic provided an absorbing set of insights into the developments there.

In this conference, a particular focus was given to Bosnia, and to a range of African experiences, particularly in Congo and Rwanda but with attention also to Sudan/Darfur and to Sierra Leone, and to the lesser known events in Cambodia (Silke Studzinsky brought us the latest news on the trials just beginning there) and South America: as well as Peru, the resounding closing plenary delivered by David Sugarman testified to the importance of a global, as well as a historical, comprehension in order to understand the impact of war crimes, especially when war crimes tribunals are not an automatic resource. One of the great regrets of the conference was that the overly complicated visa system now operating for entry to the UK meant that one speaker on African experiences in Uganda that many were very eager to hear was not able to be present: Lawrence Dulu Adrawa of the African Development and Peace Initiative. However, we are seeking to get a copy of his paper which could be posted on the SOLON website, or form part of a future issue of *Crimes and Misdemeanours*. At this stage, the issue becomes whether to mention individually every one of the fine papers delivered in this Report: as it is already a lengthy document and there were over 40 speakers! We

resisted the temptation and have continued to focus on themes and some examples illuminating broader issues, but wish to stress our gratitude, again, to those speakers who we have not so far singled out in relation to a particular point or theme: all the papers worked together to form an impressive whole and the 'glue' was the debate which was part of each session, and part of the conversation between sessions. To emphasise this, we have put a link to the Abstracts at the end of the Report, and a copy of the final conference programme also.

3 Conference Reflections

Despite the horrors that characterise war crimes, it has to be commented that from the debate following the opening plenary on, one very positive aspect emerged organically and was sustained during the various papers and discussions, becoming a conference trope. That is the extent to which so many individuals professionally involved in the aftermath of war crime, including investigators, judges, lawyers and others were passionately engaged in, and committed to their work beyond 'normal' professional duties, in ways that commanded the enormous respect and admiration of the Conference Organisers. The range and scope of the commitment demonstrated, in a humbling manner, that original discipline and formal qualifications need be no bar to involvement, witness the role played by Konrad Kweit and his team of historians in bringing Lithuanian Nazis to trial in Australia; something that was also emphasised by David Fraser's powerful and challenging plenary. Again, the paper on representing victims before the ICC given by H Candace Gorman, contextualised by her inspiring contribution to discussions through the conference, raised the possibility of interdisciplinary *pro bono* work being developed to aid war crimes trials – something that SOLON will be very interested to help forward. It was not just the speakers: many of the delegates present had tales to tell which demonstrated the same energetic dedication. For instance, we think of Martha Baker and her contribution to defining rape as a war crime. Such levels of commitment require broader public recognition. We hope that the SOLON website will be able to provide a way of informing people of developments in these various areas. .

But overall, most people agreed that there were certain universal themes spanning the historical and the modern and that because of this, there was a real need for information – accounts and analyses which practitioners in the field could draw on to help. In that

sense it is important also to stress successes more than failures: it is always easy to repeat a failure, it was pointed out. However, the creation of a synthesis – a manual – of what makes a successful tribunal was a genuinely urgent need. Whenever a new court is created, it has to create a legal culture for itself – a reference guide of what has worked elsewhere could help to avoid the repetition of old mistakes. The issue of the value of such prosecutions was considered, notably in Sandeep Gopalan's paper on Bush and Co as 'war criminals', which argued that it was not in anyone's interests to pursue such a path. Providing a challenge to this, though, Cissa Wa Numbe asked if, in the light of the targets identified by the ICC and international tribunals generally, it was possible to say that these courts were appropriately accountable and were identifying the people who needed to be prosecuted. How far were such courts located in, and focusing on, the weaker states, the economically poorer and less powerful entities and individuals? Erasmus Migyikra, contributing to the first round table with his experiences in Sudan/Dafur, had also raised this issue. As this issue of *Crimes and Misdemeanours* goes to press, events in Sudan are providing substance for their concern. We in the West do have to think seriously about this perception of the ICC. Whether or not it is justified is the most urgent question; but it provides a serious challenge to the idea put forward by other speakers that there is, somehow, a consensus about the discourse, the purpose and the nature of international justice. It is a grand hope, but as we write this Report, we find ourselves unable to accept that that hope is perceived as it needs to be, if the ICC is to work as a conduit for a genuinely international justice. *Are we talking the same language? Can we talk the same language?*

This is indeed a critical issue for us all to confront. Events in Sudan mean that it is not an issue that should be put off. It matters *now*, as media reportage underlines that there is a substantial Sudanese perception that the arrest warrant issued by the ICC on 4 March 2009 against the President of Sudan, Omar al-Bashir, by the ICC is part of a neo-colonial conspiracy against the country. There have been angry accusations from within Sudan that the ICC is only interested in prosecuting those in the 'weaker' states, in a disturbing echo of the conference questioning. This development is also accompanied, according to reports on 5 March 2009, by the worrying news that a number of international aid agencies are being evicted from Sudan/Dafur because they are labelled as having a negative political agenda, potentially causing a humanitarian disaster and

the opportunity for further war crimes. We clearly need to reflect on what are the wider implications of this for the effectiveness of the ICC and its ability to deliver justice.

Another question raised was whether it is necessary, if a genuine format for international justice is to be achieved, to identify a second category of war crimes and criminals: those who aided or were in some way complicit in the committal of war crimes; those whose aid or compliance was essential to the performance of war crimes without them being actually the perpetrators. It should not matter, as both Erasmus Migyikra and Cissa Wa Numbe argued, in a challenge to us in the West, who the perpetrators were, in terms of status, nationality or prominence. If they could be identified, should they not be prosecuted? All injustice needed to be dealt with. And as Jose Pablo Baraybar insisted, given the numbers (of victims, witnesses, perpetrators) involved in so many modern war crimes, there was also a problem with the retributive justice process of the law invoked in war crimes tribunals. There were aspects of post conflict dealing with war crimes that could not wait for the slow realities of the law. Returning to the theme of what the agenda of these tribunals should be, he urged the need to involve aspects of civil society in the delivery of justice to those awaiting it in the aftermath of what he described as a 'permanent' crime for which society demanded justice, if it was to heal – even if it meant damaging a possible legal case; again something which leads the authors of this report back to events in the Sudan, and the question of what strategies best deliver a form of justice acceptable to those affected by war crimes. Yet, in the end, the conference finished on a high note with the concluding plenary from David Sugarman, reflecting through the example of the trope of memory in Chile on many of the themes and issues brought up elsewhere in the conference.

Finally....

In the concluding Round Table, several key points were held by speakers such as Silke Studzinsky and Jose Pablo Baraybar to have been identified during the conference. First, it is now time to have a review of the existing war crimes tribunals, including the ICC, and to question the extent to which there is a rule of law which is standard to them. It seems to be agreed by most there that distant courts are not the answer in the majority of cases of trials for war crimes: there is a need for these to be as local as possible, which also raises issues of the compositions of juries in national and international tribunals. It is agreed that there needs to be a focus on other institutions and what their

role in the creation of post-war justice should be – including states and bodies such as the EU, the USA, NATO and the UN. It was suggested that while there was much discussion *from* them, there needed to be talks *about* them in this context.

Questions it is felt important to ask – and academics were targeted here as the people to carry forward this task, though obviously in collaboration with practitioners and professionals – include: who are the trials for? Are they for the peoples affected by an individual set of war crimes, or to further international ideas of ‘justice and civilisation’? Do we want such justice? Do we want what such justice brings? Who should develop the reparation formulae, and should reparation, rather than the war crimes tribunals be the main thing, since it could affect more, in practical terms, than the tribunals? There was also an issue brought up directly by Arzoo Syeddah and Kate Wright, and was implicit in many other talks: ‘How Do We Get Audiences to Give a Damn About the Congo (and for Congo, read any location from Aceh to Peru)? What Sort of a Damn Do We Want Them to Give?’ How can the media be persuaded to engage with war crimes in ways which connect and engages their audiences, and so sustains a continuity of reportage, instead of brushing it under the carpet as too often happens. *Is there such a thing as compassion fatigue?* The Victorians, as Judith Rowbotham pointed out, would not have thought so: why is it identified as a feature of the modern landscape? Excuse or reality?

As the conference progressed, it became clear that there was the need – even the demand – for another conference. It is felt that a suitable time would be two years from February 2009: sometime in the spring of 2011. Again, the idea will be to keep the process small, to facilitate discussion. The organisers hope that they will see there not just people reporting back on what has happened – or not happened – in the projects with which they were involved, identifying – as Shireen Fisher asked – the successes, the ‘what worked’ elements as much if not more than the failures (of actions or of inactions). But they will also hope to expand not just the chronological framework (the involvement of several historians looking back beyond the twentieth century has been held to be of real value by several practitioners at least) but also the conceptual and geographical areas for discussion. There will, we hope, be discussions of places like Aceh and Timor, and of the prosecutions of war crimes not so labelled, but essentially war crimes in all other respects – as in Argentina. But a key strand will remain a continuity of reflection. Therefore, the draft of the Call for Papers will be circulated, for

comment and amendment, to the speakers and other participants at this first War Crimes conference before being circulated more widely.

Finally, it is hoped that – in a variety of formats – the majority of the presentations at the conference will be published. Some will appear in a special edition of this journal; and the organising committee are in discussions with publishers over an edited volume. It is also proposed that there will be a range of accompanying material which can be lodged on the SOLON website in the intervening time before the next conference, to help keep interested people up to date. In organising this interdisciplinary conference at the Institute of Advanced Legal Studies, facilitated by IALS, along with fellow institutions in the School of Advanced Study at the University of London (Centre for Contemporary British History and the Institute of Commonwealth Studies) SOLON owes a great debt to Belinda Crothers at IALS for her practical organisation (without her, it would never have happened!) – but once again, we return to the reality that we owe a great debt to our speakers and participants, many of whom made huge efforts and considerable sacrifices to enable them to get here, and who have now returned to work that is neither a sinecure nor carries a guarantee of personal safety. It was they who made the conference the humbling, worrying but also at times inspiring, call to action that it turned into. Thank you!

[Conference Programme](#)

[Speakers Profiles](#)