Building a Legacy

Lessons Learnt from the Offices of the Prosecutors of International Criminal Tribunals and Hybrid Courts

International Conference
7–8 November 2013 in Nuremberg

Conference Report

by Viviane Dittrich

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Introduction

The following is a report of the proceedings of the conference entitled "Building a Legacy – Lessons Learnt from the Offices of the Prosecutors of International Criminal Tribunals and Hybrid Courts" which was held at the Memorium Nuremberg Trials on 7 and 8 November 2013. This report is designed to summarize the main arguments made in each presentation and to capture the key points of discussion. We have also identified some questions that remain salient.

The conference explored the timely topic of impact and legacy of the International Criminal Tribunals and Courts from the perspective of the prosecution of international crimes. As the Ad hoc Tribunals and Hybrid Courts are working towards completing their last cases and winding down, the conference provided an international forum to capture and extend the important discussions on their achievements, contributions and lessons learnt regarding the selection of cases and investigations, the completion of mandates and partnerships between national and international jurisdictions.

There were a number of reasons to organize a conference on this topic. Following the successful conference "Through the Lens of Nuremberg: The International Criminal Court at Its Tenth Anniversary" held in Nuremberg in October 2012 which indirectly touched upon the topic of legacy, it seemed apposite to hold a conference dedicated entirely to a discussion on the impact and legacy of the different tribunals at the international and national level. Moreover, to complement previous legacy conferences organized about the Tribunals it was decided to take a broad comparative approach to the topic and chose a specific focus, namely to broach the issue of legacy through the lens of the Offices of the Prosecutors. Whether or not it is too soon to speak of legacy and make legacy assessments was an issue that arose during the course of the conference.

Three key questions guided the conference discussions:
What is the impact of the prosecution of international crimes and what will remain from the work of the Tribunals at the international and national level?
What are the lessons learnt on the partnership between national and international jurisdictions?
How can functions that are currently undertaken by international courts be transferred to national systems?

Speakers included Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, Hassan Bubacar Jallow, Prosecutor of the International Criminal Tribunal for Rwanda, William Smith, Deputy Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia, James Stewart, Deputy Prosecutor of the International Criminal Court, as well as former Special Court for Sierra Leone Prosecutors, David Crane and Desmond de Silva, and Chief of Prosecutions, James Johnson, and David Tolbert, former Deputy Prosecutor of the International Criminal Tribunal for the former Yugoslavia.

Other speakers included tribunal officials and defense lawyers, as well as renowned international criminal law experts from civil society and academic institutions and representatives of national courts with jurisdiction over international crimes from Bosnia and Herzegovina, Senegal, Serbia and Uganda.

Overall, the conference had over 90 participants from 26 different countries. Attendees included, inter alia, legal professionals and tribunal staff members as well as representatives from academia, civil society and the media. In addition, thirteen journalists (from Bosnia and Herzegovina, Cambodia, Kenya, Lebanon, Liberia, Myanmar, Rwanda, Senegal, Sierra Leone, South Africa and Uganda) participated in a media workshop on international criminal law from 5 to 9 November 2013.

Over the course of two days and seven high-level panel sessions, a range of important issues facing the International Criminal Tribunals and national courts were discussed. Lessons learnt from the investigation and prosecution of international crimes, the principle and practice of complementarity, dilemmas facing defense counsel, the experiences of hybrid and domestic courts and cooperation challenges between national and international prosecution authorities took center stage in the discussions. The speakers and audience members considered these issues and generated a rich discussion.

The conference successfully brought together international legal experts and practitioners from various international and national jurisdictions to engage in a prolific exchange of experiences in a unique forum space as provided by the International Nuremberg Principles Academy.

Panel Introduction: The Notion of Legacy

Viviane Dittrich
London School of Economics
and Political Science

Viviane Dittrich provided a conceptual framing of the topic of legacy building. First, she introduced the contours of a new theoretical framework emphasizing a plural concept-ualization of legacies placing the social construction of legacies at the center. She argued that the common concept of legacy is too simplistic and one-dimensional. Viviane Dittrich placed emphasis on the multiplicity of legacies and elaborated on the significance of actor diversity in legacy building. She also compared different definitions of legacy. Second, Viviane Dittrich analyzed the tribunals as legacy leavers through the prism of the increasing institutionalization of legacy and outlined three main levels of the tribunal's legacy efforts. At a rhetorical level, legacy was recognized as an issue. On a structural level, institutional bodies and professional positions devoted to legacy were created. On a practical level, efforts to design and implement concrete legacy projects were intensified. The legacy projects of the Offices of the Prosecutors are multiple, including several Best Practices Manuals and training programs. Third, Viviane Dittrich critically highlighted some key dynamics and tensions regarding ongoing legacy building. She emphasized that attention should be paid to the notion of legacy from the moment a tribunal is created, not only once its closure is imminent. The tribunals, as legacy leavers, have a central, albeit limited, role in this process. In light of the broader actor landscape it is important to appreciate that the significance and meaning of the tribunals' legacies is not only a legal question but also a political one. Ultimately, their legacies remain under construction.

Panel

What Legacy? Whose Legacy?

The Impact and Consequences of International Criminal Tribunals and Hybrid Courts

Hassan Bubacar Jallow
Prosecutor, International
Criminal Tribunal for Rwanda

Hassan Jallow opened with a brief discussion on legacy highlighting that when we speak of legacy we mean inheritance for success, the impact and consequences of the tribunals. Certainly, different perspectives exist depending on who the stakeholders are. For instance the architects of the tribunals, lawyers, victims or historians may have different expectations. Hassan Jallow emphasized the role of the institutions themselves in the assessment of their work and identification of their legacy. This is particularly significant given that some information, for instance regarding best practices and lessons learnt, is not in the public domain. However, it seems that the jury is still out. With regard to the International Criminal Tribunal for Rwanda, Hassan Jallow drew attention to a number of achievements and contributions, namely prosecutions of the highest echelon of political, military and societal leaders of 1994, the tracking and arrest of accused persons who had fled Rwanda, jurisprudential achievements in particular in relation to gender violence, and the publication of best practices manuals. In particular, the Best Practices Compendium, prepared in cooperation with the Offices of the Prosecutors of other Tribunals, aims to serve a practical purpose in training programs. Hassan Jallow moreover highlighted other projects currently underway, including several manuals and a "Genocide Story" project. Finally, in his view, the referrals of cases to Rwanda alongside tribunal's assistance to Rwanda in its law reform have been an important signal for judicial international approval of the Rwandan legal system and for economic development.

David M. Crane
Former Prosecutor of the
Special Court for Sierra Leone,
Professor, Syracuse University;
Chair of the Board of the
Robert H. Jackson Center

David Crane began his remarks with reference to the Courtroom 600 as symbol of the legacy of Nuremberg. In light of the violent 20th century he expressed the hope that the 21st century may be better. He recalled that modern international criminal law is barely twenty years old, hence concluding that we are at the beginning of the beginning. David Crane detailed some significant contributions in terms of jurisprudence and rules of procedure and evidence and the importance of outreach. He highlighted the Special Court for Sierra Leone's pioneering role, including its narrow mandate to prosecute those bearing the greatest responsibility, the Charles Taylor trial and outreach program in Sierra Leone. Moreover, David Crane argued that politics is the bright red thread of modern international criminal law and that it is critical for a court to understand its political place in the world. Finally, he cautioned that we should continuously remind ourselves to think of the victims.

David Tolbert
President, International Center
for Transitional Justice

David Tolbert first commented on the challenge of determining any legacy. He argued that our focus should be on the national level rather than the international level while not belittling the importance of the international legacy. Extending upon David Crane's emphasis on the victims, he underlined the importance of turning our attention to the societies suffering from massive abuses and the commission of crimes. Furthermore, he argued that it is vital to reestablish the social contract between citizens and their state who failed to protect the individual. In light of a broader transitional justice argument, David Tolbert highlighted the interplay of different justice mechanisms and their signaling effects to the societies in question. From his perspective, the most important element to be emphasized is the impact on the national level long after the courts leave the country or cease to exist. To illustrate this, he used the example of the legacy projects of the Special Court for Sierra Leone in Freetown. Finally, David Tolbert noted that we should be modest in terms of what we can accomplish.

General Discussion

The discussion following the panel presentations evolved around two central themes: the interpretation of legacy and the role of politics. First, Mark Kersten asked about the usage of the term legacy. Sir Desmond de Silva asked whether one of the major achievements of the Special Court for Sierra Leone was dispensing with strict United Nations rules. Margot Hellwig-Böte questioned who has the right to decide what collective memory is and should be. It was also asked why only so few cases had been tried in

Rwanda. Hassan Jallow stated that there will likely be many interpretations of legacy going forward. While the seat of the International Criminal Tribunal for Rwanda was in Arusha he stressed that eight cases had indeed been referred to Rwanda once law reforms were put in place. David Crane cautioned to take skepticism seriously and to critically ask whether the justice we see is the justice the victims and those affected by the crimes really want. David Tolbert recognized that the interpretation of legacy is a matter of societal dialogue and debate which may well change over time. Furthermore, Philipp Ambach asked whether the prosecutorial strategy reflected what would be the most viable strategy for the Special Court for Sierra Leone. A question was raised regard-ing the International Criminal Tribunal for Rwanda's focus on victims and its legacy in Tanzania. Judge Elizabeth Ibanda Nahamya questioned whether there has been any contribution to reconciliation in Rwanda and what the track record of witness protection is. Then Murtaza Jaffer referred back to the definition of legacy and raised the point that if legacy is seen as impact how legacy may be built knowing that the ad hoc Tribunals are closing. Hassan Jallow noted that when victims acted as witnesses the Tribunal takes care to provide welfare, medical assistance and protection. He moreover stressed that the Tribunal conducted various outreach programs in Rwanda and Tanzania, however its primary mandate from the Statute is to prosecute and reconciliation is mentioned in the preamble only. David Crane reiterated the importance of politics, noting three points the tribunals hopefully showed, namely that nobody is above the rule of law, the rule of law is fair and more powerful than the rule of the fun. He expressed a hope that studies will reveal that Sierra Leoneans feel that justice was done. David Tolbert finally noted the importance of clear criteria for prosecutorial decisions and a critical assessment of possible tensions between peace and justice.

Open Questions and Outlook

- What role can the tribunals play in defining and assessing legacy?
- What is and should be the role of politics vis-à-vis the prosecutorial strategies of the tribunals?

Panel

Lessons Learnt from the Investigation and Prosecution of International Crimes

Serge Brammertz
Prosecutor, International Criminal Tribunal for the former Yugoslavia

Serge Brammertz presented the Best Practices Compendium published by the Offices of the Prosecutors in 2012 to introduce the topic of the panel. He argued that there are three major lessons learnt. First, forensics is an important issue in the international field. Second, more attention needs to be given to information collection and management from the start. Against the backdrop of the nine million pages of documents collected by the International Criminal Tribunal for the former Yugoslavia he cautioned to not try to collect everything but to go about collecting information in a more purpose-driven and analytic manner. Third, care needs to go into case selection and the tracking and arrest of fugitives. To date, the International Criminal Tribunal for the former Yugoslavia is the only tribunal with no fugitives, which is not unrelated to the role of the conditionality policy in light of the enlargement of the European Union. Serge Brammertz underscored the important role played by a favorable political climate and by trained and skilled tracking teams.

Hassan Bubacar Jallow
Prosecutor, International Criminal Tribunal for Rwanda

Hassan Jallow identified a number of major areas, drawing on his experience at the International Criminal Tribunal for Rwanda, which he considers critical for further reflection on developed practices. First, a selection of targets is necessary as no Prosecutor can prosecute all possible cases, yet he underlined that it is critical to develop and publish transparent criteria underpinning any indictment policy. Second, given the mass of evidence and documents Hassan Jallow stressed the need for modern systems of evidence collection and management. Third, he pointed to the need for an effective system of witness protection since witnesses are the building blocks of trials, in particular if there is heavy reliance on oral testimony as in the case of the International Criminal Tribunal for Rwanda. Finally, he drew critical attention to the arrest of fugitives and to the need for specialized investigators of sexual violence crimes alluding to the Best Practices Manuals on Tracking Fugitives and on Sexual Violence being developed by his office.

James Stewart
Deputy Prosecutor, International Criminal Court

James Stewart presented some insights from the Lessons Learnt project at the International Criminal Court, providing a perspective from an institution that is not winding up but building for the future. He sketched the seven aspects of the ongoing project: identification of what could be improved from the Court's own experiences (1), appreciation of the experiences of other tribunals (2), transformation of lessons learnt into dynamic goals and strategic plan (3), acquiring of resources (4), putting right people in place (5), implementation of lessons learnt process within the Office of the Prosecutor (6), and establishment and enforcement of professional standards in the Office of the Prosecutor (7). Focusing on three objectives, James Stewart emphasized that the Office of the Prosecutor at the International Criminal Court is dedicated to adopting more sophisticated methods, striving for high quality with its new strategic plan and acquiring the necessary resources in terms of budget and man power. In sum, he suggested a current trend towards more quality over quantity.

James Johnson
President and CEO, Robert H. Jackson Center

James Johnson focused his remarks specifically on the experience of the Special Court for Sierra Leone. The first lesson learnt was the importance of a narrow mandate. Although the initial expectation to have the Court complete its mandate within three years was unrealistic, the narrow mandate focusing on those who bear the greatest responsibility allowed the court to issue thirteen indictments and finish its cases within ten years. James Johnson emphasized the importance of a cooperative relationship with the government in question as second lesson learnt. The Special Court for Sierra Leone had the luxury in his view to have a government that did not obstruct its every move, but for instance provided assistance with regard to arrests and provision of security. The third lesson learnt was the imperfect and poorly effective model of voluntary contributions. With regard to investigations, James Johnson argued that another lesson learnt is to opt for a team approach to investigations with investigators who know the culture and people on the ground to get access as was the case in Sierra Leone. Furthermore, he conveyed that effective outreach programs need an enabling political environment and that witness protection needs to continue well after a trial is finished as the recent contempt cases before the Special Court for Sierra Leone demonstrate. Finally, in light of the Sierra Leone experience of having trials in situ, with the exception of the Charles Taylor trial moved to The Hague, he noted that accessibility of trials is another important lesson learnt.

Ekkehard Withopf
Senior Trial Counsel,
Office of the Prosecutor,
Special Tribunal for Lebanon

Ekkehard Withopf concentrated on the relationship between third party fact finding and prosecutions, an important topical issue relevant to various tribunals while particularly salient at the Special Tribunal for Lebanon. The relationship is complex given inherent political, legal and ethical challenges involved. He highlighted three aspects that warrant attention and reflection: first, a lack of sufficient training and absence of a standardization of training; second, a lack of standardized investigation procedures; and third, a lack of standardized procedures for the collection and preservation of evidence. As a result of procedural insufficiencies, failure to identify authenticity and evidence of little probative value, Ekkehard Withopf cautioned that evidence can be undermined. Following the establishment of the Special Tribunal for Lebanon, a practice direction regarding admissible witness statements was issued. He argued that training and procedures could be standardized even if third party fact finders believe that to gain access they must not be seen as a tool of prosecution.

William Smith
Deputy Co-Prosecutor,
Extraordinary Chambers in
the Courts of Cambodia

William Smith referred to the Best Practices Compendium which he considers an important contribution to legacy. He sketched various achievements in the international criminal law arena, including jurisprudence, elements of crimes and procedure. In order to be relevant and make a real contribution, in his view, the tribunals have to be quicker and more cost-effective and a paradigm shift needs to happen from prosecution to prevention. William Smith commended initiatives to pass on lessons learnt through written documentation such as Best Practices Manuals. With some concern he noted that the fantastic body of knowledge developed over the years is not necessarily passed on from one tribunal to another, hence in his view training and knowledge transfer deserves attention as systematic issue. For instance at the Extraordinary Chambers in the Courts of Cambodia, he did not see a systematic knowledge transfer from the experience of the International Criminal Tribunal for the former Yugoslavia. From his experience in Cambodia, William Smith elaborated on three lessons learnt. First, he argued that prosecution and trials would have been more successful had there been more effective and sustainable knowledge transfer. Second, he pointed to the relationships with other organizations since the Court does not exist in a vacuum. Finally, he mentioned very modern systems for the use of analysis.

General Discussion

Following the presentations three questions were raised by Jennifer Trahan addressed to each speaker in turn. On the recent acquittals at the International Criminal Tribunal for the former Yugoslavia, Serge Brammertz expressed his dissatisfaction with regard to the new direction of the decisions made by the Appeals Chamber. He noted the there are currently two pending trials before differently composed Appeals Chambers and he is carefully optimistic that they will rebalance the jurisprudence. Regarding the claim of one-sided prosecutions at the International Criminal Tribunal for Rwanda, Hassan Jallow stated that he does not consider such allegations fair and powerful enough to tarnish the legacy of the Tribunal. He recalled that the mandate of the tribunal was to investigate those who played a leading role in the major crime case. Moreover, he referred to one case involving four defendants in relation to the killings of Bishops that was transferred to Rwanda resulting in two acquittals and two convictions. In light of the amnesty provision in the 1999 Lomé Peace Accord and absence of accountability besides the thirteen indictments issued by the Special Court for Sierra Leone, James Johnson observed that Sierra Leone has no will or capacity to prosecute other persons. He pointed to the Truth and Reconciliation Commission and its achievements although noting that the recommendations will likely never be implemented. In his experience, the Sierra Leonean people have an incredible capacity to forgive, not to forget, which seems to work at present.

Open Questions and Outlook

- To what extent do political decisions shape the successful investigation and prosecution of international crimes?
- How can an effective and sustainable knowledge transfer take place between tribunals at the international level and from the international to the national level?

Panel

Complimenting Complementarity

Lessons Learnt from the Partnership between the National and International Jurisdictions

Serge Brammertz
Prosecutor, International
Criminal Tribunal for the
former Yugoslavia

Serge Brammertz emphasized that complementarity is one of the most important issues. If one lesson has been learnt it is that without active complementarity and finding solutions at the international and national level it is difficult to proceed. He pointed out that with 161 accused persons and arrests the International Criminal Tribunal for the former Yugoslavia has the highest number compared to other international Tribunals, yet it is still very little compared to the hundreds and thousands of cases which exist and still have to be conducted. Serge Brammertz stressed that an international approach has to develop a national component, yet that the dynamics and possibilities have changed from twenty years ago when his predecessors were faced with little acceptance of the jurisdiction of the tribunal. One of the important side effects of the Completion Strategy decided by the Security Council was to find solutions to transfer cases. Every country in the region, also given the external pressure with the enlargement of the European Union, found its own solution in its own national system. Serge Brammertz highlighted an important shift and the successful transferral of the so-called 11bis and Category II cases. Moreover, he detailed that together with the Prosecutors of the region they have developed means to increase cooperation for instance through the Liaison Prosecutor program at the International Criminal Tribunal for the former Yugoslavia and transfer of documents and requests to cooperate from the region are frequent. Given the much more difficult political climate and slow implementation of the National War Crimes Strategies, a lesson learnt has been that complemetarity needs to be present to help reduce the impunity gap. He concluded that complementarity will remain a challenge for the International Criminal Court.

Sir Desmond de Silva, QC
Former Prosecutor of the
Special Court for Sierra Leone

Sir Desmond de Silva focussed his remarks on the Special Court for Sierra Leone. He began with the proposition that where a people demand justice there could be no greater compliment that could be paid to their needs than a Prosecutor who delivers up to them the principle architect of their misery. He noted that the whole of Sierra Leone as a people was united in this one belief, namely that Taylor is responsible and the Special Court for Sierra Leone brought him to justice as first Head of State to be brought to justice and sentenced since Admiral Karl Dönitz sat in the dock in Nuremberg in 1945. He clarified that the mandate of the Special Court for Sierra Leone was limited to prosecute those who bear the greatest responsibility, in light of the criticisms levied against the Ad hoc Tribunals of working too long and too slow. Sir Desmond de Silva identified three areas in which the Special Court for Sierra Leone can have an impact. First, it was the first court to be situated in the theatre of conflict. Second, it was the first court to start an extensive outreach program. Sir Desmond de Silva recalled in some detail the political episode leading to the arrest and transfer of Charles Taylor to the court. Finally, the Special Court for Sierra Leone delivered the one thing the Sierra Leonean people wanted, namely to see the principle object of their misery brought to justice.

James Stewart
Deputy Prosecutor,
International Criminal Court

James Stewart began with an important difference contrasting the International Criminal Court to the Ad hoc Tribunals: the International Criminal Court does not have primacy as the primacy of jurisdiction resides with the national authorities. First, focusing on the notion of a positive approach to complementarity, James Stewart recalled that responsibility is squarely placed upon the shoulders of national authorities within the International Criminal Court framework. Two examples of the positive approach to complementarity were given, Guinea and Colombia. Encouraging action at the local level makes justice relevant at the very level the crimes were committed. Hence, the Office of the Prosecutor, within limits, can be understood to encourage national prosecutions. Second, James Stewart turned to admissibility challenges which in his view are an expression of complementarity. He gave illustrations of successful and unsuccessful admissibility challenges. Third, he emphasized the concept of cooperation as cardinal principle. As the International Criminal Court is independent of the United Nations system, the support of States Parties and non-governmental organizations is vital for the efficiency and cost-effectiveness of the Court. Each case is different and opportunities for partnerships seem real only in some cases. With regard to lessons learnt, James Stewart called for more patience, encouragement of local authorities to conduct prosecutions and more sophisticated engagement with States.

Alex Whiting
Professor, Harvard Law School

Alex Whiting argued, on a more somber note, that complementarity cannot be viewed solely as an aspiration, a mere slogan, but is critical to the success of international criminal justice and the International Criminal Court. Complementary needs to be at the center, not at the periphery. He distinguished between two sides of complementary. On the negative side, complementarity compromises authority as part of the compromise of the Rome Statute, allowing States to divest the power of jurisdiction of the Court. On the positive side, prosecutions done on the national level are better because they enjoy greater credibility and complementary then provides a win-win situation for States, international criminal justice and victims. Moreover, Alex Whiting argued that the International Criminal Court and complementarity depend on each other for two main reasons. On the one hand, the Court requires complementarity to succeed. Prosecuting a handful of cases will not be a credible model if no national prosecutions are initiated. On the other hand, complementary requires the success of the Court. Only if the International Criminal Court offers a credible threat would States initiate national proceedings. Taking stock of the results so far, Alex Whiting concluded that if we think complementarity is an aspiration, then the International Criminal Court has done well. If, however, we think complementarity is at the heart, he suggested there is real cause to be concerned. In various situations handled by the court, such as Uganda, Congo, Kenya, Côte d'Ivoire and Libya there have been no real national prosecutions to date. For Alex Whiting, results overall are minimal as the court is not working in that direction and the Assembly of States Parties made clear that the court is not in the business of capacity building.

General Discussion

In the discussion generated by this panel, different views on the practice of complementarity were exchanged. Richard Karegyesa shared some insights from the International Criminal Tribunal for Rwanda regarding the Rule 11bis case referrals. Focusing on capacity building through partnerships, he noted that the Tribunal engages on two levels, with the stakeholders in the criminal justice field and with the government to prioritize a criminal justice reform. However, he explained there are inherent risks to reforms that are selfishly engineered, for instance the risk of a two-tiered system, which was however neutralized in the case of Rwanda. Lastly, he noted that expectations need to be well managed. David Tolbert referred to the work of the International Center for Transitional Justice on complementarity, including the organization of four high level meetings called the Green Tree Process. He argued that States have to step up to the plate, not only in supporting the International Criminal Court but also in pursuing courageous national prosecutions. Moreover, he critically raised the nexus between the work of development agencies and international criminal justice stating that the former were scared of the latter. Further questions asked related to how the International Criminal Court is addressing the independence and the perception of being a political court and how ready the Office of the Prosecutor of the courts in Bosnia and Herzegovina was. As a response to David Tolbert, Margot Hellwig-Böte explained that Germany and the European Union in her experience were not scared of the judiciary, but then pointed to the difference between lack of capacity and lack of political will. James Stewart explained that decisions by a court like the International Criminal Court will have political consequences but it is important to appreciate that when making decisions political calculations are removed as far as possible. With regard to addressing perceptions of the Court, he stated that the Office of the Prosecutor cannot talk about ongoing cases outside of the courtroom and that the Court as such cannot be involved in political discussions. Regarding the current situation, he observed that it would be unthinkable to see a massive withdrawal from African states and recalled that initially there was remark-able level of support in Kenya. On the allegation of the court being political Sir Desmond de Silva noted that in the realm of international criminal justice it is inevitable that the high level figures indicted have their own constituency accusing a court of being political. He stated however that just because international tribunals prosecute such important categories of people does not make them political. Regarding the approximately forty Category II cases transferred to the region, Serge Brammertz observed that there has been some progress but the situation is not satisfactory. However, he emphasized to the critical mass of cases prosecuted by national authorities and the implementation of the War Crimes Strategy in the region as it is ultimately about national prosecutions. Alex Whiting underlined that indeed political will of the international community is critical. In closing, James Johnson referred back to Dr. Oscar Schneider's above quote of Robert Jackson and concluded that the desire remains unfulfilled today but that a system of international and national courts would go a long way to its fulfillment.

Open Questions and Outlook

- What is/should be the role of the tribunals in promoting and monitoring national prosecutions?
- How can opportunities for real partnerships between the International Criminal Court and States be promoted, i.e. what is necessary to truly place complementarity at the center?

Panel

Challenges and Dilemmas Defense Counsel are Facing

Caroline Buisman
Defense Counsel at the International Criminal Court

Caroline Buisman began her remarks with the premise that whatever legacy means, it includes a significant role for the Defense. She emphasized three aspects, namely the importance of acquittals, of providing an important forum of giving voice to the Defense and of public trials. At the beginning, she observed it was more about the rubberstamping of trials leading to a conviction, nowadays this is different and the Defense is heard. Quoting Robert Jackson stating "courts try cases, but cases also try courts" she highlighted the importance of acquittals as courts are far from perfect. When we talk about legacy, she cautioned to not see international trials in isolation but also consider history writing and domestic trials. According to Caroline Buisman, the Defense holds a more critical view on the success of the International Criminal Tribunal for Rwanda, its remoteness and the referral cases. She moreover stressed that it is not desirable for a judicial process to be in private session for considerable moments of a trial as is the case in the Kenya trial before the International Criminal Court. For her, trials cannot happen behind closed curtains but witness benefits and protective measures need to be more scrutinized. In light of the real danger for witnesses, she emphasized the only real protection offered to witnesses is to have public trials. Finally, Caroline Buisman drew attention to the limbo situation of ten defendants who have been acquitted and are currently still in a safe house in Arusha.

Nick Kaufman
Defense Counsel at the International Criminal Court

Nick Kaufman suggested that when considering the legacy of the Ad hoc Tribunals, we look to what extent they have contributed to eradicating impunity. He clarified that he by no means he wished to belittle the importance of accountability, but it is important to ask whether the prosecution case can be proved. He asked whether it would be a legacy to be proud of were some alleged criminal acquitted. Nick Kaufman pointed out that the resources of the Defense are markedly inferior to the largesse imposed on the Prosecution. He observed that the role as Defense Counsel is seen as inconvenient but necessary evil. For him, the role of Defense Counsel is enshrined in natural law, even Biblical law. He commented that the role of Defense is hugely challenging task, especially when being vilified by the media. The legacy of the Defense perhaps lies in checking the Prosecutor, challenging the evidence and ensuring due process. In the following, Nick Kaufman focussed on the legacy of one Defense lawyer who defended Fritz Sauckel and Karl Brandt and is most renowned for defending Adolf Eichmann, late Dr. Robert Servatius. He reviewed the legacy of the Eichmann trial, how Robert Servatius became involved and elements of the trial providing some quotations to convey different impressions of the trial.

Xavier-Jean Keïta
Principal Defense Counsel, International Criminal Court

Xavier-Jean Keïta argued that we have to change our culture to see justice as a whole. After briefly exploring the meaning of the term legacy in French, he noted that if we want the future generation to have a good heritage, it needs to include a culture of justice. He then explored several challenges and dilemmas facing defense counsel, clarifying that he is not speaking on behalf of the International Criminal Court. Xavier-Jean Keïta lamented the fact that official recognition is only given to Prosecutors and not defense counsel. He signaled his uneasiness with the slogan "Fighting against Impunity" which was distributed as stamp on the occasion of the tenth anniversary of the International Criminal Court; rather, he sees the role of the Defense in "Fighting for Justice" which he seems a more befitting slogan for a court overall. Moreover, he noted that the first acquittal of 18 December 2012 was extraordinary and emphasized the importance of the presumption of innocence until proven guilty for the legacy of the court. Two further dilemmas were briefly mentioned by Xavier-Jean Keïta, namely the authorization to re-characterize charges according to Regulation 55 and the disclosure of evidence. In addition, to fully achieve the International Criminal Court's legacy as model, he advocated for the establishment of a full organ for the Defense office. The last challenge he highlighted was the work

of defense counsel in situation countries, alluding to the detention of four defense counsel in Libya in summer 2012. In closing, Xavier-Jean Keïta reiterated that the common legacy of international legal practitioners is not fighting against impunity, but fighting for justice.

General Discussion

In the discussion the institutional role and self-understanding of defense counsel was explored in particular. The moderator asked the three speakers whether any defense counsel today attack the political structure of the international criminal justice system following Jacques Vergès' defense approach, what the term "victims" means to them and on what basis a defense counsel makes the decision to accept a client. It was also asked about the requirement of the Office of the Prosecutor to provide evidence that may incriminate and exonerate and the impact of victim participation at the International Criminal Court on the defense strategy. Philipp Ambach asked whether defense counsel feel they represent a client or the common cause, i.e. fighting against impunity. Xavier-Jean Keïta states that you chose a defense strategy, that a "défence de rupture" as developed by Jacques Vergès would be possible in the International Criminal Court, but clarified that one would have to ask the client if this were in his interest and that it would not be his choice for a defense strategy. He observed that victim participation adds a great challenge for the Defense. Lastly, he opined that he finds the slogan "Fighting against Impunity" ill suited as a description of a court's work and preferred the slogan "Fighting for Justice". Nick Kaufman stated that the onus is on the Office of the Prosecutor to prove its charges and that it is logical that only the Prosecution should thus be required to find incriminating and exonerating evidence. Within defense circles he said that victims counsel are regarded as "mini Prosecutors", however acknowledged that they are often very good lawyers. Then he explained that in terms of selecting clients every defense counsel has their own selection criteria and red line, being Jewish for instance he would not represent anyone alleged to have cooperated with the Nazi regime. Caroline Buisman emphasized that there is no homogenous victim, just like there is no homogenous war criminal. Furthermore, she echoed that position that
it is the role of the Office of the Prosecutor to bring incriminating and exonerating evidence, as even if a defense counsel comes across incriminating evidence it is one's duty to provide the best possible defense for a client.

Open Questions and Outlook

- Where is the place of the Defense within the institutional set-up of tribunals, what are the lessons learnt and where and why have they (not) been implemented?
- How congruent is the understanding and self-understanding of defense counsel and tribunal staff?

Panel

New Courts, new Legacies

Experiences and Expectations of Internationalized and Domestic Courts having Jurisdiction over International Crimes

Ciré Aly Ba
Court Administrator,
Extraordinary African Chambers
in the Courts of Senegal

Ciré Aly Ba presented on the Extraordinary African Chambers in the Courts of Senegal which were created by the African Union and the Republic of Senegal under the terms of an Agreement dated 22 August 2012. He described in some depth the composition of the different Chambers in operation during the twenty-seven month period envisaged. In the following, Ciré Aly Ba reviewed the Chambers' jurisdiction and applicable law. Against the backdrop of allegations of large-scale human rights abuses (assassinations, kidnappings, torture, forced disappearances, etc.) under the rule of then-President Hissène Habré, the African Chambers were set up to implement the decision of the African Union concerning the Republic of Senegal's prosecution of international crimes committed in Chad between 7 June 1982 and 1 December 1990, consonant with Senegal's international commitments in line with the principle of aut dedere aut judicare. The Chambers have jurisdiction over the following crimes: genocide, crimes against humanity, war crimes and torture, defined as stand-alone crime although it also serves as a material element of crimes against humanity and war crimes. Turning to the powers of the respective organs, Ciré Aly Ba emphasized that contrary to the international Tribunals, in the African Chambers investigations are led by independent judges. Indeed, investigation, prosecution and sentencing are three separate functions. He clarified that the Chief Prosecutor may initiate investigations proprio motu or on the basis of information obtained from any source. He lastly briefly referred to the rights of the Accused (presentation originally made in French).

Judge Elizabeth Ibanda Nahamya
International Crimes Division,
Kampala, Uganda

Judge Elizabeth Ibanda Nahamya focused her remarks on the International Crimes Division in Kampala, a division conceived between the Government of Uganda and the Lord's Resistance Army in 2007. She noted that Joseph Kony never signed the Accountability and Reconciliation Agreement and its Annexure, yet the government did. The International Crimes Division is not an independent Court but rather was established as a Special Division of the High Court, pursuant to Article 141 of the 1995 Constitution of Republic of Uganda. She highlighted that the division was conceived to implement formal justice measures and deal with perpetrators of serious crimes such as those committed by the Lord's Resistance Army. The Division is now a Court meant to fulfill Uganda's commitment under the Rome Statute. On 10 March 2010, the Parliament of Uganda passed the International Criminal Court Act thereby domesticating the Rome Statute almost eight years since Uganda ratified the Rome Statute. She drew attention to the fact that the Act only entered into force on 25 June 2010 so given the jurisdiction ratione temporis stipulated and the principle of non-retroactivity in Uganda its time frame excludes many perpetrators from its jurisdiction, in light the majority of crimes committed up to 2002. In addition, Judge Elizabeth Ibanda Nahamya critically noted that there is no link between the judges of the International Crimes Division and the International Criminal Court, thus calling positive complementary an illusion.

William Smith
Deputy Co-Prosecutor,
Extraordinary Chambers in
the Courts of Cambodia

William Smith reported on the experience of the Extraordinary Chambers in the Courts of Cambodia, representing the National Prosecutor Leang Chea. He noted that Cambodia is on the long, difficult road from conflict to peace and by way of introduction briefly reviewed the conflict in Cambodia during the period 1975-79. To date, there has been one Trial and Appeals Judgement in Case 001 against Kaing Guek Eav alias Duch, and in October 2013 the trial in Case 002 against Khieu Samphan and Nuon Chea was finished. William Smith highlighted that the Office of the Prosecutor had decided to prosecute ten persons, however there was a disagreement on five of these cases. The Statute had taken into account the possibility of disagreement which, according to William Smith, demonstrates that the United Nations and the Government of Cambodia understood that it would not be a perfect democratic system. He underlined the fact that the Cambodian court system is based on civil law, hence the Extraordinary Chambers also adopted the civil law system. Although expectations were initially quite low and

scepticism prevailed among international observers, he argued that as time moves on and confidence is built in these cases, the whole issue of legacy is built up and people then expect more.

Goran Salihović
Chief Prosecutor of Bosnia and Herzegovina

Goran Salhović focussed on the genesis and work of the Office of the Prosecutor and the Special Department for War Crimes in Bosnia and Herzegovina which was established on 9 March 2005.
For a summary of the presentation please refer to the written summary provided by the speaker (presentation originally made in BCS).
Following the formal presentation of some statistics, Goran Salihović added that in his opinion the judgments of the International Criminal Tribunals for the former Yugoslavia and for Rwanda can be used in the region. He asked what will happen when the former ceases to exist, stressing that the national jurisdiction is organized and a lot of cases and evidence has been transferred but he though it useful to consider how to help and further strengthen the work in the region. Goran Salihović underlined that he is happy to cooperate with his colleagues in Croatia and Serbia. In conclusion, he mentioned how impressed he was with the Courtroom 600.

Vladimir Vukčević
Chief Prosecutor of Serbia

Vladimir Vukčević emphasized how big an impression the Courtroom 600 made on him. He then concentrated on the experience of war crimes prosecutions in Serbia.
For a summary of the presentation please refer to the written summary provided by the speaker (presentation originally made in BCS).

General Discussion

The speakers were first all asked by Abubacarr Tambadou to identify one major challenge they encountered regarding the prosecution of international crimes. Speaking about the legacy of the International Criminal Tribunal for the former Yugoslavia, Vladimir Vukčević argued that it is clear that the help from the tribunal is very important, notably in relation to the tracking of fugitives, although he stressed most work done in Serbia is by Serbians. Judge Elizabeth Ibanda Nahamya identified outreach as major challenge, and the non-existence of a safe house in Kampala. The major challenges identified by William Smith revolved around the poor transferral of knowledge and technical skills and the containment of political pressure and the perception of political interference. Goran Salihović referred to the process of prosecuting in a broad sense, including witness protection, exhumations and investigations. Mohammed Ayat then asked Ciré Aly Ba about the prospect of an international criminal justice based on regional settings. Ciré Aly Ba commented that the Extraordinary African Chambers are an example of crimes committed in Chad prosecuted in Senegal which to date may be viewed as convincing and successful undertaking. Murtaza Jaffer noted that today politics is in command and that we need to shift and put justice in command. He inter alia pointed to the lack of legal framework and continuous diplomatic engagement, hence calling for reflection on a new international convention to manage international crimes. Mark Kersten asked about the one-sidedness of the work undertaken by the International Crimes Division in Uganda. Judge Elizabeth concurred that it would be better to have all international crimes prosecuted.

Open Questions and Outlook

- How similar or different are expectations and assessments of legacy of the International Tribunals and Internationalized and Domestic Courts?
- How can the dialogue between the Offices of the Prosecutors and Tribunals at the international and national level be enhanced and more institutionalized?

Panel
Cooperation Challenges between National and International Prosecution Authorities

Mbacké Fall
Chief Prosecutor, Extraordinary African Chambers in the Courts of Senegal

Mbacké Fall provided a detailed introduction to the Extraordinary African Chambers in the Courts of Senegal.
For a summary of the presentation please refer to the written summary provided by the speaker (presentation originally made in French).

Klaus Rackwitz
Administrative Director, Eurojust, The Hague

Klaus Rackwitz proposed to assess the International Criminal Court in a direct and critical manner asking upfront whether cooperation and complementarity is working. He cautioned against negative competition between institutions which might undermine claims of genuine prosecutions. Another risk he underscored is to challenge whether a suspect's rights have been preserved and truly fair prosecutions have taken place. Moreover, Klaus Rackwitz observed an imbalance between international and national proceedings. Using the example of Germany as one of richest countries in the world, he noted that we could not be feasible to hold such expensive trials here. Hence, he suggested that it might be apposite to average international standards to a more sustainable workable level. Indeed, the International Tribunals and Hybrid Courts would not be able to deal with a large number of cases with the current standards. According to Klaus Rackwitz, normally cooperation functions well, however judicial cooperation should not be reduced to complementarity as it also involves an element of competition.

Gerhard Van Rooyen
Adviser, Law Enforcement & Witness Protection, UNODC Regional Office for East Africa, Nairobi

Gerhard Van Rooyen shared insights from his experience with the Regional Office for East Africa of the United Nations Office on Drugs and Crime. Since prosecutions depended on testimonies, witness protection is crucial, especially given the danger of pressure on witnesses to recant or change their testimony. Given the influence of corruption in many countries, a need for protection is real. He referred to the United Nations Convention against Corruption signed and ratified by most States in early 2000s. Following Gerhard Van Rooyen, the level at which we work at International Tribunals is not workable at the national level, advising based on Best Practices developed at the international level but unattainable in domestic contexts simply is not sustainable. With reference to the Lubanga case, he stressed that it is important that a witness protection system is not used for a prosecutorial strategy. Gerhard Van Rooyen sketched the range of services that can be part and parcel of witness protection before, during and after trials. Drawing on his experience in South Africa where he not once changed the identity of a witness, he underscored the importance of identity in Africa and to consider witness protection programs that may involve 'social death' and high expenses as last resort. Finally, he explained that with the International Criminal Court witness protection is facing massive challenges as there are few African countries where witness protection might be outsourced from the Court. He thus appealed that we need to ensure more countries develop witness protection programs.

General Discussion

The discussion primarily revolved around the legitimacy of the prosecution of Chad's former President Hissene Habré in Senegal and the track record of witness protection. Judge Elizabeth Ibanda Nahamya inquired into how Hissene Habré can be tried retrospectively in Senegal. In addition, Xavier-Jean Keïta whether Senegal feels any responsibility since President Habré found a harbor in Senegal for considerable years. Mbacké Fall responded by noting that international crimes are imprescriptible, in line with international conventions and custom. Since requested by the International Court of Justice on 20 July 2012 to bring Hissene Habré to justice recalling the obligation to prosecute or extradite, Senegal decided to put an African to justice in Africa. Asked about practical building blocks of a witness protection program in Kenya and witness protection in cases of universal jurisdiction, Gerhard Van Rooyen noted that Kenya has excellent legislation, but not enough staff.
He further argued that witness protection involves covert operations and that

successful witness protection depends on the willingness of a witness to be protected, of institutions to learn lessons and on a measure of pragmatism. Philipp Ambach concluded that the closure of the Ad hoc Tribunals does not represent the descent of international criminal justice, but that hot topics such as the relationship between international and national institutions and witness protection are with us for some time to come.

Open Questions and Outlook

- What can be done to address the imbalance between international and national standards?
- How can more two-way communication be fostered among relevant stakeholders to ensure that international standards are actionable and sustainable on the national level?

Final Session

Forging a Legacy from the Beginning and not the End

In the final session, the moderator Ronen Steinke asked each speaker in turn to briefly address a certain issue before opening the discussion to the audience.

Serge Brammertz
Prosecutor, International Criminal Tribunal for the former Yugoslavia

Serge Brammertz indicated that the issue of selective justice is a political issue and a matter of credibility for the tribunals which need to develop and convey clear criteria for selection. Asked about Carla del Ponte's attempt to investigate crimes of various parties and the legacy of the International Criminal Tribunal in this regard, Serge Brammertz stated that if you want to be serious about prosecutions and want to be taken seriously, it is critical to investigate across parties. It is difficult to strike the right balance and it certainly involves most difficult decisions.

William Smith
Deputy Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia

William Smith also stressed that the criteria for choosing defendants and issuing indictments needs to be objective and transparent. He to not be oblivious to the context and history of a country in question and the fact that there was no will by the international community nor the Government of Cambodia to try hundreds of cases. Hence, the focus was on the main architects. William Smith stated that claims of victor's justice levied against the court are ill fitting as the events in Cambodia are not congruent with a traditional conflict.

James Stewart
Deputy Prosecutor, International Criminal Court

James Stewart acknowledged that he finds the concept of selective justice to be a difficult concept. He commented on the dilemma that if you prosecute all, there is no one left to run the country in question. Moreover, he noted that there is no quick and easy way to start and finish a case. James Stewart cautioned that tribunals should not attempt to do justice to history but to do justice to the people who suffered.

Hassan Bubacar Jallow
Prosecutor, International Criminal Tribunal for Rwanda

Hassan Jallow recalled that the mandate of the tribunals is to prosecute people and not to write history. While the work may be historical, the purpose is to do effective and successful prosecutions. Hassan Jallow explained that you give certain historical accounts and engage in negotiations as part of the proceedings and such elements may affect the ultimate record.

General Discussion

The discussion of the final session revolved around two main topics: the historical dimension of trials and the issue of selectivity. Questions were asked about the referrals to the International Criminal Court and the exclusive focus on non-state actors within these situations and the selection of cases. David Tolbert recalled Hannah Arendt's account of the Eichmann trial and conclusion that the purpose of the trial is to render justice and nothing else. However, he noted that one could also take the opposite view on history, indeed that if you think that the Nuremberg trials set a standard of revisionism. In other words, it might not just be about trials, but these tribunals establish benchmarks. Murtaza Jaffer referred to the topic of the final session and the role of the International Criminal Court vis-à-vis the closing Ad hoc Tribunals, how the Court engages with legacy consumers and the historical legal legacy. Serge Brammertz addressed the question regarding the perception of universality and of selectivity of the International Criminal Court. He observed that the Security Council decisions are not based on transparent criteria and thus in his experience at the Court it is not easy. Investigations are difficult and for security and logistical reasons you need the support of government, hence it would only be possible to work in sequences, first to investigate non-state actors and the possibly the government. James Stewart noted that the decisions were taken before he joined the International Criminal Court but that when you have a referral of a situation, while it encompasses everything there will be a focus. He briefly referred to the cases of Côte d'Ivoire and Mali, highlighting the selection of crimes bases and pragmatism involved. Furthermore, he emphasized duties special to the Office of the Prosecutor and their own code of conduct. Hassan Jallow noted once more that the work of tribunals is not to write history, but that some of its work is historic. In the Karemera Appeals Judgment judicial notice is taken of the fact that genocide

occurred which closed the door to arguments by those who want to deny genocide in Rwanda. The Tribunals form part of history, but if you look to the tribunals for history of a conflict, it will necessarily be incomplete, but you can for instance also turn to the record of a Truth and Reconciliation Commission. He highlighted that selectivity is an inevitable part of the international criminal justice process, but that selectivity has to be based on objective criteria. William Smith underlined that different countries require different approaches. In the case of Cambodia, there is no Truth and Reconciliation Commission, but there are non-governmental organizations for instance the Documentation Center of Cambodia. He highlighted he majority of the population is under thirty years of age and most are not familiar with what happened, while there are many books there is no agreed upon version. While tribunals cannot write a history book, they can write the criminal history chapter and that is what people want recorded. Jennifer Trahan asked a question about the prosecutions of Nuremberg and the definition of the crime of aggression to have prosecutions go forward. James Stewart argued that he does not accept that the Rome Statute is based on values of a particular community since the Rome Statute is a contract by all states from different regions and different cultures.

Open Questions and Outlook

- How can those creating judicial institutions and those working at the Tribunals better manage expectations regarding their purpose, success and impact?
- What are the wider lessons learnt with regard to the balancing act between awareness of the political arena a Tribunal operates in and disregard of politics in prosecutorial and judicial decisions, at each Tribunal and across Tribunals?

Kontakt und weitere Informationen

Gründungsbüro
Internationale Akademie
Nürnberger Prinzipien
Egidienplatz 23
90403 Nürnberg
Tel. 0911 231-14206
Fax 0911 231-14020
ianp@stadt.nuernberg.de
www.internationale-akademie-
nuernberger-prinzipien.de