

10th IAP European Regional Conference 2010 Group (iii)

Discussion report

5th March 2010-03-08

City Hall

The Hague

Introduction

The first order of business was to appoint a chairman. We unanimously appointed the able Magnus Elving as chairperson and Paul Ng'arua was appointed the Rapporteur for the group. In a nut shell, group three ("the group") considered the following questions: (1) whether anybody should assume responsibility for bringing alleged perpetrators of crimes against humanity to Justice, (2) the most effective model to administer justice, (3) the daunting question whether prosecution contribute to the attainment of peace and reconciliation, (4) whether the exercise of Universal Jurisdiction can, or does address the impunity gap, and (5) the question of how do we pass on experience, practical knowledge, precedents etc., to those who will inherit this work.. The group found that there was an interesting code; an analogy that reflect all these issues was found. That analogy finds expression in the various tribunals and special courts, set up in modern history, to fill the impunity gap.

Discussions:

The members of the group recalled that the problem of genocide, torture, recruitment of child soldiers, forced disappearances or other crimes against humanity stem from political actions and are indeed political matters. To this end, the Prosecutor's come in at the tail end in the administration of justice, after the commission of these offences. The Prosecutor's duty is to ensure that the crimes are brought to book and that those responsible are tried. In other words, although these felonies take place under the watch of our political leaders, time has come to ask the question, what more can the prosecutor do to prevent the occurrence of these events? We did not have an answer to this question. Is there a moral duty to do more than our duty? The group felt that sealing the impunity gap is a very effective way of prevention.

The group spoke of many instances of atrocities involving crimes against humanity that have occurred since the establishment of the ICTY and the ICTR. The lessons learned from these Tribunals have shed light on the event that took place in the Balkans and Rwanda.

Furthermore, the case load of the International Criminal Court (ICC) is a glaring indication that war crimes and crimes against humanity are still on the rise. In this regard, the group felt that the impunity gap may be closing and the message that there is no safe haven for perpetrators of crimes against humanity is slowly taking root in the World. The group agreed that a lot still has to be done to prevent these pogroms from happening in the first place. So how can we ensure that these crimes are eradicated? In this regard, the group felt that there is need to focus, not only on closing the “impunity gap”, but also on education and outreach programs. A continuous engagement with the necessary preventive measures may go along way in mitigating in the occurrence of these crimes.

1. Responsibility to bring perpetrators to book.

The group felt that depending on the scenario on the ground, the matter of arresting the perpetrators falls squarely on the hands of the National Prosecuting Authority. However, if need arises, all nations where any of the perpetrators seek shelter from accountability for their heinous crimes should arrest and prosecute the offenders. Finally the group felt that the United Nations (UN) through its organs such as the General Assembly or the Security Council (SC) should expediently facilitate for the necessary action by sending into the troubled territory sufficient equipment and manpower to seek out and arrest such perpetrators for trial. As such the crimes against humanity should be deemed as *agers omnis partes*.

2. The most effective model to try the offenders:

The discussion group looked at the various models available in the world today that have dealt with crimes against humanity. *Adhoc* Tribunals such as ICTY and ICTR were set up in Arusha and in The Hague to redress problems that occurred in Rwanda and in the former Yugoslavia respectively. Both these Tribunals were set up by the UN Security Council. These Tribunals were set up after having taken note that the commission of experts established on an urgent basis the collection of information relating to evidence of grave violations of international Humanitarian Law committed in the territory of Rwanda and the neighbouring territories and the former Yugoslavia. The groups also explored the hybrid tribunals: The Special Tribunal for Cambodia and Special Tribunal for Sierra Leone, and The *ad hoc* Court for East Timor. The group looked at the advantages and the challenges inherent in each of the models have:

(a) **The *ad hoc* Tribunals:**

As stated above, the most appropriate action to take will vary from case to case; in certain extreme cases, where the nature of conflict and its effects on the existing infrastructure are severe, where one of the combatants are in power, all have a bearing on the options available. In less severe cases, where possible the most effective means of addressing the problem of trial is in a territorial prosecution with or without support. However, in certain severe situations, as was the case in Rwanda and the former Yugoslavia, the *ad hoc* tribunal in line with the ICTR and the ICTY respectively should be considered as appropriate solutions to take.

(b) **Hybrid Courts :**

The world has witnessed several hybrid Courts come and address the impunity gap. These are notably, The Special court for Sierra Leone, Special Tribunal for Cambodia, Nuremberg Trials , International Military Tribunal for the Far East, Nanjing War Crimes Tribunal, Khabarovsk War Crime Trials etc.

Other special territorial tribunals such as **Saddam** Hussein Dujail Trial were territorial prosecutions with external support. In those trials, the arrests were carried out by the

American military. The trials were presided over by Iraqi judges. The logistic and legal support such as legal advisors and training was facilitated by the American administration. During the trial Saddam Hussein and seven different defendants were prosecuted for the killing of 148 Shias in Dujail in 1982. There is wide and varied comment on this trial.

The Special court for Sierra Leone:

On 12 June 2000, Sierra Leone's President Ahmad Tejan Kabbah wrote a letter to United Nations Secretary-General Kofi Annan asking the international community to try those responsible for crimes during the conflict. On 14 August 2000, the United Nations Security Council adopted Resolution 1315 requesting the Secretary-General to start negotiations with the Sierra Leonean government to create a Special Court.

On 16 January 2002, the UN and Government of Sierra Leone signed an agreement establishing the Court. The contract was awarded to Sierra Construction Systems, the largest construction company in Sierra Leone. Three of the indictees were leaders of the Civil Defence Forces (CDF), i.e. Allieu Kondewa, Moinina Fofana, and former Interior Minister, Samuel Hinga Norman. Their trial started on 3 June 2004 and concluded with closing arguments in September 2006. Norman died in custody on 22 February 2007 before judgement after having undergone a surgical procedure in Dakar, Senegal. The trial proceedings against him were accordingly terminated. In a category on his own is the former President of Liberia, Charles Taylor, who was heavily involved with the civil war in neighbouring Sierra Leone. Taylor was originally indicted in 2003, but he was given asylum in Nigeria after fleeing Liberia. In March 2006, Taylor fled from house arrest in Nigeria and was arrested at the border in a car full of cash. Taylor was extradited to the Special Court following a request to this effect by the Liberian Government. He was immediately turned over to the Special Court for trial. Because Taylor still enjoyed considerable support in Liberia, and the region was not entirely stable, his trial in Freetown was deemed undesirable for security reasons due to the fact that the United Nations Mission to Sierra Leone (UNAMSIL) had considerably reduced its presence. United Nations Security Council resolution 1688 of 17 June 2006 allowed the Special Court to transfer Taylor's case to The Hague, Netherlands, where the physical plant of the International Criminal Court would be used with the trial still being conducted under SCSL auspices.

Taylor's trial started on 4 June 2007. The Prosecution rested its case on 27 February 2009. Sierra Leoneans know that they have little alternative but to live with the thousands of perpetrators in their midst. There are just too many rebels, soldiers and militiamen for them all to be tried and punished. 'Let sleeping dogs lie' is what some Sierra Leoneans say. Others disagree however, and fear exists that the sleeping dogs are just lying-in-wait until the 17,000 United Nations peacekeepers that are currently ensuring security in Sierra Leone have left. Then the cycle of violence will start all over again. There is no easy way forward. But Sierra Leoneans may prove more pragmatic than fatalistic. A solution that many support is to forgive those who committed the atrocities but not those who masterminded them. Roughly speaking this has been the thinking behind creating two separate but parallel bodies to bring peace through accountability: One, the Special Court, will prosecute those who bear greatest responsibility for what happened and the Truth Justice and Reconciliation Commission will deal with other social issues such as heal the wound of conflict.

For the Special Court to sit in the country where the crimes took place - the court for Rwanda is in Tanzania; the one of the Former Yugoslavia is in The Hague - is not without its risks either. Still, each Sierra Leonean must find their own way of overcoming the past and rebuilding the future.

(c) Special Tribunal For Lebanon:

On 1st March 2009, the Special Tribunal for Lebanon will formally convene for the first time in The Hague. This briefing describes the background to the establishment of the Special Tribunal and its mandate and procedures, taking into account other international tribunals and tribunals with a mixed national and international dimension. It briefly describes the legacy of grave human rights abuses in Lebanon that has still to be addressed, as well as recent violations of human rights and deficiencies in the justice system. The Special Tribunal for Lebanon is an international criminal tribunal for the prosecution, under Lebanese law, of criminal acts relating to the assassination of Rafik Hariri on February 14, 2005. The court was established by an Agreement between the United Nations and the Lebanese Republic pursuant to Security Council resolution 1664 (2006) of 29 March 2006. The United Nations Security Council, acting under Chapter VII of the Charter of the United Nations endorsed the agreement on 30 May 2007 (Security Council Resolution 1757

(2007).The tribunal is mandated to try those suspected of assassinating former Lebanese Prime Minister Rafik Hariri , who was murdered, along with 22 others, on 14 February 2005. Several human rights organizations such as Human Rights Watch had argued that the tribunal should have been given jurisdiction over 14 other attacks perpetrated in Lebanon since October 1, 2004. In fact, the Tribunal can expand its mandate to include attacks which took place between 1 October 2004 and 12 December 2005, if they can be shown to have a connection to the 14 February incident. The tribunal marks the first time that a UN-based international criminal court tries a "terrorist" crime committed against a specific person. According to United Nations Security Council Resolution 1664 (2006), it is a "tribunal of an international character based on the highest international standards of criminal justice." For reasons of security, administrative efficiency and fairness, the tribunal has its seat outside Lebanon, in Leidschendam in The Netherlands. The premises of the tribunal will be the former Algemene Inlichtingen- en VeiligheidsDienst (AIVD) building. The Special Tribunal is a "hybrid" international court, similar to the SCSL and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Like the ECCC, the STL does not apply international (criminal) law, but rather national law (Article 2 of the Statute of the Special Tribunal). Accordingly, it also is similar to the Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina which has such "hybrid" chambers.

The Truth Justice and Reconciliation Commission (TJRC) mechanism:

The group also considered this other option to addressing the impunity gap, The Truth Justice and Reconciliation Commissions. The general consensus was that these mechanisms are often set up to promote healing by making a historical record of who committed the violence and who the victims were. They also facilitate for victims and perpetrators to meet and understand each other. If there is forgiveness and reconciliation then it is considered a success. However, in certain cases, as the TJRC of South Africa show, the commission can and did make recommendation for targeted prosecutions. This would usually occur where the perpetrator was refused an amnesty and the commission would refer the case to the attorney-general. The TJRC in South Africa was a court-like body established in 1995 after the abolition of the apartheid. Victims of human rights violations were asked to give

statements about their experiences. Perpetrators could also give testimony and request amnesty from prosecution. With respect to solving problems of reconciliation in South Africa there is a difference in opinion. On one hand, many people felt the TJRC had positive effects domestically and internationally, in bringing truth and a feeling of reconciliation. On the other hand, there were those who felt, that the TJRC was used as a 'loop hole' in order for persecutors to escape prosecution. Some people feel that justice is a necessary step for reconciliation, not an alternative to it. Under The TJRC mechanism, officials of these commissions traversed the region affected by conflict and injustice meeting with various communities. In some areas, perpetrators and the victims live together and are already reintegrated. The question is whether opening up old wounds will contribute to healing or will simply cause more problems? The Saville Inquiry was a case in point. The inquiry, also known as 'The Bloody Sunday Inquiry' was established in 1998 to investigate the events of Sunday 30 January 1972 where 14 civil rights protestors were killed by the British Army during a Northern Ireland Civil Rights Association march in the city of Londonderry. The inquiry has faced many obstacles such as gathering evidence, witness protection and costs. The final report still has yet to be filed. It is worth questioning the relevance and use of this report over thirty years after the event, especially when the majority of people in Northern Ireland accept that in order to move on it is best to cast a veil of obscurity over the past. Elsewhere perpetrators are in conflict with the local communities and survivors. Yet whether in the diamond-rich area of Kono or the former rebel stronghold of Makeni, or in Northern Uganda, people want to see an effective closure of conflict and pain. These people are not only victims but also ex-combatants who have now laid down their arms. The group thought that although it is no doubt a well recognised mechanism that can contribute to post conflict healing and reconciliation, TJRC had a limited use in addressing the impunity gap.

3. Credible prosecution does contribute to Peace and Reconciliation:

After a very lively debate, the group came to the conclusion that prosecution does contribute to peace and reconciliation. The discussion considered that the prosecution must be seen to be free and fair for it to contribute to the process of peace and reconciliation. Furthermore, the question of restitution should be considered. Victims and survivors of the atrocities cannot begin to forgive, heal, seek peace and reconciliation unless they feel that justice has been done and that the truth has been told, and preserved for posterity. It is not enough that the perpetrators are found guilty but also that they should not be allowed to benefit from their criminal acts. The telling of the truth and its preservation will contribute to a sense of justice, closure and reconciliation.

In this regard, Prosecution discretion must be exercised in a balanced manner. Prosecutions must not be seen as a victor's justice; where one side to the conflict is seen to be persecuting the losers. Transitional justice is not entirely baggage free. The group felt that indeed a credible prosecution does contribute to peace and reconciliation. Other methods considered along with prosecution is the Truth Justice and Reconciliation Commissions (TJRC) such as happened in South Africa. This route to peace and reconciliation is to be used sparingly and at any rate, employed in cases where prosecutions cannot be effectively carried out. This option should not be a case for blanket impunity. In any event, Commissioners should have power to recommend prosecutions in warranted situations. Also credible TJRC should be able to order reparations along with truth telling and facilitate the preservation of the evidence for posterity.

4. Will the exercise of Universal Jurisdiction address the Impunity gap?

The group felt that Universal Jurisdiction will be necessary to address the impunity gap. However, if universal jurisdiction it is not applied fairly and across the board, it may lose credibility and be seen as just another instrument of oppression of minorities and disadvantaged groups. There have been instances of unfair application of this in some

European jurisdictions. In that case, an investigating magistrate has been charged or indicted for abuse of power.

5. Lessons learned, Legacy and continuity issues:

The group debated the need to pass on “know how”, experience arising out of the exercise of universal jurisdiction and other mechanism such as the experiences gathered from *ad hoc* tribunals, hybrid courts, and territorial courts acting with external assistance instituted to end impunity. The group felt that there is need for continuous learning and capacity building .In this regard the group commended the IAP for organising this conference. Nonetheless, the group also felt that the IAP can and should partner with other Legal associations and bodies such as the International Bar Association (IBA) and Universities to get the word across more effectively. The presentation made by University of Oslo on ICC legal tools, for instance, was considered as a very potent mode of transfer of knowledge in this regard. This will facilitate the transfer of jurisprudence and experience to all our members.

Presented by

Paul Ng’arua

This 5th day of March 2010 at The Hague.